ORIGINAL

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.

S163453

Appellate District, Division One, No. D050019
San Diego County Superior Court No. SCN200740
The Honorable Joan P. Weber, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

STEVE OETTING
Supervising Deputy Attorney General

JENNIFER A. JADOVITZ
Deputy Attorney General
State Bar No. 207004

110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2204
Fax: (619) 645-2191
Email: Jennifer.Jadovitz@doj.ca.gov

Attorneys for Plaintiff and Respondent

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ISSUE PRESENTED

On July 23, 2008, this Court granted review on the following issues as presented in appellant's petition for review: 1. "In *People v. Burton* (1971) 6 Cal.3d 375, 383-384, this Court held that a minor's request to speak to 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." At issue here, is whether the *Burton* rule remains binding on courts within California or whether the rule was abrogated [by] *Fare v. Michael C.* (1979) 442 U.S. 707 [99 S.Ct. 2560, 61 L.Ed.2d 197]][,] in which the United States Supreme Court applied a "totality of the circumstances" test, to a minor's request to call his *probation officer*. 2. Whether appellant's federal constitutional rights under the Fourteenth and Fifth Amendments were violated when the police failed to stop their interrogation when the minor appellant asked to call his father."

INTRODUCTION

Appellant and his cohorts confronted a group of males outside an Oceanside residence. Shortly thereafter, Rusty Seau approached the scene and

exchanged words with one of appellant's cohorts. A physical confrontation ensued. When Seau fled the scene, appellant fired his gun several times at him. One of the shots fired by appellant hit Seau in the upper back, just below the top of his head. Seau died as a result of the gunshot. Appellant later gave two interviews with police during which he admitted shooting Seau.

The Court of Appeal upheld the denial of appellant's motion to suppress evidence of the statements he made during a custodial interrogation, and held that appellant's request to call his father during the interrogation was not tantamount to an invocation of his rights under *Miranda*[1]. The Court of Appeal was correct.

In *People v. Burton* (1971) 6 Cal.3d 375, 383-384, this Court suggested that a minor's request to speak with his or her parent was tantamount to an invocation of the minor's constitutional rights under *Miranda*, unless the People affirmatively demonstrate a contrary intent. However, in *People v. Rivera* (1985) 41 Cal.3d 388, this Court recognized that the *Burton* rule is inconsistent with the United States Supreme Court authority of *Fare v. Michael C., supra*, 442 U.S. at p. 707, wherein the court held that a minor's request to speak to a probation officer or parent could not be considered tantamount to an invocation of the minor's Fifth amendment rights.

Because the suppression of a defendant's statement is limited to that which is compelled under the federal constitution, this Court should now hold that a minor's request to speak to a parent during a custodial interrogation is only one factor to be considered under the totality of the circumstances test in determining whether the minor has asserted his or her rights under *Miranda*. A minor's request to notify his or her parents does not create a presumption that the minor intended to invoke his or her rights under *Miranda*. Applying the

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

totality of the circumstances standard here, the lower court correctly concluded that appellant did not assert his *Miranda* rights.

STATEMENT OF THE CASE

On November 6, 2006, a San Diego County Superior Court jury found, 17 year-old appellant guilty of second-degree murder.[2/] (Pen. Code, § 187, subd. (a).) The jury also found it true that appellant personally used and discharged a handgun during the commission of the murder. (Pen. Code, §§ 12022.5, subd. (a) & 12022.53, subd. (d).) Appellant was sentenced to a total of 40 years to life in state prison. (2 CT 495-496.)

On appeal, appellant claimed that the trial court erred in denying his motion to suppress his pre-trial statements on the ground they were obtained in violation of *Miranda*. The Court of Appeal, Fourth Appellate District, Division One, rejected appellant's claim and upheld his conviction. Pursuant to United States Supreme Court and California case law, the appellate court held that "under the totality of the circumstances," appellant "knowingly and voluntarily waived his *Miranda* rights and did not invoke them by requesting to speak to his father" during his first police interview. Additionally, the appellate court held that in light of appellant's waiver in the first interview, statements obtained during the second interview did not violate *Edwards v. Arizona* (1981) 451 U.S. 477 [101 S.Ct. 1880, 68 L.Ed.2d 378]. (Slip Opn. at 2-3.)

STATEMENT OF FACTS

On the late afternoon of June 9, 2005, 16-year-old Rusty Seau was gunned down and killed as he fled from a physical altercation with three male

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2. Appellant's cohorts, Joseph Turner and James Turner, were tried separately. (2 CT 293.)

individuals. The autopsy revealed that Seau died as a result of a single gunshot to his upper back, 16 inches below the top of his head. (3 RT 227-230, 233, 235-236, 247-257, 269-272, 321-329.)

On September 20, 2005, at around 6:40 a.m., appellant was arrested at the home of his aunt and uncle in Hemet.[3/] (3 RT 238-240.) After appellant was taken into custody, he was transported to the Oceanside Police Department. (3 RT 281, 286-287.)

The record demonstrates that Detective Kelley Deveney spoke to appellant in the back of the police car within 30 to 40 minutes of his arrest. She advised appellant that he was under arrest for "J.D.O. from his probation officer," i.e., a warrant issued by probation, and that he was being taken to Oceanside. Noting that appellant's aunt and uncle were aware of the situation, the detective asked appellant if he wanted anyone else notified that he was in custody. Appellant said he wanted his father notified. Appellant did not have his father's phone number. Thereafter, appellant was transported to the Oceanside Police Department. The drive lasted 60 to 90 minutes. (2 RT 34-37, 44.)

Upon arriving at the police station, appellant was provided with something to eat. Shortly thereafter, Detectives Deveney and Gozier, of the Oceanside Police Department, interviewed appellant.[4/] Appellant told the detectives that he was 16. Detective Deveney told appellant that they were confirming the warrant. Detective Deveney then said "I got the information, you[r] dad's phone number. Do you want to make a call to him? Or did you

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3. Appellant attempted to flee the house prior to being taken into custody. (3 RT 239-240.)

4. The record indicates that appellant was placed inside the interview room sometime between 8:30 and 9:00 a.m., and the interview lasted "a couple of hours." (2 RT 40-41.)

want us to?" Appellant replied, "I'd like to call him." Detective Deveney said, "You would?" Appellant answered, "M-hm." (2 CT 281-282.)

Detective Deveney informed appellant that some paperwork was necessary, whereupon she obtained some general information from appellant, i.e., his address, physical information, his father's name, and contact information. Detective Deveney advised appellant of his constitutional rights pursuant to *Miranda*, and appellant indicated that he understood his rights by responding "Yeah" to each advisement. Appellant never made any statement that he wished to remain silent. Nor did he ever request an attorney. (2 RT 66; 2 CT 282-284.)

Detective Deveney asked appellant, "[]. Okay, does your dad work, or would I be able to in touch with him at home?" Appellant answered, "Nuh-hm. He works, but the number you have, that's the cell phone number." Detective Deveney and appellant talked about appellant's family background. (2 CT 285-287.)

At some point, appellant talked about an individual, "Black Jack"[5], and some fraudulent activity involving fake identifications. In discussing that matter, appellant said he "was going to do it, but [he] never got the chance to do it." Detective Deveney asked, "This wasn't being used to, for you to get a fake i'd?" Appellant replied, "It should be on my probation, my probation file." It appears that Detective Deveney was trying to ascertain whether the identification cards appellant had on his person were legitimate as there was an "a.k.a" listed on appellant's probation report. Appellant stated that he did not have an a.k.a., rather, his name had apparently been changed. (2 CT 287-288.)

Appellant again stated that he was not involved in any fake identification activity. Appellant explained that he had a "fallout" with Black Jack because

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5. The record indicates that one of appellant's cohorts, James Turner, went by the gang moniker "Black Jack." (2 CT 292-297; 3 RT 283.)

he thought Black Jack was trying to hide his (appellant's) social security card, shot records, and birth certificates, and trying to "scam" his money. It was "possible" Black Jack was using appellant's name and giving it to someone else. (2 CT 288-290.)

Appellant discussed the circumstances of his previous probation violation. Appellant explained that the first time he got "locked up" he had to do "four months out of six." Appellant said, "Like if I get locked up today, this will be my second time." Thereafter, appellant talked about Black Jack and his possible whereabouts. (2 CT 291-294.)

Eventually, Detective Deveney asked appellant how he ended up in Hemet. Appellant said that he was kicked out of Black Jack's apartment. Detective Deveney said, "And you couldn't go home 'cause of your warrant." Appellant replied, "I couldn't go home 'cause I was running from probation." (2 CT 294.)

Shortly thereafter, Detective Deveney brought up the subject of the instant shooting. Detective Deveney said that she heard "rumors" that "James" and "Joey" were around when a kid was shot in June. Appellant asked, "You're talking about Rusty?" Detective Deveney replied yes and asked appellant if he was "hanging" with Rusty at that time. Appellant admitted that he was staying with Rusty at the "time the shooting went down, but [he] knew nothing about it." Appellant claimed that he heard that Black Jack "did it," but he did not talk to Black Jack about it. Appellant then discussed at length what he had heard about the shooting, why it may have happened, and who may have been involved. (2 CT 301-309.)

Appellant initially claimed that he had nothing to do with the shooting and he was not present went it happened. Detective Deveney then told appellant that witnesses had identified him in photographs as being the shooter. Detective Deveney also said that members of appellant's family had said that

appellant told them of his involvement in the shooting. Appellant asked, "Like who?" She asked, "Is that important right now?" Appellant said, "Yeah, that's rather important." Detective Deveney stated, "Apparently you have told some people in your family that you were involved and they have contacted us about that." Detective Deveney told appellant that if he was involved in the shooting perhaps he had a reason. (2 CT 309-310.) Appellant then readily admitted his involvement in the shooting. He stated,

> Well just to scratch everything, to just come clean with it: I was there, I was, I was there and I was the shooter. But the thing that happened was if I didn't shoot, I was going to, you know what I'm saying, get hurt by the other people.

(2 CT 311.)

Appellant explained that it was "like an initiation thing. So like if I didn't do this, they were going to get me." Appellant then discussed the details of what led up to the shooting, and he again admitted that he fired the gun after Black Jack yelled at him twice to shoot. (2 CT 311-320.)

Afterwards, Detective Deveney asked appellant if he wanted to take a break. Appellant said, "I would like to talk to my dad." A moment later, appellant asked, "Can I make a phone call to my dad?" Detective Deveney replied, "Yes, you can. I'm going to bring a cell phone into you and you can use it. In fact, you can use it while we're taking the break okay. Do you have the number or do you want me to bring you the number Tony?" Appellant said, "No, I need it." (2 CT 320-321.)

Detective Deveney told appellant that they were arranging for a phone and charging it up for him, and then Detective Deveney said she had a couple more quick questions. Detective Deveney asked appellant who was in the car. Appellant said there were four people in the car, himself, Black Jack, Joey, and Frank , a.k.a. "Tiny Squabbles." Appellant also admitted that he went the moniker "Blue Devil," and that he was the only one who fired a gun. After

discussing a few more names, in reference to a diagram, appellant explained where he was standing when he fired each shot. (2 CT 321-323.)

Moments later, Detective Deveney said, "Okay, let me see what's going on with that phone. We got your number for your dad." There was some discussion regarding at which phone number appellant's father could be reached. Appellant then admitted that he told his aunt and uncle, and his father about what happened. Apparently, Detective Deveney called a number in an attempt to reach appellant's father but it was out of service. Appellant asked to call his cousin whom he claimed had his father's phone number. (2 CT 326-327.)

Appellant was left alone in the room and he made three calls. During the first call, appellant was heard to say, "Hey man, what's up? Dad is [sic] me, I'm in jail. So, see if you can, as soon as you get this, call back at this number, Bye." During the second call, appellant informed an individual that he was in jail and asked if the person had heard from his dad. Appellant told the person he was going to try contact his dad. Appellant's third call was not answered. The interview then ended. (2 CT 327-329.)

On September 22, 2005, while at juvenile hall, appellant was interviewed a second time. He again admitted that he shot Seau. (2 CT 357-383.)

At trial, appellant reiterated that he was the person who shot Seau. (5 RT 640-649, 655-661, 663-678, 683-685.)

ARGUMENT

I.

WHETHER A MINOR HAS INVOKED HIS OR HER *MIRANDA* RIGHTS IS PROPERLY DETERMINED SOLELY ON THE TOTALITY OF THE CIRCUMSTANCES TEST

Appellant contends that, based upon this Court's decision in *Burton*, a minor's request to speak to a parent during a custodial interrogation is tantamount to an invocation of the right to remain silent and the right to counsel under *Miranda*, and therefore all questioning by police must cease. (Appellant's Opening Brief on Merits ("ABOM") 14-33.) Appellant argues that his confession was inadmissible because it was obtained in violation of *Miranda*. Pursuant to the "per se" rule of *Burton*, appellant faults the trial and appellate courts for relying upon the United States Supreme Court decision of *Michael C.*, *supra*, 442 U.S. 707, in determining that he waived his *Miranda* rights.[6/]

As will be demonstrated, a minor's request to speak to a parent before or during an interrogation does not create a presumption that the minor sought to invoke his or her rights. Rather, it is merely one factor to be considered under the totality of the circumstances test to determine whether the minor intended to assert his or her *Miranda* rights, and it should not be given an greater weight than any other factor considered under that standard. Applying the "totality of the circumstances" standard here, the lower court correctly concluded that appellant knowingly and voluntarily waived his constitutional rights, and did not assert them when he subsequently asked to call his father.

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6. Appellant does not challenge the voluntariness of his statements.

A. Whether a Minor Intended to Invoke His or Her Constitutional Rights Must Be Evaluated Under the Totality of the Circumstances

1. Standard Of Review

This Court has firmly established that,

> in ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated.

(*People v. Saunders* (2006) 38 Cal.4th 1129, 1133-1134; *People v. Brendlin* (2006) 38 Cal.4th 1107, 1113-1114).

Accordingly, this Court reviews "the trial court's resolution of the factual inquiry under the deferential substantial-evidence standard," and "the ruling on whether the applicable law applies to the facts is a mixed question of law and fact that is subject to independent review." (*People v. Saunders, supra*, 38 Cal.4th at p. 1134.)

2. The Totality of the Circumstances Rule

In California, after the ratification of Proposition 8 in 1982, a challenge to the voluntariness of a minor's waiver or assertion of his or her Fifth Amendment rights is evaluated solely under federal law; thus, statements may not be suppressed based on California law. (*People v. Lewis* (2001) 26 Cal.4th 334, 383-384; *People v. Peevy* (1998) 17 Cal.4th 1184, 1188; *People v. May* (1988) 44 Cal.3d 309, 311; see also *In re Lance W.* (1985) 37 Cal.3d 873, 885-890 [same applies to Fourth Amendment rights].)

It has long been established that the determination of a valid waiver of an individual's *Miranda* rights rests upon the totality of circumstances:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if

> the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

(*Moran v. Burbine* (1986) 475 U.S. 412, 421 [106 S.Ct. 1135, 89 L.Ed.2d 410].)

> It is also well established that similar principles apply to minors: A minor has a Fifth Amendment privilege against self-incrimination, which precludes admission of a minor's confession obtained without the minor's voluntary, intelligent, and knowledgeable waiver of his or her constitutional rights.

(*People v. Lewis, supra,* 26 Cal.4th at p. 383, citing *In re Gault* (1967) 387 U.S. 1, 55 [87 S.Ct. 1428, 18 L.Ed.2d 527]; *People v. Burton, supra*, 6 Cal.3d at pp. 383-384.)

Similar to claims regarding invocations made by an adult, a court must look to all of the circumstances when deciding whether a minor has voluntarily waived or asserted his or her rights. As this Court has observed, in making the determination of

> whether a *minor's confession* is *voluntary*, a court must look at the *totality of circumstances*, including the minor's age, intelligence, education, experience, and capacity to understand the meaning and consequences of the given statement.

(*People v. Lewis, supra*, 26 Cal.4th at p. 383; emphasis added.)

> Prior to the passage of Proposition 8, in *Burton*, this Court was called upon to decide whether a minor's request to see his parents 'reasonably appear[ed] inconsistent with a present willingness on the part of the suspect to discuss his case freely and completely with police [a]t that time.

(*People v. Burton, supra*, 6 Cal.3d at p. 382.)

There, after being booked at the police station on charges of murder and, at some point, prior to the commencement of an interrogation, the 16-year-old minor suspect asked to see his father who was present at the police station. His request was denied. Thereafter, the minor was advised of his *Miranda* rights,

which he indicated he understood and waived. Subsequently, the minor confessed his crimes. (*People v. Burton, supra*, 6 Cal.3d. at p. 379-381.)

After surmising that a minor would naturally seek help from a parent upon being taken into custody, this Court held that when a

> minor is taken into custody and is subjected to interrogation, without the presence of an attorney, his request to see one of his parents, made at any time prior to or during questioning, must, *in the absence of evidence demanding a contrary conclusion*, be construed to indicate that the minor suspect desires to invoke his Fifth Amendment privilege. The police must cease custodial interrogation immediately upon exercise of the privilege.

(*People v. Burton*, *supra*, 6 Cal.3d at pp. 383-384.)

Finding that the People had failed to meet their burden of "affirmatively demonstrating" that the minor did not intend to assert his privilege, this Court found the minor's subsequent confessions inadmissible. (*People v. Burton*, *supra*, 6 Cal.3d at. p. 383.)

Eight years after this Court rendered its decision in *Burton*, in *Michael C.*, *supra*, the United States Supreme Court overruled this Court's decision extending *Burton* to hold that, during an interrogation, a minor's request to speak to his probation officer amounted to a per se invocation of the minor's Fifth Amendment rights under *Miranda*. In considering that issue, the court emphasized that it had never "extended the per se aspects of the *Miranda* safeguards beyond the scope of the holding of the *Miranda* case itself." (*Fare v. Michael C., supra*, 442 U.S. at p. 717.) In that respect, the court stated, "it is clear that 'a State may not impose . . . greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them.'" (*Ibid.*, quoting *Oregon v. Haas* (1975) 420 U.S. 714, 719 [95 S.Ct. 1215, 1219, 43 L.Ed.2d 570]; emphasis in original.)

The court explained that the per se rule of "*Miranda* [is] based upon the unique role [a] lawyer plays in the adversary system," in which case "an

accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease." (*Fare v. Michael C., supra,* 442 U.S. at p. 719.) After thoroughly considering the various duties and responsibilities of a probation officer, the court reasoned that a probation officer "is not in a position to offer the type of legal assistance necessary to protect the Fifth Amendment rights of an accused undergoing custodial interrogation." The court declared,

> [w]hether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legals rights of that person in his dealings with the police and the courts.

(*Id.* at pp. 719-722.)

Recalling that *Miranda* itself applied the "totality of the circumstances surrounding the interrogation" approach to the determination of whether "the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel," the court could "discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so." (*Fare. v. Michael C., supra*, 442 U.S. at pp. 724-725.)

Finding "[t]he totality approach permits - *indeed, it mandates-inquiry into all the circumstances surrounding the interrogation*," the court announced that factors such as "the juvenile's age, experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendments, and the consequences of waiving those rights," should be evaluated to determine the validity of the waiver. (*Fare. v. Michael C., supra*, 442 U.S. at pp. 724-725, italics added.)

In regards to a juvenile's request for a probation officer *or a parent*, the court reasoned that the "totality" approach would

> refrain[] from imposing rigid restraints on police and courts in dealing with an experienced older juvenile with an extensive prior record who knowingly and intelligently waives his Fifth Amendment rights and

voluntary consents to interrogation.

(Fare. v. Michael C., supra, 442 U.S. at pp. 725-726.) The court reiterated that "the issue of waiver" should be determined "on the basis of all the circumstances surrounding the interrogation" of a minor. (*Ibid.*)

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

In *People v. Rivera, supra,* 41 Cal.3d at p. 388, this Court revisited the issue of whether by requesting to speak to a parent during an interrogation a minor "per se invokes his [or her] privilege against incrimination." This Court acknowledged that, in light of *Michael C.*, the *Burton* rule "may not be compelled by the federal self-incrimination clause." (*Id.* at p. 395.) Nonetheless, because "*Burton* ha[d] been an established part of California jurisprudence for well over a decade," the Court stated "it is appropriate to recognize its holding as one component of the state constitutional privilege against self-incrimination." (*Ibid.*)

Nonetheless, in light of the fact that it is now clearly established in California that exclusion of a defendant's statement is only required based upon federal grounds, (*People v. Peevy, supra*, 17 Cal.4th at p. 1188; *People v. Sims* (1993) 5 Cal.4th 405, 440; *People v. Markham* (1989) 49 Cal.3d 63, 71; *People v. May, supra*, 44 Cal.3d at p. 315), this Court's prior approval of *Burton* on independent state constitutional grounds is no longer valid.

Here, by insisting upon a presumption that a minor's request to speak to a parent during an interrogation is equivalent to an intent to invoke his or her Fifth Amendment privilege, appellant asks this Court to do what it cannot,

"impose . . . greater restrictions as a matter of *federal constitutional law* when [the United States Supreme Court] specifically refrains from imposing them.'" (*Fare v. Michael C., supra*, 442 U.S. at p. 717, quoting *Oregon v. Haas, supra*, 420 U.S. at p. 719; emphasis in original.) Were this Court to uphold appellant's position, such holding "would be 'an extension of the *Miranda* requirements [that] would cut the [United States Supreme Court's] holding in that case completely loose from its own explicitly stated rationale.'" (*Ibid.*, quoting *Beckwith v. United States* (1976) 425 U.S. 341, 345 [96 S.Ct. 1612, 1615, 48 L.Ed.2d 1].)

Based upon the well reasoned authority of *Michael C.,* this Court should hold that a minor's request to speak to a parent is but one factor to be considered under the totality of the circumstances to determine if the minor has waived his or her constitutional rights.

In support of his claim, appellant asserts that a parent "occupies a special place in the legal system." (See AOBM 26.) This assertion is unavailing as it assumes a relationship of trust. Even assuming a relationship of trust exits between a minor and his or her parent(s), such circumstance

> does not indicate that the [parent] is capable of rendering effective [if any] legal advice sufficient to protect the juvenile's rights during interrogation by the police, or of providing the other services rendered by a lawyer.

(*Fare v. Michael C., supra*, 442 U.S. at pp. 722-723.)

That was the concern expressed in *Michael C.,* regarding equating an individual who, perhaps, in the minor's eye, sat in a position of trust with a lawyer: that "a juvenile's request for almost anyone he considered trustworthy enough to give him reliable advice would trigger the rigid rule of *Miranda.*" (*Id.* at p. 723.) Simply put, "'the parental role does not equate with the attorney's role in an interrogation by police.'" (*Ahmad A. v. Superior Court* (1989) 215 Cal.App.3d 528, 537-538, quoting *People v. Maestas* (1987) 194

Cal.App.3d 1499, 1510, fn. 9.) Notably, "California does not recognize a parent-child privilege of confidentiality." (*Ahmad A. v. Superior Court, supra,* 215 Cal.App.3d at p. 535, fn 5, citing *De Los Santos v. Superior Court* (1980) 27 Cal.3d 677, 683.) Hence, "[t]he State cannot transmute the relationship between [a parent] and juvenile offender into the type of relationship between attorney and client that was essential to the holding of *Miranda* . . . ." (*Fare v. Michael C., supra*, 422 U.S. at p. 723.)

The *Burton* rule is inconsistent with *Michael C.* As previously stated, this Court has already once recognized that the *Burton* rule "may not be compelled by the federal [constitution]." (*People v. Rivera, supra*, 41 Cal.3d at p. 395.) Likewise, there can be no presumption that a minor's request to speak to a parent is "tantamount" to a request to speak to counsel or remain silent because such a presumption would inappropriately elevate one factor above all the other factors, as well as negate the relevance of all the other factors that must be considered under the totality of the circumstances to determine whether a minor intended to invoke his or her *Miranda* rights. Furthermore, to presume that a minor's request to speak to a parent constitutes an invocation of the right to counsel or right to remain silent is not only inflexible and inconsistent with the totality of the circumstances test, such a directive lacks wisdom, and would be "overly paternalistic, unnecessarily protective and sacrifice[] too much of the interests of justice." (See *Commonwealth v. Williams* (Pa. 1984) 504 Pa. 511, 520, 475 A.2d 1283.)

Therefore, just as the court did in *Michael C.*, when it considered the minor's request to speak to his probation officer, this Court should "decline to attach such an overwhelming significance" to a minor's request to speak to a parent. (*Fare v. Michael C., supra*, 442 U.S. at p. 724.) Were the Court to do otherwise, it would impermissibly "'impose . . . greater restrictions as a matter of *federal constitutional law*,'" which the United States Supreme Court itself

"'has specifically refrain[ed] from imposing.'" (*Fare v. Michael C., supra,* 442 U.S., at p. 717, quoting *Oregon v. Haas*, *supra*, 420 U.S. at p. 719; emphasis in original.)

Respondent has not found any California case law decided after *Burton,* nor has appellant cited any, in which a court, upon considering a minor's request to speak to a parent, did not employ a "totality of the circumstances" approach to determine the validity of a minor's waiver of his or her *Miranda* rights.

Accordingly, in light of *Michael C.,* and the passage of Proposition 8, *Burton* must be abrogated. Based upon *Michael C.*, and in light of this Court's comments in *Rivera* which recognized that *Burton* was inconsistent with *Michael C.*, there can be no presumption that a minor's request to speak to a parent constitutes an invocation of the minor's *Miranda* rights. Rather, it must remain that the determination of the validity of a minor's waiver of his or her rights under *Miranda* requires an inquiry into the totality of the circumstances surrounding the interrogation, and a minor's request to speak to a parent is merely one more factor to be considered under the totality of the circumstances approach to determine if a minor has waived his or her *Miranda* rights.

3. Other Jurisdictions

Decisions from other jurisdictions which have addressed this issue have held that, in light of *Michael C.*, a minor's request to speak to a parent was not tantamount to an invocation of the minor's rights, but rather only one factor to be considered under the totality of the circumstances in determining whether the minor waived his or her rights. And, in all but the case of *State v. Anderson* (Or. Ct.App. 2001) 175 Or.App. 464, after considering the totality of the circumstances, these court's found the minor's waiver was valid. (See *State v. Anderson* (Or. Ct.App. 2001) 175 Or.App. 464, 472-473, 28 P.3d 662 [15 year

old minor's request to speak to father not invocation of right to silence; case remanded because record indicated trial court made no dispositive findings as to waiver]; *State v. Jones* (Minn. 1997) 566 N.W.2d 317, 324 [17 ½ year old minor's request to speak with parent did not automatically invoke right to attorney or right to remain silent]; *State v. Whitaker* (Conn. 1990) 215 Conn. 739, 750 [regarding 17 year old minor's request to call mother, court held no Fifth amendment right to parental advice, refusing to expand exclusionary rule of state statute applicable to juveniles], decision upheld in *Whitaker v. Meachum* (D. Conn. 1996, No. 2:92CV689) 1996 WL 912158 ** 7-8 [court found minor petitioner's request to call mother not an invocation of right to silence or right to counsel]; *McIntyre v. State* (Md. Ct.App. 1987) 309 Md. 607, 614-641 [15 year old minor's "mere request to speak to mother" not an invocation of right to remain silent]; *United States ex rel. Riley v. Franzen* (7th Cir.1981) 653 F.2d 1153, 1158-1162 [17-year-old minor's request to talk to father not an invocation of right to silence or right to counsel]; *State v. Valencia* (Az. 1979) 121 Ariz. 191, 195-196 [17 year old minor's request to call mother not a request for an attorney]; *Chaney v. Wainwright* (5th Cir.1977) 561 F.2d 1129, 1131-1132 [same].)

None of the above cited cases, whether following federal constitutional standards or a state statute, appeared to elevate the factor of the minor's request to speak to a parent, or give it any more consideration, over the other factors to be considered under the totality of the circumstances. Additionally, respondent was unable to find a single case from another jurisdiction, nor does appellant cite any, in which a court found a presumption that a minor's request to speak to a parent is tantamount to an invocation of the minor's Fifth Amendment

rights.[7]

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7. Some jurisdictions that apply the totality of the circumstances to determine the validity of a minor's waiver of his or her *Miranda* rights, consider factors such as the presence, absence, or notification of a parent or interested adult, during interrogation, as may be required by statute. Respondent did not find any case where a court gave any of those factors more weight than any other factor. Indeed, the following states specifically rejected application of a per se rule in determining the validity of a minor's waiver. (See *State v. Fernandez* (La. 1998) 712 So.2d 485, 487-489; *State v. Nichols S.* (Me. 1982) 444 A.2d 373, 377; *Commonwealth v. Williams* (Pa. 1984) 504 Pa. at pp. 511, 521 [rejected application of rebuttable presumption minor incompetent to waive rights absent opportunity to consult with interested adult]; *In re Williams* (S.C. 1975) 265 S.C. 295, 299-300.)

Other jurisdictions have various statutory or state constitutional requirements e.g., only parent or counsel can waive rights; parent must be present at interrogation; no interrogation until parents notified; waiver must be in writing or taken in court, which are often strictly enforced and a violation thereof results in an invalid waiver. (See Colo. Rev. Stat. Ann., § 19-2-511; Conn. Gen. Stat. Ann., § 46b-137; Ind. Code Ann., § 31-32-5-1; Iowa Code, § 232.11(2); *State v. Bell* (Kan. 2003) 276 Kan. 785, 796-797; Baldwin's Ky. Rev. Stat. Ann. § 610.060; *Commonwealth v. Alfonso A.* (Mass. 2003) 438 Mass. 372, 380-381; Mont. Code Ann., § 41-5-331; N.C. Gen. Stat. Ann., § 7B-2101, subds. (a)(3) & (b); N.D. Century Code Ann., § 27-20-27(2); N.M. Stat. Ann., § 32A-2-14; *In re C.S.* (Ohio 2007) 115 Ohio St.3d 267, 284; Okla. Stat. Ann. Tit. 10, § 7303-3.1, subd. (A); *State v. Horse* (S.D. 2002) 644 N.W.2d 211, 218; Vernon's Tex. Stats. and Codes Ann., Family Code, § 51.09 ;Wash. Rev. Code Ann., § 13.40.140; *State v. Mears* (Vt. 2000) 170 Vt. 336, 340.)

Title 18 United States Code section 5033, of the Federal Juvenile Delinquency Act, requires that when a minor is taken into custody, the arresting officer must immediately advise the minor of his legal rights; and immediately notify the Attorney General and the minor's parents, guardian, or custodian of the minor's custody, and of the minor's rights. It appears, however, that federal constitutional standards are applied in situations were the validity of a minor's waiver of his or her rights is called into question due to a violation of section 5003, in which case the totality of the circumstances test is used to determine the validity of the minor's waiver. (See *United States v. Doe* (9th Cir. 2000) 219 F.3d 1009, 1016-1017 [violation of statute prejudicial error]; *United States v. White Bear* (8th Cir. 1982) 668 F.2d 409, 411-413 [minor's waiver valid despite violation of statute].)

B. Based Upon The Totality of the Circumstances Appellant Knowingly And Voluntarily Waived His Fifth Amendment Rights Under *Miranda*

Appellant's motion to suppress evidence of his custodial statements was based upon two grounds of error: (1) that the officers violated Welfare and Institutions Code section 627, subdivision (b)[8], and (2) that his statements were obtained in violation of *Miranda*. (1 CT 211-216.)

At the hearing on the motion[9], the People called Detective Deveney to the stand. Detective Deveney stated that on September 20, 2005, appellant was arrested at his aunt and uncle's home in Hemet. Detective Deveney spoke to appellant in the back of her car within 30 to 40 minutes of his arrest. Detective Deveney advised appellant that he was under arrest for "J.D.O. from his probation officer," i.e., a warrant issued by probation (see 2 RT 44), and that he was being taken to Oceanside. Detective Deveney told appellant that, once they arrived in Oceanside, he could make as many telephone calls as he wanted to whomever he wanted. When Detective Deveney asked appellant if he wanted anyone notified that he was in custody, appellant said he wanted his father notified. Detective Deveney asked appellant if he had his father's phone number. Appellant said he did not. Thereafter, appellant was transported to the Oceanside Police Department. (2 RT 34-37.)

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8. Welfare and Institutions Code section 627, subdivision (b) states, in pertinent part:

> Immediately after being taken to a place of confinement pursuant to this article and, except where physically impossible, no later than one hour after he has been taken into custody, the minor shall be advised and has the right to make at least two telephone calls from the place where he is being held, one call completed to his parent or guardian, a responsible relative, or his employer, and another call completed to an attorney.

9. The record indicates that at the hearing, the court and counsel discussed only the circumstances of the September 20, 2005 interview.

Upon arriving at the Oceanside Police Department, appellant was placed inside an interview room. About 10 to 15 minutes later, Detective Deveney and Detective Govier entered the room. Detective Deveney informed appellant that they had located a telephone number for his father. When Detective Deveney asked appellant if he wanted her to make the call to appellant's father to advise him that appellant was in custody or if he wanted to make the call, appellant said that he wanted to make the call himself. (2 RT 37-39.)

Detective Deveney then told appellant "Okay. We're getting that warrant confirmed now. I got the information, your dad's phone number. Do you want to make a call to him or did you want us to call?" After stating he wanted to be the one to call his father, appellant continued to talk to Detective Deveney. Sometime later, appellant requested to talk to his father. Appellant presented no evidence on his behalf at the hearing. (2 RT 45-47.)

As demonstrated by the transcript of the interview, before appellant was asked any questions related to the incident and prior to being advised his *Miranda* rights, Detective Deveney indicated that they had obtained a phone number for appellant's father. She asked appellant, "Do you want to make a call to him? Or did you want us to?" Appellant responded, "I'd like to call him." Shortly thereafter, appellant was advised of his *Miranda* rights, which he indicated he understood, and the interview continued. (2 CT 281-284.) After appellant admitted his involvement in the crimes, he asked to talk to his father, but he did not have a phone number. (2 CT 320-321.)

The trial court ultimately determined that, in light of *Michael C.* and *People v. Hector* (2000) 83 Cal.App.4th 228, despite a "technical violation"of the statute,[10/] suppression was not required unless it found that appellant's

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10. The trial court found the statute had been "technically violated," in light of the time frame of when appellant was provided with a phone to call his father. (2 RT 65.)

request to call his father was tantamount to an invocation to remain silent or speak to an attorney, which the court found "it really [was not] in th[at] context." (2 RT 61-64.)

However, the trial court had not found any authority, nor did defense counsel provide any, which stated that the remedy for a violation of the statute was suppression of the statement. (2 RT 65-66.) Rather, the court "in fact" found "that the case law [was] to the contrary." Although *Hector* did not deal directly with Welfare and Institutions Code section 627, the court found *Hector*

> very instructive in saying that under federal law, the request for a parent simply is not a *Miranda* violation and should not result in the suppression of a statement. And I find that case controlling in this context. And under *Hector*, and the Supreme Court case which I already cited, *Fare v. Michael C.*, I just don't think the exclusionary rule is applicable in this context.

(2 RT 66.)

In concluding that *Miranda* was not violated, the trial court found no "tie-in whatsoever" between appellant's request to talk to his father and his *Miranda* rights. The trial court emphasized that when appellant was advised of his *Miranda* rights, he said he understood them, and he never made any statement that he wished to remain silent. Upon determining that appellant's request to talk to his father appeared to be a matter of just having his father and family notified that he had been arrested, the trial court pointed out that appellant was arrested at the home of his aunt and uncle, thus appellant's family had already been notified of his situation. (2 RT 66-68.)

Applying the totality of the circumstances test, the record supports the trial court's ruling that no *Miranda* violation occurred, and appellant's statements were admissible at trial.

Shortly after the interview began, appellant was advised of his *Miranda* rights. Appellant stated that he understood each of his rights, and he never made any statement that he wished to remain silent. Nor did he ever request an

attorney. (2 RT 66; 2 CT 282-284.) Based on the record,

> [t]here is no indication that [appellant] was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be. He was not worn down by improper interrogation tactics or lengthy questioning or by trickery or deceit.

(*Fare v. Michael C.*, *supra*, 442 U.S. at pp. 726-727.)

Furthermore, nothing in the record suggests that appellant was incapable of understanding the nature of his actions. Contrary to appellant's assertions (see AOBM 32), his conduct during the interview demonstrated that he was a mature 16 year old, who was no stranger to criminal activity.

During his interview, appellant readily spoke of his detailed knowledge of Black Jack's involvement with false identification activity, and his comments suggested that the only reason he did not get involved in the illicit activity was because of a "fall out" he had with Black Jack. (2 CT 287-290.) Appellant's statements revealed that he was streetwise to the justice system. At one point, appellant admitted that he had a prior probation violation, and that he ran from probation on one occasion. (2 CT 291, 294.) In relation thereto, evidence was presented at trial that when appellant was initially picked up on September 20, he attempted to flee the house prior to being taken into custody. (3 RT 239-240.)

The record also established that appellant had previous experience with law enforcement. Appellant's probation report demonstrated that in September 2003, he was arrested for burglary and making a threat to commit a crime, in which he allegedly threatened to kill another individual. In June 2004, during a traffic stop, appellant fled police on foot. Afterwards, marijuana was found inside the vehicle, an arrest warrant was issued, and appellant was eventually taken to juvenile hall. (See 2 CT 461.)

As for appellant's request to call his father, as pointed out by the appellate court, appellant

> did not specifically ask to call his father before he was read his *Miranda* rights. [Rather,], he merely answered Deveney's questions about who else should be notified and whether he wanted to be the one to call his father.

(Slip Opn. at 9, fn. 6; see 2 CT 281-282.)

At that point, it is clear that appellant merely wanted his father *notified* of his situation, since he did not specifically ask to call his father in effort to seek advice or help. As also pointed out by the appellate court,

> the message [appellant] left during his first telephone call for his dad advising him he was in jail, without asking for any advice from him, was circumstantial evidence of [appellant's] intent to have his father merely notified about his arrest and not an invocation of his rights.

(Slip Op.at 9.)

Based upon the above circumstances, at least two factors from *Michael C.* support the conclusion that appellant's request to call his father "was not the functional equivalent of a request for an attorney." (*United States ex rel. Riley v. Franzen, supra*, 653 F.2d at p. 1159.) First, there is no evidence in the record that appellant's father was trained in the law, in which case he was in no position to advise appellant of his legal rights. Second, as demonstrated above, any communication that may have occurred between appellant and his father would not have been privileged. (*Id.* at pp. 1159-1160.)

Furthermore, there is nothing in the record to indicate that appellant wanted to call his father for legal advise or in order to contact an attorney. (*Chaney v. Wainwright, supra,* 561 F.2d at p. 1131.) Additionally, based on the circumstances of this case, "it strains the imagination to view appellant as a "child" involved in a juvenile court delinquency." (*Ibid.*) And, since appellant did not even reside with his father or apparently have readily available a contact number for his father (2 CT 327), "the apron-string tie was not strong in [this 16 year old]." (*Chaney v. Wainwright, supra,* 561 F.2d at p. 1131.)

This issue is not unlike the circumstance of a defendant who makes an ambiguous request for counsel, in which case police are not required to cease questioning. (*Davis v. United States* (1994) 512 U.S. 452, 458-462 [114 S.Ct. 2350, 129 L.Ed.2d 362].) It is well established that in such cases,

> [a] suspect's expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights.

(*People v. Cruz* (2008) 44 Cal.4th 636, 667-668, citing *People v. Medina* (1995) 11 Cal.4th 694, 752; *People v. Sully* (1991) 53 Cal.3d 1195, 1233.)

Likewise, in cases like this one, despite a request to speak to a parent, where a minor indicates that he or she understands his or her rights and willingly continues to answer questions, that circumstance should be given the same type of consideration and would necessarily "avoid difficulties of proof and [provide] guidance to [police] officers conducting interrogations]" of particularly sophisticated minors. (*Davis v. United States, supra*, 512 U.S. at pp. 458-459.)

Here, based on all of the above cited factors, the trial court properly considered the totality of the circumstances surrounding the interrogation to determine whether appellant wished to invoke his constitutional rights. In doing so, the trial court correctly determined that appellant's statements were not obtained in violation of *Miranda* and properly denied appellant's motion to suppress.

C. Appellant's Statements From The September 21, 2005 Interview Were Properly Admitted At Trial

Appellant also claims that the statements obtained from the interview conducted on September 21, 2005 were improperly admitted at trial. This claim is based upon the premise that he did not waive his rights during the first interview. (AOBM 34.) As discussed above, there was no *Miranda* violation during the first interview. Accordingly, there was no violation of *Edwards v.*

Arizona, supra, 451 U.S. at pp. 484-485, and the statements obtained during the second interview were properly admitted at trial.

CONCLUSION

Accordingly, for the reasons stated herein, respondent respectfully requests that the judgment be affirmed.

Dated: February 5, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

STEVE OETTING
Supervising Deputy Attorney General

JENNIFER A. JADOVITZ
Deputy Attorney General

Attorneys for Plaintiff and Respondent

JAJ:ah
SD2007800382
80332995.wpd

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 8011 words.

Dated: February 5, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

JENNIFER A. JADOVITZ
Deputy Attorney General

Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Lessie**

No.: **S163453**

I declare:
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On February 5, 2009, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Elisa A. Brandes (2 copies)
Attorney at Law
PMB 14
2650 Jamacha Road, #147
El Cajon, CA 92019
Counsel for Appellant

Mike Roddy
Executive Officer
San Diego Superior Court
220 West Broadway
San Diego CA 92101-3409

The Honorable Bonnie M. Dumanis
District Attorney
San Diego County District Attorney's Office
330 West Broadway, Suite 1320
San Diego, CA 92101

Court of Appeal of the State of California
Fourth Appellate District
Division One
750 B Street, Suite 300
San Diego, CA 92101

Appellate Defenders, Inc.
555 West Beech Street, Ste. 300
San Diego, CA 92101

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 5, 2009, at San Diego, California.

Anna Herrera
Declarant

Signature

80333906.wpd