IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	Calif. Supreme Court No. S148462
Plaintiff and Respondent,	San Diego Co.Super.Ct. No. SCD173300
v.	
JEFFREY SCOTT YOUNG,	
Defendant and Appellant.	

APPELLANT'S REPLY BRIEF

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INTRODUCTION

In this Reply Brief, appellant addresses specific contentions made by respondent, but does not reply to arguments already adequately addressed in Appellant's Opening Brief. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the Opening Brief, does not constitute a concession, abandonment or forfeiture of the point by appellant,[1] but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

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1 See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3

GUILT PHASE ISSUES

I. APPELLANT'S STATEMENT TO THE POLICE THAT THEY HAD ALREADY "HEARD IT ALL" WAS ELICITED IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS AND ITS ADMISSION INTO EVIDENCE AGAINST HIM WAS PREJUDICIAL

(Reply to Respondent's Arg. I, RB 39-53.)

Appellant's claim that his statement to the police that they had "heard it all" was admitted in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 consists of four separate arguments:

(1) Part A, below: appellant's request that the police read him his rights was an *invocation* (AOB 60-66; Part C);

(2) Part B, below: the police playing of appellant's taped phone conversation with Jason Getscher prior to *Miranda* warnings was the *functional equivalent of questioning* (AOB 66-68, Part D);

(3) Part C, below: the use of *the two-step or "midstream" advisement* condemned by the United States Supreme Court, i.e., the deliberate delayed advisement of his rights, invalidated his subsequent waiver and statement (AOB 69-74; Part E, section 1);

(4) Part D, below: the police *"softening up"* of appellant invalidated any waiver (AOB 75-76, Part E, section 2.)

Respondent makes a selective response to these arguments, addressing only the first and fourth, i.e., respondent argues first that appellant waived his

right to silence and that the waiver was not coerced, and secondly, that there was no "softening up" of appellant. (RB 43-47, 48-49.) Respondent ignores appellant's other arguments and the principles and authorities appellant relies on, perhaps because of the lack of authority to refute the claims. Respondent skips over appellant's most significant arguments and asserts that there can be no harm from the admission of the challenged evidence. (RB 50-53.)

Appellant addresses each of his arguments in logical sequence, replying to the arguments respondent makes, and reiterating the arguments respondent fails to address.

A. Appellant Made a Sufficiently Clear Invocation Of His Right to Silence; The Police Violated His *Miranda* Rights by Continuing to Question Him Prior to Giving *Miranda* Advisements.

Appellant contends that he invoked his right to silence under *Miranda* when he asked the officer to give him his rights – a request blatantly ignored by his interrogator. (AOB 60-66.)

Respondent argues that although *Miranda* requires the police to advise suspects of their right to silence, the police "failure to [advise appellant of his right to silence] did not render [appellant's] subsequent waiver involuntary." (RB 47.) Respondent argues that because appellant's invocation was ambiguous, the police questioning was permissible. (As shown in more detail below, this argument sidesteps the meat of appellant's claim, that a two-

step or midstream *Miranda* advisement is ineffective.) Respondent first argues, in a footnote, that appellant's request to "get his rights" was not a sufficiently clear invocation of his rights. Respondent cites *Berghuis v. Thompkins* (2010) 560 U.S. 370 and *People v. Stitely* (2005) 35 Cal.4th 514, 535 and argues that the ambiguous or equivocal nature of appellant's request did not require the police to give him those rights before interrogating him. (RB 47-48, fn. 7.)

Appellant's request for his rights was a clear and unambiguous invocation of those rights. The interrogating officer clearly understood it as such as demonstrated by his response promising not to ask appellant any questions. (5CT 1091.) *Connecticut v. Barrett* (1987) 479 U.S. 523, 529 directed that in determining whether an invocation is clear or equivocal, the defendant's words must be "understood as ordinary people would understand them." The officer's responses show he clearly understood petitioner had expressed a desire to remain silent. (*Cf. Hurd v. Terhune* (9th Cir. 2010) 619 F. 3d 1080, 1089 ["the interrogating officers' comments show that they subjectively understood Hurd's responses as unambiguous refusals.").

Respondent agrees that the officer must have interpreted appellant's response as a request for *Miranda* warnings (RB 48, fn. 7) – but respondent does not address the fact that the officer refused to give those warnings until after he played the tape recording of appellant's admissions (a functional

equivalent of an interrogation, as appellant argues in **Part **, pages *****, below). Instead, citing *People v. Stitely,* 35 Cal.4th at 535 and *Berghuis v. Thompkins,* 560 U.S. 370, respondent argues that appellant's "ambiguous" request permitted the officer to continue questioning appellant. (RB 47-48, fn. 7.) Appellant anticipated such an argument and addressed it in his Opening Brief. (AOB 64-65.)

Both *Berghuis v. Thompkins* and *People v. Stiteley* recognized that a suspect must receive *Miranda* warnings before any interrogation. Both cases involved ambiguous invocations made **after** *Miranda* advisements had been given – not, as here, an invocation made prior to any *Miranda* advisement.[2] *Miranda* itself so holds, stating that when "the police [have] not advised the defendant of his constitutional privilege . . . at the outset of the

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[2] Appellant's Opening Brief cited, *inter alia*, *Sessoms v. Runnels* (9th Cir. 2012) 691 F.3d 1054 for the principle that the clear invocation rule applies only where the defendant has been advised of his rights, and not to an invocation made prior to the advisement, as here. *Sessoms* was subsequently vacated and remanded for consideration under *Salinas v. Texas* (2013) __ U.S. __ [133 S.Ct. 2174].) However, the vacatur does not affect the validity of appellant's argument, which cited to *Sessoms* only as additional authority for a principle clearly enunciated in the United States Supreme Court opinion in *Davis v. United States* (1994) 512 U.S. 452.

The Ninth Circuit recently issued its post-vacatur opinion, and analyzing the facts under *Salinas,* the en banc panel held that the defendant had made a sufficiently clear invocation, relying in part on the fact that the officers' response showed that they understood the defendant's statement as an invocation. (*Sessoms v. Grounds* (9th Cir. 2014) 768 F.3d 882, 895.) The panel also criticized the practice of delaying the administering of *Miranda* warnings until mid-interrogation, emphasizing that *Miranda* warnings are required at the outset of custodial interrogation. Interrogation does not begin once the officers get to the hard questions. (*Id.* at 895.)

interrogation," the suspect's "abdication of [that] constitutional privilege—the choice on his part to speak to the police—[is] not made knowingly or competently because of the failure to apprise him of his rights." (*Miranda*, 384 U.S. at 465.)

The unambiguous invocation rule set out in *Davis v. United States* (1994) 512 U.S. 452 explains that the "primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves," and that only "*after* having [those rights explained to him]," the suspect is required to "affirmatively" invoke his rights. (512 U.S. at 460-61; emphasis provided.) *Berghuis* does not change the *Davis* rule that applies only after the *Miranda* warnings have been given: *Berghuis* recognized and emphasized that a suspect must be given his *Miranda* rights prior to any interrogation. (560 U.S. at ___; [130 S.Ct. at 2260].) The reason is logical: a suspect not fully aware of his rights—because in this case the police did not explain them -- cannot be reasonably expected to unambiguously waive them. In consequence, where as here, the invocation (ambiguous or not) is given before the suspect is read his rights, analysis is under *Miranda* and not the *Davis* rule.

B. The Police Playing of the Getscher Tape Recording Was the Functional Equivalent of Interrogation.

Appellant's argument — almost totally disregarded in Respondent's Brief — is that (1) the playing of the tape was the functional equivalent of an

interrogation; and (2) the two-step police tactic of deliberately[3] delaying the administering of *Miranda* advisements until after the tape-playing interrogation in order to get a statement (3) rendered appellant's purported waiver of his *Miranda* rights ineffective. This is the holding of *Seibert v. Missouri* (2004) 542 U.S. 600, in which the High Court denounced the increasingly popular police tactic of first interrogating the suspect, then giving warnings and re-eliciting incriminating statements, as a distortion of *Miranda* that furthered no legitimate countervailing interest. (*Id.* at 612-13; see AOB 70-74.)

Respondent does not address the relevant case law and ignores the principles set out in the precedents cited by appellant. Appellant therefore refers this Court to his Opening Brief. (See AOB 66-68, relying on *Rhode Island v. Innis* (1980) 446 U.S. 291, 301, *People v. Sims* (1993) 5 Cal.4th 405, 442; *People v. Davis* (2005) 36 Cal.4th 510, 555.)

Instead, respondent states the "the only thing" the police did was "to play a tape of Young's admissions to Jason Getscher." (RB 45.) Although respondent glosses over the "functional equivalent of an interrogation" argument by attempting to minimize it in this way, this Court cannot and should not do the same. The interrogation-by-tape is the underpinning of

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[3] As set forth in the Opening Brief, the determining question is whether the delay was deliberate. Here, the officer's stark refusal to comply with appellant's request for *Miranda* advisements, and the officer's statement that he first had to play the tape (i.e., the functional equivalent of an interrogation) demonstrates without doubt that the delay was deliberate. (AOB 72-74.)

appellant's argument that the delayed or "midstream" *Miranda* warning was in violation of clear United States Supreme Court precedent, as set out below. (Respondent also ignored this argument.)

C. Deliberate Delay of the *Miranda* Advisements Renders Them Ineffective.

As stated above, respondent ignores the facts, premises and precedents upon which this argument is based.[4] Appellant therefore summarizes the discussion as set out in detail and at length in the Opening Brief. (See AOB 68-74.)

1. Detective McDonald first ignored appellant's initial request to hear his rights, stating that instead he would first play the tape of appellant's admissions to Getscher (the functional equivalent of an interrogation).

2. After the tape was played, the officer asked appellant if that was enough. Appellant said, "No, I heard about enough." This was appellant's first unadvised statement. (5CT 1092.)

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[4] Respondent does suggest that appellant could have said he did not want to listen to the tape during "lulls" in the conversation. (RB 45.) Appellant's failure to stop the police from playing the tape, does not amount to a waiver of rights (which were not given) nor does it transform the playing of the tape from the functional equivalent of an interrogation into a consensual discussion. Respondent also mistakenly claims that the officer "promised not to ask questions *during the playing of the tape*." (Emphasis provided.) In fact, the officer did not say that. What he actually said was, "And then, after we're done [playing the tape], I'm not going to ask you any questions." (5CT 1091.)

3. The officer then (after some softening up) *Mirandized* appellant and said they had "everything on tape" and just wanted "some details," and asked appellant if he wanted to tell his side of the story. (5CT 1092-93.)

4. Appellant said "You heard it all." This was appellant's second statement, made after the midstream *Miranda* warnings, and the statement used against him at trial. (5CT 1095.)

5. *Seibert v. Missouri,* 542 U.S. 600 denounced the "two-step" or "question-first" police interrogation tactic in which the police deliberately delay administering *Miranda* warnings (see no. 1 above), then after eliciting incriminating information (see no. 2), give the warnings and re-elicit the admission (see no. 4). *Seibert* held that such a deliberately delayed *Miranda* warning renders them ineffective and distorts the meaning of *Miranda*. (*Id.* at 613, 621.)

The question is whether the delay was deliberate; the courts assess deliberateness by considering both objective and subjective evidence. The objective evidence in this case shows deliberate delay because of "the continuity of police personnel and the overlapping content" of the two statements. (See *id.* at 615.) The subjective evidence shows deliberate delay by Detective McDonald's refusal to *Mirandize* appellant at the outset despite appellant's express request, and his insistence on first playing the tape. (See *id.* at 615-16.)

Respondent refuses to recognize appellant's argument, and turning his back on the High Court precedent and the two-step police tactic, attempts to reframe the issue: Respondent agrees with appellant that the police should advise a suspect of his rights at the outset of an interrogation, but argues that the officer's "failure to do so in this case" does not taint appellant's subsequent statement made after a proper advisement so long as there was "no actual coercion." (RB 47.)

Respondent relies on the principle set out in *People v. Scott* (2011) 52 Cal.4th 452, 477 that as long as the defendant is eventually given his *Miranda* warnings, a valid waiver and subsequent statement is admissible despite a previous *Miranda* violation "so long as no actual coercion or other circumstances calculated to overcome his free will. (RB 47.)

Respondent's argument misses the point made by *Seibert*: deliberate delay in *Mirandizing* a suspect renders the delayed advisement *ineffective.* Because the delayed warning was in effect no *Miranda* warning, admissions made after the delayed warning are also in violation of *Miranda.* There is no valid subsequent *Miranda* warning (with a waiver) to render the subsequent statement admissible.

People v. Scott is inapposite as it does not address the key issue of a deliberate delay in giving the *Miranda* warnings. In *Scott*, the first unadvised police inquires were standard booking questions and asked about his hobbies,

including martial arts. All these statements were excluded. The question in *Scott* was whether the initial *Miranda* violation tainted the incriminating statements made by the defendant after he had received *Miranda* warnings. *Scott* found second statement voluntary, and held that the failure to give *Miranda* warnings prior to the standard booking questions and the defendant's hobbies did not therefore taint the defendant's subsequent voluntary statement. (*Id.* at 477.)

Scott does not provide a proper framework for the issue here. Appellant does not claim that the officer's initial failure to *Mirandize* appellant, followed by incriminating statements, tainted the second *Mirandized* statement, as the defendant argued in *Scott*. Rather, appellant contends that the *deliberate delay* in giving the *Miranda* advisements until *after* the playing of the tape recording (effectively, an interrogation) and his first incriminating statement rendered the delayed warnings ineffective. Thus appellant's statement "you've heard it all" was inadmissible against him.

D. Any Implied Waiver Must Be Deemed Invalid.

Appellant contends that he did not waive his *Miranda* rights because he invoked those rights; and because the midstream *Miranda* advisement, given after the functional equivalent of an interrogation, was ineffective, he could not make a knowing waiver. (Parts A, B and C, above.)

Alternatively, assuming *arguendo* that the above arguments are rejected, appellant contends that any implied waiver must be deemed invalid because it was obtained through improper "softening up" of appellant by the police, as in *People v. Honeycutt* (1977) 20 Cal.3d 150, 160.

Respondent argues that because the police officer did not seek to ingratiate himself with appellant, discuss former acquaintances, disparage the victim, as occurred in *Honeycutt*, there was no softening up resulting in a coerced waiver. (RB 49.) Appellant anticipated this argument and addressed it in the Opening Brief: In fact the detective discussed appellant's former acquaintances at some length, repeatedly stating that Torkelson and another guy were "looking to make a deal," and that this was appellant's "opportunity." (5CT 1090-91.)

Although respondent also argues that appellant was not coerced into waiving his rights because "the only thing" the officer did was to play the Getscher tape. (RB 45.) But this "thing" was an interrogation, as argued above. Respondent also suggests that appellant could have said he did not want to listen to the tape, and that he was noncommittal when the officer told him that he would give appellant his rights *after* the tape-playing interrogation. (RB 45.) Appellant contends that *Miranda* places the burden on law enforcement to advise the suspect of his rights prior to interrogating him; the