In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

SAMUEL MOSES NELSON,

Defendant and Appellant.

Case No. S181611

Appellate District Division Three, Case No. G040151
Orange County Superior Court, Case No. 04ZF0072
The Honorable Frank F. Fasel, Judge

REPLY BRIEF ON THE MERITS

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The United States Supreme Court has held that once a criminal suspect has knowingly and voluntarily waived his right to an attorney during police questioning, he can invoke that right thereafter only by unambiguously and unequivocally asking for an attorney. A request for someone other than an attorney is not sufficient, and does not require the police to cease questioning. (*United States v. Davis* (1994) 512 U.S. 452 [114 S.Ct. 2350, 129 L.Ed.2d 362] (*Davis*).) This Court has applied Davis in many situations where there is no clear and unambiguous invocation of the right to counsel. In appellant's case, the Court of Appeal expressly declined to apply the clear rule in *Davis* because appellant was a minor. Appellant asks this Court to affirm and effectively create a special rule which would make any minor's request for a parent equivalent to a request to speak to an attorney, and require police questioning to cease. However, this Court just disapproved such a rule in *People v. Lessie* (2010) 47 Cal.4th 1152, 1156 (Lessie).

As *Davis* explained: The "primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves.[1] '[F]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process.' [Citation.] A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted." (*Davis, supra,* 512 U.S. at pp. 460-461.) *Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 [101 S.Ct. 1880, 68 L.Ed.2d 378] (*Edwards*) affords a second layer of prophylaxis by requiring immediate and total cessation of questioning when the suspect

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

requests an attorney. However, the high court concluded that a third level of protection – extending *Edwards* to ambiguous requests – was unnecessary where a suspect has validly waived his rights. (*Davis, supra,* 512 U.S. at pp. 459-462.) Thus, the suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (*Ibid.*) Officers therefore are not required to stop questioning the suspect in the face of ambiguous comments that might be construed as a request for a lawyer. (*Ibid.*)

Invocation of the right to counsel requires at minimum "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney. (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 178 [111 S.Ct. 2204, 115 L.Ed.2d 158]; *Davis* at p. 459.) The likelihood that the suspect would wish counsel to be present is not the test. (*Davis* at p. 459, citing, *Edwards,* 451 U.S. at p. 485.) However, appellant maintains that *Davis* does not apply to minors, particularly minors who ask to speak to a parent. (AAB 4-5, 18.)[2] He stresses instead how this Court and the high court have historically had a heightened concern for juveniles generally, and particularly during custodial interrogation. (AAB 23-24, 28, 31.) Although he describes the rule and rationale of *Davis,* he expresses a preference for the rationale in the concurring opinion of Justice Souter which advocates police clarification of ambiguous references to counsel, and disapproves of the distinction between a waiver of *Miranda* rights and postwaiver invocation of those same rights. (AAB 31-32, 34-35; *Davis, supra,* 512 U.S. at pp. 469, 471, conc. opn. of Souter, J.) Appellant even warns that *Davis* supports a "regime" that would allow the police to

[2] "AAB" refers to appellant's answering brief.

deliberately ignore a minor's attempt to invoke *Miranda* rights, a practice that in or of itself can increase the coercive atmosphere *Miranda* was intended to dispel. (AAB 39.)

Appellant urges this Court to apply the "totality of circumstances" test from *Fare v. Michael C.* (1979) 442 U.S. 707 [61 L. Ed. 2d 197, 99 S. Ct. 2560] (*Fare*). (AAB 3-4, 18, 25, 34, 38.) There are two problems with appellant's approach. First, *Fare* dealt with the start of questioning and whether there had been an initial waiver of *Miranda* rights. Thus, it had little to say about whether some statement or behavior after an initial knowing and voluntary wavier should count as a subsequent invocation of *Miranda* rights. Second, even if *Fare* applies to post-waiver, midst-of-questioning invocations, it cannot be read to establish, as appellant would have this Court believe, that when a minor asks to speak to a parent, it is the same as if he were requesting an attorney.

Fare established the totality of circumstances test for evaluating a waiver of *Miranda* rights by an adult or minor. (*Fare,* 442 U.S. at p. 725.) In *Fare,* the United States Supreme Court overruled this Court's extension of a rebuttable presumption that a minor's request for a parent (in response to being given *Miranda* rights) was the same as a request for an attorney. It squarely held that only a request for an attorney is a request for an attorney, and observed:

> The per se aspect of *Miranda* was thus based on the unique role the lawyer plays in the adversary system of criminal justice in this country. Whether 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 legal rights of that person in his dealings with the police and the courts. For this reason, the Court fashioned the rigid rule that 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.)

Appellant's argument, while purporting to rely on the totality of circumstances test in *Fare,* glosses over the great emphasis *Fare* places on the unique skills of attorneys, distinguishing attorneys from others who might offer consolation or advice to a suspect during police interrogation, but not lawyerly skills. Thus, as this Court explained in *People v. Lessie, supra,* 47 Cal.4th 1152, 1165:

> The high court held that *In re Michael C.* (1978) 21 Cal.3d 471, this Court had unjustifiably extended *Miranda, supra,* 384 U.S. 436, by treating a suspect's request to speak with someone other than an attorney as an invocation of the Fifth Amendment privilege. (*Fare,* at pp. 722-723.) Underlying *Miranda,* the high court explained, is the recognition that " 'the attorney plays a vital role in the administration of criminal justice under our Constitution' " (*Fare,* at p. 722, "[i]t is this pivotal role of legal counsel that justifies the *per se* rule established in *Miranda,* and that distinguishes the request for counsel from the request for a probation officer, a clergyman, or a close friend" (*Ibid.*).

Appellant's requests to speak to his mother before taking a polygraph were not the unambiguous requests for an attorney required by *Davis.* Therefore, appellant advocates a special rule for minors to equate a request for a parent with a request for an attorney. To hold that they nonetheless counted as an invocation would create a special rule that a minor's request for a parent is equivalent to a request for an attorney. But this is the same special rule which was specifically rejected by this Court in *Lessie, supra,* 47 Cal.4th at p. 1156.

Even if the *Fare* totality of circumstances test applies in the postwaiver context, it does not justify the relief the Court of Appeal gave here. Part of the "totality of circumstances" in appellant's case was that he had already been advised of his rights to an attorney and had already knowingly and voluntarily waived that right. There is no reason to assume he forgot all that during questioning, any more than would someone older than he. He was not a child, he was a teenager, and he had a history with

law enforcement and juvenile court that made him something other than a mere "waif," as the trial court found. Based on his personal experience being represented by an attorney, he necessarily understood the "unique role the lawyer plays in the adversary system of criminal justice in this country." (*Fare* at p. 719.) He was part of a society in which "the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts." (*Fare* at p. 719.) There was no reason under any totality of circumstances test to give any special weight to this request to speak to a parent. That is particularly true here, where he sought advice whether to submit to a polygraph exam, not whether to continue questioning. This Court should find that the appellate court was incorrect when it rejected the objective "reasonable officer" test in *Davis* and instead purported to apply *Fare's* totality of circumstances test to hold that appellant unambiguously invoked his Fifth Amendment rights when he asked to speak to his mother after a knowing and voluntary *Miranda* waiver during police interrogation.

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CONCLUSION

The murder conviction should be reinstated.

Dated: December 20, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 1,735 words.

Dated: December 20, 2010

EDMUND G. BROWN JR.
Attorney General of California

ELIZABETH A. HARTWIG
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Samuel Moses Nelson** No.: **S181611**

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 **December 20, 2010,** I served the attached ***REPLY 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:

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Clerk of the Court – For Delivery To:
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The Honorable Tony Rackauckas
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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on **December 20, 2010,** to **Appellate Defenders, Inc.** at the following electronic notification address:

eservice-criminal@adi-sandiego.com.

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 **December 20, 2010,** at San Diego, California.

Loreen Blume
Declarant

Loreen Blume
Signature

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