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July 20, 2011

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

RE: SUPPLEMENTAL LETTER BRIEF
People v. Nelson, Case No. S181611

Dear Mr. Ohlrich:

On June 22, 2011, this Court invited the parties to submit simultaneous supplemental letter briefs on the effect, if any, of *J.D.B. v. North Carolina* (June 16, 2011, No. 09-11121) ___ U.S. ___, 131 S.Ct. 2394 [2011 WL 2369508] (*J.D.B.*). Respondent submits that: (1) *J.D.B.* is inapposite because that case pertained to the issue whether a minor was in custody for purposes of *Miranda*,[1] whereas the present case pertains to the issue whether a minor who requests to speak with his mother after waiving *Miranda* is unambiguously invoking his Fifth Amendment right to counsel or his Fifth Amendment right to silence;[2] and (2) even if *J.D.B.* applies generally to post-waiver invocation inquires, it has no effect on the present case because that case involved a 13-

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

[2] As stated in respondent's Brief on the Merits, the United States Supreme Court recently established that "there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*." (*Berghuis v. Thompkins* (2010) 560 U.S. ____ [1110, 130 S.Ct. 2250, 2260, 176 L.Ed.2d 1098] ("*Berghuis*"), citing, *Davis, supra,* 512 U.S. at pp. 459-462.)

year-old minor, whereas the present case involves a sophisticated 15-year-old minor who was experienced and familiar with talking to police officers.

The United States Supreme Court's Ruling In *J.D.B. v. North Carolina*

In *J.D.B.*, the United States Supreme Court ruled that a child's age is a factor to be considered when determining whether the child is in custody for purposes of *Miranda*. (*J.D.B., supra,* 131 S.Ct. at pp. 2399, 2406.) In that case, two home break-ins occurred and various items were stolen. (*Id.* at p. 2399.) The minor—a 13-year-old seventh grade student—was briefly questioned by police when he was observed behind a residence in the neighborhood where the crimes occurred. (*Ibid.*) Police subsequently learned that a digital camera matching the description of one of the stolen items had been found at the minor's middle school and seen in the minor's possession. (*Ibid.*) About five days after the initial break-ins, a uniformed police officer interrupted the minor's middle school class, removed him from the classroom, and escorted him to a school conference room. (*Ibid.*) Waiting in the conference room was another police officer and two school administrators. (*Ibid.*) The police officers and school officials questioned the minor for over 30 minutes, asking him about the break-ins and confronting him about the stolen camera. (*Ibid.*) Prior to this interrogation, the minor was not given a *Miranda* warning, was not informed that he was free to leave, and was not given an opportunity to speak with his guardian. (*Ibid.*) The minor eventually made several incriminating statements during the interrogation. (*Id.* at pp. 2399-2400.)

At trial, the minor's attorney made a motion to suppress the minor's statements, arguing that the minor was subjected to a custodial interrogation without being afforded *Miranda* warnings. (*Id.* at p. 2400.) The trial court denied the motion, finding that the minor was not in custody at the time of the interrogation. (*Ibid.*) The North Carolina Court of Appeals and the North Carolina Supreme Court affirmed that ruling, both concluding that the minor was not in custody at the time of the interrogation. (*Ibid.*) The North Carolina Supreme Court specifically declined to extend the test for custody to include consideration of the age of the individual subjected to questioning. (*Ibid.*)

The United States Supreme Court reversed the ruling of the state courts, holding that a minor's age is a relevant factor to be considered when determining whether a person is in custody. (*Id.* at p. 2406.) The court did not reach the issue whether the minor in that case was in custody at the time of the interrogation. (*Id.* at p. 2408.) Rather, the court remanded the case to the state courts to make a custody determination, taking into account all of the relevant factors, including the child's age. (*Ibid.*) In so doing, the court specifically noted that its ruling "is not to say that a child's age will be a determinative, or even a significant, factor in every case." (*Id.* at p. 2406.) A child's age is more appropriately viewed as one factor among many to be considered when determining whether the child was in custody. (See *J.D.B., supra,* 131 S.Ct. at pp. 2406-2408.)

<u>*J.D.B.* Is Inapposite Because That Case Pertained To A Custody Analysis, Whereas The Present Case Deals With The Issue Of Post-Waiver Invocation</u>

J.D.B. is inapplicable in the present case because this Court is not faced with the question whether a minor was in custody at the time of the interrogation. Indeed he was; therefore, before the interrogation began, the investigators properly read and explained appellant's *Miranda* rights to him, and appellant said he understood those rights and was willing to talk with the investigators. (3 CT 535-538; 2 RT 295-296.) Because custody is not an issue in this case, *J.D.B.*'s holding—that a minor's age is relevant in making a custody determination—is not pertinent.

The distinction between a custody determination (as was at issue in *J.D.B.*) and a post-waiver invocation determination (as is at issue here) is an important one. That is because a custody determination requires an analysis of whether a *reasonable person in the position of the accused* would feel he or she is free to leave. (*J.D.B., supra,* 131 S.Ct. at p. 2397, citing *Thompson v. Keohane* (1995) 516 U.S. 99, 112 [116 S.Ct. 457, 133 L.Ed.2d 383] [whether a suspect is in custody for *Miranda* purposes is an objective determination looking to whether a reasonable person in the position of the accused would have felt he or she was at liberty to terminate the interrogation and leave].) Conversely, a post-waiver invocation determination requires an analysis of whether a *reasonable police officer* would have understood that the suspect was invoking the right to counsel. (See *People v. Williams* (2010) 49 Cal.4th 405, 428, citing *Davis v. United States* (1994) 512 U.S. 452, 459 [114 S.Ct. 2350, 129 L.Ed.2d 362].) Evaluation of ambiguity in a post-waiver invocation must include "consideration of the communicative aspect of the invocation—what would a listener understand to be the defendant's meaning." (*People v. Williams, supra,* 49 Cal.4th at p. 428; see *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1124.)

J.D.B. does not suggest that age should be considered as part of the *Davis* unequivocal-invocation test. Although *J.D.B.* is rooted in the understanding that a minor might misinterpret the import of surrounding circumstances relevant to reasonable indicia of custody, it does not logically suggest that such misunderstanding could somehow render unambiguous a communication that is ambiguous on its face. Indeed, nothing in *J.D.B.* supports the conclusion that a minor's request to speak with a parent is tantamount to an unambiguous invocation of the Fifth Amendment right to counsel or the Fifth Amendment right to silence. A reasonable police officer questioning a minor would have no practical guidance in determining whether a facially ambiguous statement becomes an "unequivocal invocation" simply because of the minor's age. Stated another way, once a statement is ambiguous on its face so that it suggests only that the minor "might" be invoking his or her rights, it is unrealistic and ineffective to rely on the fact of a minor's age as reasonably informing the police officer that the facially ambiguous statement is instead an unequivocal invocation.

Further, the high court in *J.D.B.* did not fundamentally alter the objective analysis underlying a custody determination. Rather, *J.D.B.* simply clarified that a person's age is a relevant factor in applying the accepted test of whether a person is in custody. (*J.D.B., supra,* 131 S.Ct. at pp. 2399, 2406.) Here, however, ruling as appellant urges—that a minor's post-waiver request to speak with a parent is an unambiguous invocation of the right to remain silent or the right to counsel—would fundamentally alter and expand the rights available under *Miranda*. It is one thing to hold that a minor's age is a relevant factor in determining whether a reasonable person in the minor's position would feel that he or she is free to leave, thus triggering a *Miranda* advisement. It is another thing entirely to hold that once a minor has received a *Miranda* advisement, any request to speak with a parent requires cessation of questioning.

Miranda does not include the right of a minor to speak with a parent. Should this Court hold as appellant suggests, it would be expanding the protections available under *Miranda*. Such an expansion would be inconsistent with previous precedent of the United States Supreme Court. In *U.S. v. Patane* (2004) 542 U.S. 630, 631 [124 S.Ct. 2620, 159 L.Ed.2d 667], the United States Supreme Court noted the "strong presumption against expanding the *Miranda* rule any further." In *Chavez v. Martinez* (2003) 538 U.S. 760, 778 [123 S.Ct. 1994, 155 L.Ed.2d 984] (conc. opn. of Souter, J.), Justice Souter pointed out the requirement of a "powerful showing" before expanding the rights afforded under *Miranda*. Indeed, the high court has declined to extend *Miranda* even where it has perceived a need to protect the privilege against self-incrimination. (See, e.g., *New York v. Quarles* (1984) 467 U.S. 649, 657 [104 S.Ct. 2626, 81 L.Ed.2d 550] ["the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."]; *Moran v. Burbine* (1986) 475 U.S. 412, 427 [106 S.Ct. 1135, 89 L.Ed.2d 410] ["Because neither the letter nor purposes of *Miranda* require this additional handicap on otherwise permissible investigatory efforts, we are unwilling to expand the *Miranda* rules to require the police to keep the suspect abreast of the status of his legal representation."].)

Indeed, 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.* (1979) 442 U.S. 707, 717 [99 S.Ct. 2560, 61 L.Ed.2d 197], quoting *Oregon v. Haas* (1975) 420 U.S. 714, 719 [95 S.Ct. 1215, 43 L.Ed.2d 570], emphasis in original.) Were this Court to uphold appellant's position, such a 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].)

The United States Supreme Court has made clear its unwillingness to expand *Miranda*. Yet that is precisely what appellant is asking this Court to do: create a bright-line rule that anytime a minor asks to speak with a parent, he is invoking his rights under *Miranda*. Not only is such an expansion inconsistent with previous precedent from the high court, it is also unnecessary. That is because, as this Court has recently noted, an initial waiver determination already requires looking to the suspect's age, experience, education, background, and intelligence. (*People v. Lessie* (2010) 47 Cal.4th 1152, 1169.) Hence, there is no reason to reinsert those same considerations when examining a police officer's objective reasonableness under *Davis*.

In fact, the present case aptly demonstrates why it would be ill-advised to expand *Miranda* in the manner appellant suggests. At the time of the interrogation, appellant was 15 years old and very experienced with the criminal justice system. Specifically, just four or five months before the interrogation, appellant had been arrested after being caught in a stolen car. He had also been arrested on a different occasion for possessing stolen property. He had spent 61 days in juvenile hall for one of his arrests. When the police officers were advising appellant of his *Miranda* rights, appellant admitted that he had been read his *Miranda* rights before, and indicated that he was familiar with those rights ("Like you have the right to remain silent"). (3 CT 535-536.) As the interrogating officer read appellant his rights, appellant stated that he understood each of those individual rights and would ask for clarification if needed. Appellant was relaxed and comfortable speaking with the officers and freely answered their questions. (Slip opn. at p. 9.)

The facts of the present case demonstrate that appellant was not a naïve child whose young age impeded his ability to invoke his *Miranda* rights. Rather, the evidence before the trial court indicated that appellant was experienced, relaxed, and comfortable in talking with police officers, and that he understood his *Miranda* rights. Stated another way, appellant was fully aware that, if he wanted to speak with an attorney, he simply had to ask. Likewise, appellant was fully aware that he had the right to remain silent, and could invoke that right at any time. (3 CT 535-536 ["Like you have the right to remain silent."].) Thus, the facts of the present case demonstrate how a categorical expansion of *Miranda* in the manner appellant suggests would lead to illogical results.

As such, and for the reasons outlined in respondent's Brief on the Merits and Reply Brief, the judgment of the Court of Appeal should be reversed.

Sincerely,

DONALD W. OSTERTAG
Deputy Attorney General
State Bar No. 254151

For KAMALA D. HARRIS
Attorney General

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Samuel Moses Nelson** Case 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 July 20, 2011, I served the attached **SUPPLEMENTAL LETTER BRIEF** 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:

Mary Woodward Wells Attorney at Law P.O. Box 3069 Del Mar, CA 92014 [Attorney for Appellant, Samuel Moses Nelson – 2 copies]	Clerk of the Court–For Delivery to: The Honorable Frank F. Fasel Judge–Department C41 Orange County Superior Court 700 Civic Center Drive West Santa Ana, CA 92701
Stephen M. Kelly, Clerk Fourth Appellate District, Division Three Court of Appeal, State of California 601 W. Santa Ana Blvd. Santa Ana, CA 92701	The Honorable Tony Rackauckas District Attorney – Attn: Appeals Orange County District Attorney's Office 401 Civic Center Drive West Santa Ana, CA 92701
Appellate Defenders, Inc. Attn: Leslie Rose, Esq. 555 W. Beech Street, Suite 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 July 20, 2011, at San Diego, California.

Connie Pasquali	C. Pasqual
Declarant	Signature

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