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

re: *People v. Samuel Moses Nelson*, S181611

APPELLANT'S SUPPLEMENTAL LETTER REPLY BRIEF

Dear Mr. Ohlrich:

This letter brief constitutes appellant's reply to the Attorney General's supplemental letter briefing on the effects of *J.D.B. v. North Carolina* (2011) 564 U.S.__, 131 S.Ct. 2394 [2011 WL 2369508] ("*J.D.B.*") regarding the proper test to evaluate a post-*Miranda*[1] invocation of the right to counsel by a youth who asks to speak to a parent.

Clearly, the parties disagree about the effect of *J.D.B.* on the issue presented in this case. Appellant maintains that the United States Supreme Court holding in *J.D.B.* – that the police must take the age of juvenile suspects into consideration when deciding whether to inform them of their *Miranda* rights – supports the application of the *Fare/Lessie*[2] totality of circumstances test as the constitutionally appropriate test to evaluate post-*Miranda* invocations by a juvenile. Although *J.D.B.* addressed a different aspect of youth rights under *Miranda* than is presented here, appellant contends the Supreme Court's focused attention on the distinguishing characteristics of children – and their corresponding susceptibility to police coercion in the confession context – is equally relevant to an evaluation of

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

[2] *People v. Lessie* (2010) 47 Cal.4th 1152 ("*Lessie*") and *Fare v. Michael C.* 1979) 442 U.S. 707.

the sufficiency of a juvenile's mid-interrogation invocation of his Fifth Amendment rights as it is to a determination of a minor's custody.

In turn, respondent submits the holding in *J.D.B.* is not pertinent to the present case because the there is no dispute the 15-year-old Nelson was in custody at the time of his interrogation. (RSB, p. 3.)[3] According to respondent, *J.D.B.* does not suggest age should be considered part of the unequivocal-invocation test identified in *Davis v. United States* (1994) 512 U.S. 452, 459 ("*Davis*") – which is the standard respondent is advocating to be applied to post-*Miranda* invocations by juveniles – or does it support the conclusion that a minor's request for a parent constitutes an invocation of his Fifth Amendment rights. (RSP, p. 3.) Finally, respondent argues that even assuming *J.D.B.* applies and age is deemed a relevant factor, it has no effect on this case because *J.D.B.* involved a 13-year-old whereas "the present case involves a sophisticated 15-year-old minor who was experienced and familiar with talking to police officers." (RSB, pp. 1-2.)

By way of reply to respondent's supplemental brief, appellant states the following: First, although respondent correctly notes that *J.D.B.* involved the issue of a minor's custody determination rather than a post-waiver invocation (RSB, p. 3), the United States Supreme Court's extended discussion of the developmental capabilities and limitations of juveniles, including that children are more susceptible to influence and outside pressures, and its resulting finding that the police must take into account the objective reality of the age of the youth they are going to question is highly relevant to any assessment of a juvenile suspect's behavior in the interrogation setting – whether the issue pertains to a youth's initial custody determination or a post-waiver invocation of his Fifth Amendment rights. (*J.D.B., supra*, 131 S.Ct. at pp. 2403-2404.)

J.D.B. does not just stand for the limited proposition that a minor's age is relevant to a *Miranda* custody analysis, as respondent contends. (RSB, pp. 3, 5.) As the first Supreme Court case since *Fare v. Michael C.* to directly address the matter of youth rights under *Miranda*, *J.D.B.* is significant not only for the Court's continuing and unwavering affirmation of the developmental differences between juvenile and adult minds but for its identification of a child's age as a relevant and objective factor that can be

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[3] Respondent's Supplemental Brief ("RSB").

considered without compromising the objective nature of *Miranda's* custody analysis. As *J.D.B.* explained, "common sense" and "a wide body of community experience" make it possible for adults to understand objectively what to expect from children in various contexts, which, likewise, "make[] it possible to know what to expect of children subjected to police questioning." (*Id.* at pp. 2303-2304.)

Further, while the United States Supreme Court has not yet addressed the question of the proper standard of review to apply to a juvenile suspect's post-waiver invocation of his Fifth Amendment rights, there is nothing in *J.D.B.* or the Court's historical treatment of juvenile jurisprudence to suggest the Court would ever adopt a standard of review that fails to account for those special problems that are recognized to be naturally present when addressing police interrogation of detained minors. (See, e.g., *Haley v. Ohio* (1948) 332 U.S. 596, 599-600 [recognizing that children are no "match for the police" in interrogation settings]; *Gallegos v. Colorado* (1962) 370 U.S. 49, 54-55 [minors make decisions differently than adults]; *In re Gault* (1967) 387 U.S. 1, 45 [calling for "special caution" to be used in the context of juvenile confessions]; and, most recently in the Eighth Amendment context, *Roper v. Simmons* (2005) 543 U.S. 551, 569-570 [recognizing juveniles' lessened culpability due to their general "lack of maturity[,]...underdeveloped sense of responsibility" and heightened "vulnerab[ility] or suscept[ibility] to negative influences and outside pressures, including peer pressure"]; and *Graham v. Florida* (2010) 560 U.S.__, 130 S.Ct. 2011, 2026 [noting "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"].)

In fact, this Court has responded directly to the high court's admonition to use "special caution" in the context of juvenile custodial interrogations. (*Lessie, supra,* 47 Cal.4th 1152, 1166, citing *In re Gault, supra*, 387 U.S. 1, 45, and *Haley v. Ohio, supra,* 332 U.S. 596, 599.) Confirming courts need not "blind themselves to the differences between minors and adults in this context," this Court adopted the federal totality of the circumstances test of *Fare v. Michael C., supra,* 442 U.S. at pp. 724-726, which mandates inquiry into all the circumstances surrounding the interrogation, including the suspect's age and experience. (*Lessie, supra,* at p. 1167.) Under the *Fare/Lessie* test, a request for a parent still remains a relevant factor and a minor's statements are subject to exclusion if the totality of the circumstances reflects the minor's purpose in asking to speak with a parent is to invoke his Fifth Amendment privileges (*Lessie, supra*, at pp. 1167-

1168), which is exactly what the Nelson Court of Appeal concluded happened here:

> After considering Nelson's age, experience, maturity, sophistication, the length, intensity, and content of the interrogation, we conclude Nelson's purpose in requesting to speak with his mother was to secure her assistance to protect his Fifth Amendment rights. Further evidence of Nelson's desire to invoke his *Miranda* rights is evidenced by his various requests to end the conversation about the murder. His words and conduct were inconsistent with "a present willingness to discuss the case freely and completely. [Citation.]" In short, the record reflects a juvenile who persisted in his attempts to seek his mother's assistance in protecting his rights, who numerous times indicated he did not want to continue speaking, and after over five hours of interrogation submitted to the deputies insistence that he write out a confession.

(2010 WL 673215, p. 18; internal citations omitted.)

Despite this clear judicial backdrop, respondent continues to maintain that the adult clear-invocation test identified in *Davis* is the appropriate standard to apply to any post-waiver invocation determination – whether a juvenile or adult suspect is involved. (BOM, pp. 20, 26.)[4] Respondent also challenges the application of *J.D.B.* to *Davis*, explaining that "a reasonable 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." (RSB, p. 3.)

This point, however, serves only to prove up appellant's underlying argument that *Fare/Lessie* – and not *Davis* – is the constitutionally appropriate standard to apply to a post-waiver invocation determination involving a juvenile suspect. In *Fare v. Michael C.*, the Supreme Court justified its application of the totality of the circumstances test to juveniles only because it allowed for the consideration of characteristics such as age and experience, and thus specifically accounted for the special caution that society recognizes must be extended to youth. (*Fare, supra*, 442 U.S. at

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[4] Respondent's Brief on the Merits ("BOM").

725.) *Davis*, on the contrary, was clearly an adult case that was written to address uncertain, conditional, or otherwise disconnected references by an adult suspect to having or wanting to have an attorney. Under *Davis,* the Court made clear that to invoke the Fifth Amendment right to counsel, a "suspect must unambiguously request counsel." (*Davis, supra*, at p. 459.) However, flexibility and balancing of interests is lost under this test. If the suspect's request fails to meet the requisite level of clarity, the officer is allowed to continue his interrogation. (*Id.* at pp. 459-460.) In short, *Davis* simply does not direct itself to an analysis of a juvenile suspect's request to speak to a parent. When, for example, Sam Nelson first asked the officer "can I call my mom?" (3CT 641), it was plainly stated. It was not conditional, uncertain, or ambiguous. However, under *Davis*, such a request for a parent could be rightfully ignored by the interrogating officer because as Justice O'Connor explained, "a statement either is such an assertion of the right to counsel or not." (*Ibid.*)

Contrary to respondent's claims, appellant is not claiming that his mid-interrogation request to speak with his mother is "tantamount to an unambiguous invocation" of his Fifth Amendment rights or is he asking for "a bright line rule that anytime a minor asks to speak with a parent, he is invoking his rights under *Miranda*." (RSB, pp. 3, 5). Appellant is fully aware that the per se rule of *People v. Burton* (1971) 6 Cal.3d 375 is no longer the law in California. Rather, appellant is advocating for the same standard articulated by the Supreme Court in *Fare v. Michael C.*, adopted by this court in *Lessie,* and now strengthened by *J.D.B.* which mandates consideration of all the circumstances – including a youth's age – when deciding whether a juvenile has waived his *Miranda* rights. As observed by the *Nelson* Court of Appeal, "nothing said by the *Fare* or *Lessie* courts suggests that the totality of the circumstances test must be abandoned when evaluating whether a post waiver request to speak to a parent constitutes an invocation of a minor's Miranda rights." (2010 WL 673215, p. 18.)

Finally, the adoption of the totality of circumstances standard, as opposed to *Davis'*s test, is all the more critical now because with the abrogation of Burton's per se rule, California provides no effective procedural safeguards to youth in custodial interrogation settings. Although Welfare and Institutions Code section 627, subdivision (b), contains the right to parental notification, the facts of *Lessie* and this case show this right is easily ignored. In *Lessie*, the officers willfully deprived the juvenile of his statutory right to call his father (*People v. Lessie*, *supra*, 47 Cal.4th at p. 1161.) In this case, the officers never even told appellant that he had a right

to call his mother or an attorney. Further, the statute clearly lacks any practical teeth. Appellant questions how many juveniles typically carry around the name and number of an attorney in their back pockets or honestly understand the role of an attorney well enough to understand why one would be useful to him while being detained by law enforcement. In this case, for example, respondent observes that appellant was "very experienced with the criminal justice system," that he was "not a naïve child," and that he "was fully aware that, if he wanted to speak with an attorney, he simply had to ask." (RSB, p. 5.) However, as *J.D.B.* has made so very clear, age is far more than a chronological fact. (*J.B.D, supra*, at p. 2400.) No matter how sophisticated a juvenile subject appears, he cannot be compared to an adult subject (*Gallegos v. Colorado, supra*, 370 U.S. 49, 54) or viewed as a miniature adult (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 115-116). Here the fact appellant had past experience with the courts or police bear little relevance to whether he actually understood how to adequately invoke his *Miranda* rights after having waived them. There was no evidence appellant was ever subjected to a custodial interrogation and appellant's testimony at the suppression hearing shows that he had certainly heard *Miranda* warnings before but just never gave them much thought. (1RT 240.) This is consistent with studies showing absolutely no relationship between the amount of juvenile court experience and the ability to truly appreciate the meaning of the *Miranda* warnings. (Grisso, Thomas, "*What We Know about Youth's Capacities as Trial Defendants,*" Youth on Trial, note 49, at pp. 139, 151.)

In conclusion, appellant urges this Court to evaluate post waiver invocations by juveniles under the totality of the circumstances test, reject the *Davis* rule, and affirm the Court of Appeals judgment.

Respectfully submitted,

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People v. Samuel Nelson
Supreme Court No. 181611

DECLARATION OF SERVICE

I, Mary W. Wells, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, California, in which county the within mentioned delivery occurred, and not a party to the subject cause. On August 17, 2011, I served the attached *supplemental letter reply brief* by transmitting the document electronically to the following address:

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On the same date, I also served the same above-entitled document by placing a separate copy thereof with postage prepaid into the United States mail, in a separate envelope for each addressee named hereafter and addressed respectively as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on August 17, 2011, at Del Mar, California.

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