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.	No. S163453 Court of Appeal No. D050019 Superior Court No. SCN200740

APPEAL FROM THE SUPERIOR COURT OF
SAN DIEGO COUNTY

Honorable Joan P. Weber

APPELLANT'S OPENING BRIEF ON THE MERITS

SUPREME COURT
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By appointment of the
Supreme Court under the
Appellate Defenders, Inc.,
independent case system.

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ISSUE PRESENTED

Is a minor's request during police interrogation to speak to a parent an invocation of the privilege against self-incrimination that renders statements made after the request inadmissible?

STATEMENT OF THE CASE

Appellant was charged in count one with first degree murder in violation of Penal Code section 187, subdivision (a). (1CT 2.) It was further alleged that appellant personally used a handgun within the meaning of Penal Code sections 12022.53, subdivision (d) and 12022.5, subdivision (a) and that the murder was done for the benefit of a street gang within the meaning of Penal Code section 186.22, subdivision (b)(1).

The jury found appellant guilty of murder in the second degree and found the handgun allegations to be true. (2CT 539; 6RT 909.) The jury deadlocked with respect to gang allegations, and a mistrial on this allegation was declared. (2CT 539; 6RT 914.)

The court sentenced appellant to the indeterminate term of 40 years to life: 15 years to life on the murder count plus 25 years to life on the Penal Code section 12022.53, subdivision (d) allegation. (2CT 495; 6RT 933-934.) A 10 year term on the Penal Code section 12022.5, subdivision (a) allegation was stayed. (2CT 495-496; 6RT 933-934.) In addition, the court ordered restitution fines of $10,000 pursuant to Penal Code sections 1202.4, subdivision (b) and 1202.45. (2CT 496; 6RT 932.) Appellant received 450 days of presentence custody credit for actual time served. (2CT 496.)

A notice of appeal was filed on December 15, 2006. (2CT 497.) On April 8, 2008, the Court of Appeal, Fourth District, Division One affirmed the judgment. A petition for rehearing was not filed.

STATEMENT OF FACTS

I. PROSECUTION'S CASE

On June 9, 2005, at about 5:00 p.m., Carlos Murillo, a United Parcel Service delivery man, was making a delivery, when he saw a group of males, in their late teens or early twenties, in front of 588 Gold Drive. (3RT 249, 251, 254.) Murillo, recognized one of the group as "Rusty," later identified as Rusty Seau. (3RT 266, 278.)

Two of group were standing around, but another was agitated and in a fighting stance. (3RT 251.) Seau was walking away. (3RT 251.) As Murillo returned to his truck after making the delivery, he saw one of the males yelling and shouting at Seau, who appeared to be trying to walk away. (3RT 252, 262.)

Murillo, proceeded to his next delivery at 569 Gold Drive. As he passed 588 Gold Drive, he saw one of males throw two punches at Seau and miss. (3RT 254.) Seau struck back and the other two "jump in" and joined the fight. (3RT 255.) Seau ran away and the group chased after him. (3RT 255.)

As Murillo arrived at his next delivery, he heard four or five gunshots in rapid succession. (3RT 255, 268.) While he was driving away, he saw a group of people running toward the corner where Murillo had last seen Seau. (3RT 256.) Murillo parked his van, went to where the crowd was gathering, and saw Seau laying on the ground. (3RT 257.)

Seau was later pronounced dead at the scene. (3RT 272.) The cause of death was a single gunshot wound to the right side of his upper back. (3RT 324.) The wound was likely inflicted by a medium caliber revolver or

semi-automatic weapon fired from a distance of more than nine inches. (3RT 324, 328.) The position of the wound indicated that the bullet had entered the body from the rear while the victim was standing in a "crouching-like" position. (3RT 326.)

Oceanside Detective Yanci Blackwell was assigned to investigate the homicide. (3RT 228, 233.) Blackwell was informed that a group of African-American males left the scene in a white Cadillac, registered to James Bell, also known as James Turner. (3RT 236-237.) On August 5, 2005, Blackwell interviewed James Turner at his home. (3RT 243.) During the course of the interview, some nine millimeter ammunition was located in two of the bedrooms in the house. (3RT 243-245.)

On September 20, 2005, Yanci went to the Hemet residence of one of appellant's family members for the purpose of serving an arrest warrant for appellant. (3RT 239.) Yanci was in the backyard of the residence while other officers knocked on the front door and announced "police". (2RT 239.) Seconds after the officers in the front of the house announced their presence, appellant was apprehended as he climbed out of a rear window. (3RT 239.) Appellant was sixteen years old at this time. (1CT 1; 5RT 621.)

Appellant was interviewed by detectives Kelly Deveney and Govier at the police station on September 20, 2005, the day of his arrest. (3RT 287.) Appellant first denied being present when Seau was shot. (2CT 302.) He said he had heard rumors that James and Joseph Turner were both there and that James "did it." (2CT 302.) Appellant heard the incident started because James had been "jumped" by Seau and his cousins two or three weeks before. (2CT 304.)

The detectives told appellant that several witnesses had identified him as Seau's shooter. (2CT 310.) They also told him that some of appellant's family members had told the police that appellant had told them that he did it. (2CT 310.) After which, appellant stated, "Well to just 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 that if I didn't shoot, I was going to, you know what I'm saying, get hurt by other people." (3CT 311.) Appellant further explained that "it was like an initiation thing. So like if I didn't do this, they were going to get me." (2CT 311.)

James was involved in an "incident" earlier that day at Vons with some people over his girlfriend. (2CT 311.) James picked up Joey and someone known to appellant as "Tiny Squabbles" or Frank in his car and they drove to Gold Drive to fight the people from the incident at Vons. (2CT 321.) James told them, "Alright this is going down with . . . . woo, woo, Tony you better shoot. You got to shoot somebody." (2CT 311.) James gave appellant a "357" in the car while they were driving around picking up the others. (2CT 312, 314-315.)

Appellant felt threatened by James because told him he was from "Rollin' 60's," a Los Angeles gang. (2CT 312.) He interpreted James's statements to mean that if he did not shoot, he would be killed. (2CT 312.) Appellant was living on the streets and running from probation. James "was taking [appellant] under his wings and showing [him] how things are supposed to be done this and that. So he was a big influence." (2CT 312.) James had been trying to recruit appellant into the group and appellant went along with it for some place to stay. (2CT 313.)

But, when they arrived, the two guys from the earlier incident did not

want to fight. (2CT 313.) James saw Seau, and James and the others jumped him. (2CT 311.) Seau was trying to get away and appellant was just standing there when James yelled at him to shoot. (2CT 324.) After yelling at appellant to shoot a second time, James started coming toward appellant. (2CT 316.) Appellant fired the first two shots from one place, then as Seau ran, appellant moved to a second location to fire three more shots. (2CT 323.)

Deveney and Govier interviewed appellant a second time on September 21, 2007 at juvenile hall. (3RT 287.) The detectives asked appellant about the incident at the Vons store. (2CT 359.) On the day of the shooting, appellant and James went to the Vons store to give some money to James's girlfriend who worked in the same shopping center. (2CT 360.) When they arrived, James got into a verbal dispute with the boyfriend of a girl James knew. (2CT 360.) The girl's boyfriend and his companion told James and appellant, "You bitches meet us in the block and we'll handle this . . . ." (2CT 360.) After that, James and appellant went to get Tiny Squabbles and Joey. (3CT 360.)

On the way, they stopped at James's apartment. (2CT 361.) While there, James gave appellant the gun in a small backpack and told him, "You gotta pop one of these mother fuckers." (2CT 362.) Joey gave appellant instructions on how to hold the gun and shoot it; appellant had never held a gun before. (2CT 364, 374.)

When the two guys from the Von's store arrived at the designated house, they said that they did not want to fight. (2CT 363.) After that, James saw Seau walking down the street and said, "Aw, that fucker jumped me like two weeks ago." (2CT 363.)

At that point, Joey ran up to Seau and the two exchanged disrespectful comments concerning their respective gangs. (2CT 363.) Joey swung at Seau and James and Tiny Squabbles ran over to join in the fight. (2CT 364.) James yelled at appellant to "Shoot, shoot." (2CT 364.) They continued to fight and James yelled, "Shoot that mother fucker." (2CT 364.) James started walking towards appellant and appellant began shooting. (2CT 364.)

After they got into the car, appellant returned the gun to James. (2CT 364.) Later, they went called James's girlfriend and arranged to put the gun in the trunk of her car. (2CT 375.)

Appellant was afraid that if he did not do as James said, that he would be "disciplined" meaning beaten up or killed. (2CT 364.) Appellant told the detectives, he was not part of the gang, but that he had been disciplined before. (2CT 367.)

Appellant told the officers that he wanted Seau's family to know that he was sorry for what happened and that he did not mean for anyone to get hurt. (2CT 371.) Appellant had gone to school with Seau and there were no problems between them. (2CT 372.)

James Turner used the moniker "Blackjack" and was documented as an "affiliate" of Deep Valley Crips ("DVC"), a primarily African-American gang. (3RT 283-284; 4RT 419.) Joseph "Joey" Turner used the moniker "Tiny Bamm" and had claimed membership in DVC since at least May 11, 1999. (3RT 284; 4RT 419, 474.)

Seau was a documented member of the Deep Valley Bloods ("DVB"), which was primarily a Samoan gang. (3RT 285-286; 4RT 421.) The DVC's primary rival was the DVB. (3RT 375.)

Appellant was not documented as a gang member in the Cal Gangs database. (4RT 461.) In the course of his investigation, Govier learned that appellant used the moniker "BkBlueDevil." (3RT 283.)

II. DEFENSE EVIDENCE

Appellant testified in his own defense. Appellant was born in 1988 and was raised by his mother's adopted parents after his mother gave him up at the hospital. (5RT 621.) While growing up in Riverside County, appellant came in contact with gang members both at school and while playing basketball. (5RT 623-624.)

Until appellant was about eight years old, he did not know who either of his biological parents were. (5RT 624.) When appellant was in the seventh grade, he was told that his biological father lived in Oceanside and appellant began visiting him. (5RT 626-627.)

On one of these visits, appellant met Joey Turner while attending a movie with his sister. (5RT 625.) Appellant's sister was a friend of Joey's girlfriend. (5RT 626.) Joey was introduced to appellant as "Tiny Bamm." (5RT 626.)

In 2003, when appellant was in the ninth grade, he moved to Oceanside to live with his biological father. (4RT 624.) From there, he and his father moved to Vista where they resided with his father's parents. (5RT 627.) About two years later, appellant had a fight with his sister and ran away from home because he was scared that he would get into trouble. (5RT 627-629.) During the fight, appellant dislocated his hip when his sister threw an iron at him. (5RT 630.)

Appellant left his house in the middle of the night and stayed in his

garage until morning because he was unable to walk. (5RT 630-631.) James picked him up the next morning and took him to James's apartment. (5RT 632.) When appellant met James earlier the same month, James told appellant that he was a member of the Rolling Sixties gang. (5RT 631-632.) James was an adult and was sharing an apartment with three men in the military. (5RT 631.)

While staying with James, James told him about "discipline." (5RT 633.) Appellant explained that "discipline" meant "that if you do not follow a direct order, if you do not do what you are told, basically whatever [James told him] to do, he'll do that to you. If he tells you to rob somebody, he'll rob you. If he tells you to beat somebody up, he'll beat you up. That's what discipline is." (5RT 633.)

The first time appellant was "disciplined," was about two weeks after he moved in with James. (5RT 635.) James told him to steal some liquor from a 7-Eleven store. (5RT 633.) When appellant refused, James and Frank began hitting appellant with their fists. (5RT 634.) They continued to hit him until he ran away from them. (5RT 634.)

Appellant later returned to James's apartment because he had nowhere else to go. (5RT 635.) Appellant was on juvenile probation at the time and was afraid that if he returned to his father's house his probation would be violated and he would be sent to juvenile hall. (5RT 637.)

About a week after being disciplined for refusing to steal the liquor, appellant was disciplined a second time. (5RT 637.) This time, James and Frank decided to rob some Mexicans they saw while appellant was riding with them in a car. (5RT 638.) James and Frank jumped out of the car, but appellant remained behind. (5RT 638.) When they returned, they asked

appellant why he did not help them. (5RT 638.) Appellant told them he "didn't feel like it." (5RT 638.) When they returned to James's apartment, Frank and James began hitting appellant. (5RT 638.)

On the day of the shooting, appellant did not have breakfast because there was no food in the apartment. (5RT 640.) When there was nothing to eat, appellant would drink "anything from gin to E&J" because after drinking, he would no longer be hungry. (5RT 640.)

On the day of the shooting, while James and appellant were on the way to James's apartment after the incident at Vons, James asked appellant if he wanted to fight the two guys. Appellant said he did not care. (5RT 645.) James got mad and said, "one of these guys ought to get shot" and that appellant needed to shoot him. (5RT 645-646.) James told him that if he refused, that he would be disciplined. (5RT 647.) Appellant understood that to mean that he would be shot. (5RT 647.) James warned appellant that he would be disciplined five or six times during the five minute car ride to his apartment. (5RT 645, 647.) After Joey joined them, Joey kept telling him over and over that he needed to shoot someone. (5RT 660.)

At first, appellant thought they were just joking, but then James told him that he did not do as he was told, that James was "really going to 'dp' [discipline] [him] this time." (5RT 661.) Appellant became scared and he started to believe that it was not a joke. (5RT 661.) Appellant removed the gun from the backpack and put it into this jacket pocket. (5RT 682.)

When they arrived at 588 Gold Drive, the two men from the store were in front of the house along with twelve to fifteen other people. (5RT 667.) One of the two said that it was all a misunderstanding and James and Joey both backed down. (5RT 667-668.)

After that, James saw Seau walking down the street. (5RT 668.) James, who was still mad over the incident with the guys from the store, said, "That mother fucker and his cousin jumped me like two weeks ago." (5RT 669.)

Joey walked up to Seau and said, "I'm Tiny Bamm from the Deep Valley Crip Gang." (5RT 670.) Seau said, "What's bobbing, blood" and put up his hands as though he was about to fight. (5RT 671.) Joey swung twice at Seau and Seau swung back. (5RT 671.) Joey was hit in the jaw and James and Frank joined in the fight. (5RT 672.) Appellant remained standing on the sidewalk. (5RT 672.)

Frank and James began yelling at appellant to shoot. (5RT 674.) Appellant just stood there because he did not want to shoot and because he had no problems with Rusty. (5RT 674.) James broke away from the fight and started walking toward appellant still yelling at him to shoot. (5RT 675.) A couple of seconds later, Seau broke away from the fight and started running away. (5RT 675.)

James continued toward appellant; James was angry and has his fist balled up. (5RT 676.) Appellant stepped away from James. (5RT 676.) Appellant was scared and felt like he did not have any other choice but to shoot because of James's threats to discipline appellant. (5RT 676.)

Appellant shot the gun four times. (5RT 677.) He did not want to hit or kill Seau, but he wanted it to "look real" to Frank and James. (5RT 677.) Appellant fired the gun to protect himself from being beaten up by Frank and James. (5RT 677.) On cross-examination, appellant denied telling the detectives at the police station that he shot from two different locations. (5RT 680-682.)

Russell Gotteman was a teacher at Alta Vista High School. (5RT 582.) He also directed the STRIVE program; a program designed to prepare students with "barriers to their success in academics" in acquiring basic entry level work skills. (5RT 582.) Gotteman met appellant in the fall of 2004, when he was a student in the program. (5RT 583-584.) Gotteman spent just under 200 hours working with appellant. (5RT 590-591.)

Gotteman felt that appellant was very immature. The school is a continuation school and the school did not have many tenth graders. (5RT 586.) Appellant continually got into trouble for being a "goof ball" in class and not taking school seriously. (5RT 586.) Gotteman further found appellant to have a "non-violent" nature. (5RT 591.) Gotteman worked to convince appellant to "acheive" and to "buckle down, mature, and take school seriously." (5RT 586-587.)

Gotteman found appellant to be a "follower" who did not demonstrate leadership characteristics in any way." (5RT 587.) He also found appellant to be "impulsive" and "easily manipulated." (5RT 587-588.) Appellant did not think out the consequences of his actions. (5RT 588.) Although Gotteman knew of other gang members at the school, Gotteman did not have any knowledge of appellant being in a gang. (5RT 590.)

On cross-examination, Gotteman testified he was unaware that on September 17, 2003, appellant was arrested for a theft related offense and that at the time of the arrest he said to the store employees, "You don't know what I'll do. I'll murder you. I'm going to kill you when I get out. I'm from Eastside Perris." (5RT 597.) This information, however, did not

change Gotteman's opinion of appellant. (5RT 597-598.)

Ron Etzweiler ran several anti-drug and alcohol programs at Alta Vista High School. (5RT 602-603.) In 2004 and 2005, Etzweiler developed a relationship with appellant for the purpose of encouraging him to join one of the programs. (5RT 604.) Etzweiler spent "at least a couple of hundred hours" working with appellant in both 2004 and 2005. (5RT 605-606.) Etzweiler did not believe appellant was a gang member because he did not talk to Etzweiler about being in a gang and he did not wear gang clothing. (5RT 607-608.) Etzweiler never saw "any aggression in a violent manner" from appellant. (5RT 608.)

III. PROSECUTION'S REBUTTAL

Officer Danny Payne arrested appellant at a grocery store on September 17, 2003. (5RT 697.) At the time of the arrest, appellant told Payne that he "didn't know who [he] was dealing with and that he would come back to murder [him]." (5RT 698.) Appellant also said that he was from "Eastside Perris." (5RT 698.) On cross-examination, Payne admitted that these statements were made after Payne's partner apprehended appellant by slamming appellant's head against a wall. (5RT 699-700.) Appellant was thirteen years old and weighed about 130 pounds at the time. (5RT 699.)

ARGUMENT

APPELLANT'S CONVICTION SHOULD BE REVERSED BECAUSE ADMISSIONS MADE DURING THE INTERVIEWS ON SEPTEMBER 20, 2005 AT THE POLICE STATION AND SEPTEMBER 21, 2005 AT JUVENILE HALL WERE OBTAINED IN VIOLATION OF APPELLANT'S FIFTH AMENDMENT *MIRANDA*[1] RIGHTS.

I. INTRODUCTION

At trial, defense counsel moved to exclude evidence obtained during the interviews based upon a violation of appellant's *Miranda* rights and upon a violation of Welfare and Institutions Code section 627, subdivision (b).[2] (2RT 53.) In this regard, counsel argued that this Court's holding in *People v. Burton* (1971) 6 Cal.3d 375, 383-384, that a minor's request to call 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" was controlling.

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

[2]Welfare and Institutions Code section 627, subdivision (b) states:

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. The calls shall be at public expense, if the calls are completed to telephone numbers within the local calling area, and in the presence of a public officer or employee. Any public officer or employee who willfully deprives a minor taken into custody of his right to make such telephone calls is guilty of a misdemeanor.

While the trial court found that a violation of Welfare and Institutions Code section 627, subdivision (b) occurred, it found that suppression of the evidence was not the appropriate remedy for such violations. (2RT 65-66.) With respect to the *Miranda* violation, the trial court, citing *Fare v. Michael C.* (1979) 442 U.S. 707 and *People v. Hector* (2000) 83 Cal.App.4th 228, applied a "totality of the circumstances" test, and ruled that appellant's requests to speak to his father did not invoke his *Miranda* rights. (2RT 66.) Likewise, on appeal, the court agreed with the rationale of *Fare v. Michael C.*, *supra*, 442 U.S. 707 and *People v. Hector, supra*, 83 Cal.App.4th 228, and applied a "totality of the circumstances" test.

The *Burton* case has never been overruled, it is, and should remain, binding law in California.

II. SUMMARY OF ARGUMENT

To safeguard the right against compelled self-incrimination guaranteed by the Fifth and Fourteenth Amendments, the United States Supreme Court requires that before a person in custody may be questioned by police, he must be informed that he has the right to remain silent, that any statement he makes may be used against him, and that he has the right to the presence of an attorney, either retained or appointed. (*Miranda v. Arizona, supra*, 384 U.S. at p. 444.) If a suspect indicates at any time prior to or during custodial interrogation, that he wishes to invoke his right to remain silent, the interrogation must cease. (*Id.* at p. 473-474.)

On appeal, the reviewing court must accept the trial court's resolution of disputed facts and inferences, and its evaluations of

credibility, if they are substantially supported. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1311.) But, the court must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statements were illegally obtained. (*Ibid.*)

At issue in the present case, is whether appellant's requests to call his father were sufficient to invoke his *Miranda* rights and thereby require the interrogation to cease. In *People v. Burton, supra*, 6 Cal.3d at pp. 383-384, this Court held that when a minor is subjected to custodial interrogation, without the presence of an attorney, his request to call one of his parents, must, in the absence of evidence demanding a contrary conclusion, invoke the minor's Fifth Amendment privilege. Upon such request, the police must cease the interrogation immediately.

As discussed below, the rule created by the *Burton* case: (1) is well reasoned and is necessary to protect minors' rights under the Fifth Amendment; (2) has never been overruled by any court; and (3) is unaffected by Proposition 8, codified as article I, section 28, subdivision (d) of the California Constitution. Moreover, even if the "totality of the circumstances" test applied by the trial court is the proper standard, appellant's rights were nevertheless invoked and the police were required to stop the interrogation.

III. FACTS RELEVANT TO THE INTERROGATIONS

A. The Arrest

Appellant was arrested at 6:40 a.m. on September 20, 2005 at a residence in Hemet. (2RT 35-36.) Within 30 to 40 minutes of his arrest, detective Deveney spoke with appellant while he was seated in the back of a police car. (2RT 36.) She told him he was under arrest and was going to be transported to Oceanside. (2RT 36.) She told him that once he got to Oceanside, he could make as many phone calls as he wanted. (2RT 36.) She told him his aunt and uncle knew he was in custody and asked him if there was anyone else he wanted notified. (2RT 36.) Appellant told her he also wanted his father notified. (2RT 36.)

Appellant arrived at the Oceanside police department an hour to an hour and a half later. (2RT 37.) Appellant was not advised that he had the right to make a phone call to an attorney. (2RT 44.)

B. The September 20, 2005 Interview at the Oceanside Police Department.

Appellant was taken to an interview room at the Oceanside Police Department. He sat in the room alone for 10 to 15 minutes before detective Govier arrived and gave appellant some breakfast. (2RT 38.) Approximately 10 to 15 minutes later, the interview began. (2RT 38.)

After some initial "small talk," the officers told appellant that they had his father's phone number. (2CT 282.) They asked appellant if he wanted them to call his father or if he wanted the detectives to make the call. Appellant responded, "I'd like to call him." (2CT 282.) Deveney asked again, "you would?" (2CT 282.) Appellant said, "M-hm." (2CT

282.) Deveney said, "Okay. So in the meantime, we've just got to fill out these papers. You go by Tony Lessie, right?" (2CT 282.)

After a series of questions concerning his age, his weight, place of birth, his father's name, the following exchange took place.

DEVENEY: Okay. Tony because you are under age, you're only sixteen, and because you are in our facility, I have to read you your rights. Alright. So, its no big deal but I have to by law. You have the right to remain silent. Do you understand that? Can you say yes?

LESSIE: Yeah.

DEVENEY: Any statements you make may be used as evidence against you. Do you understand that?

LESSIE: Yeah.

DEVENEY: Okay. You have the right to the presence of an attorney, either retained or appointed free of charge, before and during questioning. Do you understand?

LESSIE: Yeah.

DEVENEY: So you understand these rights?

LESSIE: Yeah.

DEVENEY: Okay. Oh, how long is your hair in real life when it's not in a pony tail?

LESSIE: Like probably right here?

DEVENEY: Well like two inches maybe?

LESSIE: Probably like an inch.

DEVENEY: Okay. So it's not exactly short. I can't see. Do you know your social?

GOVIER: It's cuz it's so cold.

DEVENEY: No, it's cuz I didn't have my glasses, I keep forgetting them,

LESSIE: Um, I . . . is it, I think it's like [number given] . . .

DEVENEY: You go way too fast for me. [partial number]

LESSIE: [Number repeated.]

DEVENEY: I didn't even check what you were wearing.

LESSIE: Just black jeans and a gray T-shirt.

DEVENEY: Do you have any tatoos?

LESSIE: Nuh, huh.

DEVENEY: [Unintellible.] And black shoes, are those black?

LESSIE: Yeah

GOVIER: Are both ears pierced or just that one?

LESSIE: Both.

DEVENEY: Thank you. Okay, and does your dad work, or would I be able to get in touch with him at home?

LESSIE: Nuh-hm. He works, but the number you have, that's the cell phone number.

DEVENEY: Okay. Alright. One other thing came up that we wanted to talk to you about besides your warrant was, do you know a guy named Black Jack?

LESSIE: M-hm.

DEVENEY: Well he's involved in some, we think fraud activity, and we did a search warrant at his home and we found some stuff with your name on it. And we just, I'm going to show you

what we found, right 'cause I want to be pretty direct with you. Um, it was two birth certificates.

LESSIE: Yeah, those are both mine.

The interview proceeded with appellant explaining that he had two birth certificates because he was adopted by his grandparents at birth, but then his name was changed when his biological father took custody of him when he was in third or fourth grade. This led to a discussion regarding how he came to live with his father, why he had left his father's home, and how he came to meet and live with Joey Turner, and his confession. (2CT 285-325.)

After appellant had admitted his involvement in the shooting, and about two hours after the interview had begun, Deveney told appellant, "Okay. Let me see what's going on with that phone. We got your number for your dad." The detectives left the room briefly and returned with a phone. (2CT 325; 2RT 44.)

The detectives attempted to call appellant's father, but the number they had did not work. (2CT 326-327.) They asked appellant if there was someone else he wanted to call. He asked to call his cousin to get his father's phone number. The officers gave appellant the phone and left the room. (2CT 327.) Appellant made three phone calls.

During the first phone call, appellant left the following message, "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." (2CT 327-328.)

During the second phone call, appellant again asked for his father and briefly explained to whoever had answered that he was in jail for murder. (2CT 327-328.) He then told the caller, "But I'm going to talk to

you later, I'm about to try to get in contact with my dad." (2CT 328.)

Appellant tried a third phone number, but there was no answer. (2CT 329.)

C. The September 21, 2005 Interview at Juvenile Hall.

The next day, appellant was interviewed a second time at juvenile hall. (2CT 357-383.) Appellant was advised of his *Miranda* rights a second time, and this time he expressly agreed to talk to the officers. (2CT 359.) The second interview was initiated by the officers because "[they] needed to come down [that day] to ask [appellant] a couple more questions since some stuff came up after the fact. Um, there were a couple of little minor discrepancies and things [they] just wanted to go over them with [appellant] 'cause [they] weren't clear on exactly what happened and who was involved." (2CT 358.) At the time of the second interview, the officers were aware that appellant had not yet met with his attorney. (2CT 379.)

During the second interview, the detectives asked appellant follow-up questions and asked him to elaborate on the information he had given them the previous day.

IV. EVIDENCE OBTAINED DURING THE SEPTEMBER 20, 2005 INTERVIEW AT THE OCEANSIDE POLICE DEPARTMENT MUST BE SUPPRESSED.

A. The *Burton* Rule Is Well Reasoned and Necessary to Protect Minors' Rights Under the Fifth Amendment.

Under the rule set forth in the *Burton* case, a minor's request to consult with 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." (*Burton, supra,* 6 Cal.3d at pp. 383-384.) In the *Burton* case, a sixteen year-old defendant's request to see his parents was denied. (*Burton, supra,* 6 Cal.3d at p. 375.) The youth was later advised of his *Miranda* rights and he said that he both understood them and was willing to waive them. (*Ibid.*) During the subsequent interrogation, the teenager made a full confession. (*Ibid.*) In holding that the minor's request to call his parents was sufficient to invoke his rights under *Miranda*, this Court observed:

> It is fatuous to assume that a minor in custody will be in a position to call an attorney for assistance and it is unrealistic to attribute no significance to his call for help from the only person to whom he normally looks - a parent or guardian. It is common knowledge that this is the normal reaction of a youthful suspect who finds himself in trouble with the law.

(*Id.* at p. 382.)

In *People v. Rivera* (1985) 41 Cal. 3d 388, 394, this Court characterized *Burton* as establishing "a general or 'per se' rule that a juvenile's request to speak to his parent constitutes an invocation of his

self-incrimination privilege."[3] Regardless, of the label placed on the *Burton* rule, it is clear that *Burton* creates a presumption that a request to talk to a parent invokes a minor's *Miranda* rights, which must be given effect "in the absence of evidence demanding a contrary conclusion." (*See People v. Rivera, supra,* 41 Cal. 3d at pp. 395-396 [con. opn. of Grodin, J.].) Under *Burton* rule, the court will assume a minor's request to call a parent is an indication of his unwillingness to proceed with the interrogation or a desire for advice regarding how to conduct himself with the police, the burden is on the prosecution to affirmatively demonstrate otherwise. (*Burton, supra,* 6 Cal.3d at p. 382-383.)

While many things may have changed since this Court decided the *Burton* case, the reasons underlying the Court's decision have not. A minor in police custody today is in no better position to call an attorney than at the time of the *Burton* decision. Likewise, the normal reaction of a minor who finds himself in police custody is still to call for help from his parent. It remains unrealistic to believe that a minor's request to speak to a parent at the time of an interrogation is anything but an indication that he seeks advice regarding how he should conduct himself with the police before proceeding with the interview. (*See Burton, supra,* 6 Cal.3d at p. 382-383.)

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[3]In *People v. Hector, supra,* 83 Cal.App.4th at p. 237, the Court of Appeal concluded that the Court in *Rivera* "overstates" the *Burton* rule, but plainly this Court cannot mis-characterize its own rule.

B. The United States Supreme Court Has Never Addressed The Issue of Whether A Minor's Request to Call A Parent Invokes His *Miranda* Rights.

Where the United States Supreme Court has never directly addressed an issue, the California Supreme Court is free to interpret matters of federal constitutional law. (*People v. Black ("Black II")* (2007) 41 Cal. 4th 799, 819.) The *Burton* decision has never been overruled by the California Supreme Court, nor has the United States Supreme Court ever addressed the issue of whether a minor's request to call his parent is sufficient to invoke the minor's *Miranda* rights. Therefore, the *Burton* case is still good law in California.

Nevertheless, the courts below mistakenly relied upon *Fare v. Michael C., supra,* 442 U.S. 707 for the proposition that a "totality of the circumstances" test should be applied to consider whether appellant's request to call his father invoked his Fifth Amendment right to remain silent. In that case, the United State Supreme Court considered the issue of whether a minor's request to call his *probation officer* invoked the minor's rights under *Miranda.*

In the *Fare* case, the United States Supreme Court reaffirmed its holding that "an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease." (*Fare, supra,* 442 U.S. at p. 719.) The Court further interpreted the California Supreme Court's holding in the *Burton* case as setting forth a "*per se*" rule that a minor's request to speak to a parent has the same effect as a request for an attorney. (*Id.* at p. 715.) The Court, then, turned to the matter of whether a juvenile's request for his probation officer is likewise subject to

the same *per se* rule.

In this regard, the Court in the *Fare* case stated that a rule providing that a request by a juvenile for his *probation officer* has the same effect as a request for an attorney is a significant extension of federal law. (*Fare, supra,* 442 U.S. at p. 718.) Such extension was "[b]ased on the [California] court's belief that the probation officer occupies a position as a trusted guardian figure in the minor's life that would make it normal for the minor to turn to the officer when apprehended by the police . . . " and the probation officer's duties to the minor under state law. (*Id.* at p. 719.)

In disagreeing with this Court's assessment with respect to probation officers, the United States Supreme Court stated that the *per se* rule of *Miranda* is based on the "unique role the lawyer plays in the adversary system of criminal justice in this country." (*Fare, supra,* 442 U.S. at p. 719.) The Court distinguished the roles of the probation officer and the attorney, noting that probation officers are not trained in the law and do not possess the skill to represent the minor before the police or the courts. (*Ibid.*) The Court further noted, that the probation officer "does not assume the power to act on behalf of his client by virtue of his status as adviser, nor are the communications of the accused to the probation officer shielded by the lawyer-client privilege." (*Ibid.*) Finally, the Court pointed out that the probation officer is a member of law enforcement who owes duties to the state, including the responsibility for filing petition alleging wrongdoing by the juvenile. (*Id.* at p. 720.) The Court in the *Fare* case concluded that the issue of whether a request to call a probation officer invokes *Miranda* is subject to a "totality of the circumstances" test and not to the same "*per se*" rule as a request to call an attorney. (*Id.* at p. 724.)

While *Fare* opinion made one passing reference to the applicability of a totality of the circumstances test to requests to call a probation officer or a parent (*Fare, supra,* 442 U.S. at p. 725), the Court did not engage in any analysis with respect to a request to call a parent. Nor was the issue of a request to call a parent before the Court. Consequently, the single reference made by the Court in *Fare* to same rule applying to a request for a parent, can only be regarded as non-binding dicta.

Indeed, it is not clear that the Court would have ruled the same way with respect to a request to call a parent. While in most cases a parent does not have the legal training of an attorney, a parent nevertheless occupies a special place in legal system. In California, for example, the police are required to advise a minor of his right to call his parents, in addition to his right to call an attorney. (Welf. and Inst. Code, § 627, subd. (b).) Unlike a probation officer, a parent is empowered to act on behalf of the minor and normally owes his or her allegiance to the child, not to the state.

Thus, any assumption that the *Fare* decision regarding requests for probation officers is equally applicable to requests for parents is improper. Moreover, to the extent one may read *Fare* as foreshadowing how the Court would rule regarding a minor's request for a parent, such reading constitutes improper speculation. (*See, Black II, supra,* 41 Cal. 4th at p. 819 [California court will not speculate as to whether the United States Supreme Court will change its position in the future, notwithstanding indications in recent cases that it may do so].)

C. The *Burton* Rule Is Unaffected by Proposition 8.

Since the adoption of Proposition 8, codified as article I, section 28, subdivision (d) of the California Constitution, federal standards are applied to a defendant's claim that his or her statements were elicited in violation of *Miranda*. (*People v. Markham* (1989) 49 Cal.3d 63, 68-69 [Prop. 8 abrogates state constitutional privilege against self-incrimination].)

A review of the *Burton* decision makes clear that *Burton* was decided based upon the defendant's *federal* constitutional rights under *Miranda* and the Fifth Amendment. (*See Fare, supra,* 442 U.S. at p. 717 ["We note at the outset that it is clear that the judgment of the California Supreme Court [in the *Burton* case] rests firmly on that court's interpretation of federal law."].) Indeed, nowhere in this Court's discussion of whether the minor's request to speak to a parent invoked his Fifth Amendment rights, does the Court make any reference to any state constitutional privilege or right which may have been abrogated by Proposition 8. (*Cf., Rivera, supra,* 41 Cal. 3d at p. 395 [setting forth alternative state grounds for *Burton* rule, in the event *Burton* rule is not compelled by federal constitution].) Consequently, the *Burton* decision is unaffected by Proposition 8.

V. EVIDENCE OBTAINED DURING THE SEPTEMBER 20, 2005 INTERVIEW AT THE OCEANSIDE POLICE DEPARTMENT MUST BE SUPPRESSED.

A. Application of the *Burton* Rule.

In the present case, as in the *Burton* case, appellant's request to call his father was effectively denied. While in *Burton,* the police simply told the minor he could not call his father, here the detectives told him he could call his father, but only after they "filled out some papers." (2CT 282.) Under the *Burton* rule, the police were required to stop the interrogation upon appellant's request to call his parents.

At the time of his arrest, Deveney asked appellant if there was anyone else he wanted notified, and appellant said his father. (2RT 36, 40.) Deveney told appellant that he could call anyone he wanted from the police station. Having received this promise, there was no need for appellant to make a separate request to call his father.

But, once at the police station, Deveney asked appellant whether he wanted the detectives to call his father or whether appellant wanted to make the call. (2CT 282.) Twice, appellant responded that he wanted to make the call. (2CT 282.) Had appellant merely wanted his father notified, there would have been no need for appellant to speak with his father personally. Thus, it is clear that appellant wanted to do more than merely tell his father that he had been arrested.

As in the *Burton* case, the fact that appellant was subsequently advised of his *Miranda* rights does not change the result. After the initial assertion of his right to remain silent, appellant was entitled to be free of repeated attempts at interrogation. (*Edwards v. Arizona* (1981) 451 U.S.

477, 484-485.) Indeed, unlike the present case, the minor in the *Burton* case made an affirmative waiver of his rights. Nevertheless, the minor's confession in *Burton* was excluded as involuntary; the result here should be the same.

B. Even under the *Fare* "Totality of the Circumstances" Test, Appellant's Request Invoked His *Miranda* Rights.

Even if this Court disagrees that the trial court should have applied the *Burton* rule, the trial court erred in concluding that under the "totality of the circumstances," appellant's request was insufficient to invoke his Fifth Amendment right to remain silent. Under the "totality of the circumstances" test set forth in the *Fare* case, the court considers factors such as the minor's age, race, experience with the police, intelligence, background, education, mental and physical condition at the time of the questioning, capacity to understand the warnings given, nature of the Fifth Amendment rights, and the consequences of waiving those rights. (*Fare, supra,* 442 U.S. at p. 725-726.)

The court may also consider whether the purported waiver was the result of trickery or deceit. (*Id.* at p. 726.) For example, the failure to inform a minor that a family member has sought to speak with the minor is one factor in the totality of the circumstances that may weigh against a determination that a confession was voluntary. (*See People v. Rivera* (1985) 41 Cal.3d 388, 405 (dis. opn. of Mosk, J.) ["Of course, if the police have purposely kept from a minor the fact that his parent is actively seeking to speak with him, such abusive tactics should feature prominently in any evaluation of whether the minor's confession was indeed voluntary."].)

Under this test, the government must show, by a preponderance of the evidence, that the accused voluntarily, knowingly and intelligently waived his rights. (*Colorado v. Connelly* (1986) 479 U.S. 157; *People v. Sims* (1993) 5 Cal.4th 405, 440.) On appeal, the question of whether the challenged statements were illegally obtained is subject to independent review. (*People v. Bradford, supra,* 15 Cal.4th at p. 1311.)

People v. Hector, supra, 83 Cal.App.4th 228, is illustrative of the "totality of the circumstances" test. In the *Hector* case, the detectives began interviewing a seventeen year-old by gathering some biographical information and the advising the minor of his *Miranda* rights. (*Id.* at p. 232.) Soon after the interview began, the minor asked the detectives to call his mother. The detectives attempted to call his mother, but she was not home. The detectives spoke with the minor's step-father and told him that minor was at the police station. The step-father said that he expected the mother back in about an hour and that he would give her the information. (*Ibid.*)

The detectives proceeded to interview the minor in the *Hector* case. The minor initially denied involvement in the shooting of which he was accused. But, after having been falsely told that a witness identified him, he admitted involvement, but denied being the shooter. (*People v. Hector, supra,* 83 Cal.App.4th at p. 233) Later, in the interview, the minor asked a second time to speak to his mother, but the police failed to stop the interrogation. At a later point, the minor asked, "Well . . . , after everything I tell you man, can I just call my mother?" The detective promised the minor that he could and the minor then made a full confession. (*Ibid.*)

On appeal, the court applied the *Fare* "totality of the circumstances"

test. In this regard, the court interpreted the *Burton* rule, as "not irreconcilable" with the *Fare* case as both require an examination of the surrounding circumstances. (*People v. Hector, supra,* 83 Cal.App.4th at p. 237.) The court concluded that the minor's request to call his mother did not invoke his *Miranda* rights. In this regard, the court noted that the minor was seventeen years old and had "substantial prior experience with police procedures." The minor had twice before been placed in a camp: once for robbery, and a second time for attempted robbery and assault. (*Id.* at p. 236.) The court further noted that when advised of his *Miranda* rights, the minor indicated that he had heard them before and understood them. Finally, the court pointed out that after he was informed that the police were unable to reach his mother, he did not indicate that he wanted to stop the interview, but instead answered the questions. (*Ibid.*)

The facts in the present case differ significantly from the facts in the *Hector* case. Before his arrest in the present case, appellant had one burglary conviction for which he was granted probation and released to his father. (2CT 461.) The only other police contact noted in the probation report was a traffic stop in which from which appellant fled on foot and after which marijuana was discovered in the car. Although appellant's father brought him to the police station to turn himself in, there is no record that appellant was convicted of any charge resulting from this incident. (2CT 461.)

The fact that appellant had been arrested before is not evidence that he had ever before been advised of his *Miranda* rights - - such advisements are only required upon custodial interrogation. Unlike the *Hector* case, there is nothing in the record to indicate that appellant had ever before been

advised of his *Miranda* rights or was subjected to police interrogation in either of the previous incidents.

At the time of the interview, appellant was sixteen years old; younger than the defendant in the *Hector* case. He had completed the tenth grade, but was no longer in school. (2CT 282-283; 2CT 463.) Ron Etaweiler, one of appellant's high school teachers described appellant as "immature" and a "follower." (2CT 470.) Russell Gotteman, another of his teachers, described appellant as "immature for his age," a "follower" and "easily manipulated." (2CT 472.)

Most significantly, in the *Hector* case, there was no evidence of abusive tactics by the police. Specifically, the officers in the *Hector* case, never misled the minor and honored his request by attempting, albeit unsuccessfully, to telephone the minor's mother. In contrast, the police in the present case, deliberately and in violation of state law, refused to allow appellant the opportunity to call his father. (*See* Welf. and Inst. Code, § 627, subd. (b).) Further, in telling appellant that he could use the phone, but "in the meantime, we've just got to fill out these papers," Deveney implicitly conditioned the phone call on appellant answering her questions. (2CT 282.)

Deveney further misled appellant by the manner and timing of the *Miranda* advisements. First, in advising appellant of his *Miranda* rights, the detective told appellant that these rights were "no big deal." (2CT 284.) Second, the advisements were given in the middle of a series of routine booking type questions. Only seconds before, the detective had told appellant that before he could use the phone, they "just got to fill out these papers" - - a process which involved having appellant answer the

detectives' questions. (2CT 282.) After having just been told that before he could use the phone, the "papers" must be completed, it is unreasonable that appellant would think that he would be allowed to call either his parent or an attorney until after he had answered the detectives' questions.

Third, while "routine booking questions" are not normally considered "interrogation" for the purposes of *Miranda,* an exception exists where the purpose of the questions is to illicit incriminating responses. (*Pennsylvania v. Muniz* (1990) 496 U.S. 582, 601 n.14.) Here, after deliberately and illegally refusing to allow appellant to use the phone before he answered the detectives questions, the detective inserted the *Miranda* warnings in the middle of a series of routine booking questions. It is unlikely that a sixteen year-old, without any legal training, would be able to distinguish between the type of questions he was apparently going to be required to answer before he could use the phone, and the questions he had a right to refuse to answer pursuant to his Fifth Amendment rights.

Finally, the evidence does not support the trial court's conclusion that appellant's request was merely for the purpose of notifying his father of his arrest. (2RT 67.) As discussed above, if this was the purpose of the appellant's request, there would have been no need for appellant to speak with his father personally. Indeed, when appellant was finally permitted to use the phone, he left a message, apparently on his father's answering machine, that he was in jail *and* asked his father to call him. (2CT 327-328.) After having left this message, appellant placed two more calls in repeated attempts to speak with his father. (2CT 327-328.) If appellant merely wanted to notify his father, he did so when he left his father the phone message.

VI. EVIDENCE OBTAINED DURING THE SEPTEMBER 21, 2005 INTERVIEW AT JUVENILE HALL MUST ALSO BE SUPPRESSED.

Once a suspect has invoked his right to counsel, he may not be subjected to further interrogation until counsel has been made available to him, unless the suspect himself initiates a further conversation with the police. (*Edwards v. Arizona, supra,* 451 U.S. at pp. 484-485; *McNeil v. Wisconsin, supra*, 501 U.S. at pp. 176-177; *Michigan v. Mosely* (1975) 423 U.S. 96, 104, footnote 10.) Even if the defendant has been advised of his rights, the admission of evidence obtained in a subsequent interview, requires a showing that the defendant reinitiated the contact. (*Minnick v. Mississippi* (1990) 498 U.S. 146, 150.) In the event that the police initiate any subsequent conversation with the defendant in the absence of counsel, the suspect's statements are presumed involuntary and are inadmissible as substantive evidence at trial. (*McNeil v. Wisconsin, supra*, 501 U.S. at 176-177.)

As established in section V., above, appellant's request to talk to his father invoked his *Miranda* rights on September 20, 2005. The evidence is undisputed that the second interrogation on September 21, 2005, at juvenile hall, was initiated by the detectives. (2CT 358-359.) It is likewise undisputed that appellant was not represented by counsel at the time of this second interrogation. (2CT 379.) Therefore, the United State Supreme Court's holding in *Edwards v. Arizona, supra,* 451 U.S. at pp. 484-485, requires any evidence obtained during this second interview to also be suppressed.

VII. THE ERROR HERE REQUIRES REVERSAL.

Finally, there can be no doubt that appellant was prejudiced by the admission of evidence obtained during the two interviews. When evidence is obtained in violation of *Miranda*, the error is reviewed under the "harmless beyond a reasonable doubt" standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Cunningham* (2001) 25 Cal.4th 926, 994.) Under this standard, reversal is required unless the reviewing court can say, beyond a reasonable doubt, it did not contribute to the findings of guilt. (*Chapman, supra,* 386 U.S. at p. 24; *Arizona v. Fulminante* (1991) 499 U.S. 279; *People v. Cahill* (1993) 5 Cal.4th 478, 51.)

In the present case, the evidence at issue is appellant's admissions regarding his involvement in the crime.

> A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so. While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision.

(*Arizona v. Fulminante, supra,* 499 U.S. at 296, internal citations and quotation marks omitted.)

Moreover, in the present case, but for appellant's admissions, there was virtually no evidence that appellant was involved in the shooting. Indeed, not a single witness identified appellant as even being at the scene, much less as having been the person who fired the gun. The weapon was

never found, nor was there any fingerprint or other physical evidence placing appellant at the scene. Consequently, the government cannot meet its burden of proving, beyond a reasonable doubt, that the admission of appellant's confession did not contribute to the findings of guilt. (*See Chapman, supra,* 386 U.S. at p. 24.)

CONCLUSION

Mr. Lessie thus asks this Court to reverse his conviction and exclude all evidence obtained during the September 20 and 21, 2005 interrogations.

November 6, 2008

Respectfully submitted,

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Case Number: S163453

CERTIFICATE OF APPELLATE COUNSEL

Pursuant to rule 8.504(d) of the California Rules of Court

I, Elisa A. Brandes, appointed counsel for appellant Tony Lessie in Supreme Court case number S163453, hereby certify, pursuant to rule 8.504(d) of the California Rules of Court, that I prepared the foregoing petition for review on behalf of my client, and the word count for this petition is 10378. I prepared this document using WordPerfect®X3, and the above-stated word count was generated by WordPerfect®X3 for this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed, at San Diego County, California, on November 6, 2008.

Elisa A. Brandes
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Case Number: S163453

DECLARATION OF SERVICE

I, undersigned, say: I am 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. My business address is PMB 14, 2650 Jamacha Road # 147, El Cajon, California. I served the APPELLANT'S OPENING BRIEF ON THE MERITS of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at San Diego County, California on November 6, 2008

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 6, 2008 at San Diego County, California.

Elisa A. Brandes