ORIGINAL

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

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY

Honorable Joan P. Weber

SUPREME COURT
FILED

MAY 12 2008

Frederick K. Ohlrich Clerk

Deputy

APPELLANT'S PETITION FOR REVIEW

express mail 5-10-08

RECEIVED
MAY 12 2008
CLERK SUPREME COURT

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By appointment of the
Court of Appeal under the
Appellate Defenders, Inc.,
independent case system.

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Plaintiff and Respondent,	)
	) Court of Appeal
v.	) No. D050019
	)
TONY LESSIE	) Superior Court
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Defendant and Appellant.	)
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APPELLANT'S PETITION FOR REVIEW

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Defendant/Appellant/Petitioner Tony Lessie respectfully petitions for review pursuant to California Rule of Court, rule 8.500(b)(1). The Court of Appeal, Fourth Appellate District, Division One, filed its published opinion on April 8, 2008, affirming the judgment of the Superior Court of San Diego County.

ISSUE PRESENTED

1. In *People v. Burton* (1971) 6 Cal.3d 375, 383-384, this Court held 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." At issue here, is whether the *Burton* rule remains binding on courts within California or whether the rule was abrogated *Fare v. Michael C.*(1979) 442 U.S. 707 in which the United States Supreme Court applied a"totality of the circumstances" test, to a minor's request to call his *probation officer*.

2. Whether appellant's federal constitutional rights under the Fourteenth and Fifth Amendments were violated when the police failed to stop their interrogation when the minor appellant asked to call his father.

NECESSITY FOR REVIEW

Review should be granted because it concerns an important question of law as permitted by California Rules of Court, rule 8.500(b). The issues are important because they concern appellant's rights under the federal constitution.

Moreover, in *People v. Burton* (1971) 6 Cal.3d 375, 383-384, this Court held 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." Later in *Fare v. Michael C.*(1979) 442 U.S. 707, the United States Supreme Court considered the effect of a minor's request to call his *probation officer*. With respect to a probation officer, high court applied a "totality of the circumstances test" to the issue of whether such a request invokes the Fifth Amendment privilege While this Court's holding in the *Burton* case has never been overruled, several appellate courts, including the court in this case, have interpreted the decision in *Fares* as abrogating the rule in *Burton*. Review is necessary to settle the important question of whether the *Burton* rule remains binding law in California.

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 forty years to life: fifteen 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 ten 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 copy of the Opinion is attached hereto as Appendix A. A petition for rehearing was not filed.

STATEMENT OF FACTS

For the purposes of this petition, appellant adopts the opinion's recitation of facts with respect to the crime itself. (App. A, Opn at p. 3.) Facts surrounding the interrogations at issue are as follows.

I. 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 informed him that 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 also told him that 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, 40.) Appellant did not have his father's phone number with him at that time. (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.)

II. 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."

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.)

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

The next day, appellant was interviewed a second time at juvenile halls. (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.

ARGUMENT

REVIEW SHOULD BE GRANTED AND 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, 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.*(1979) 442 U.S. 707 and *People v. Hector* (2000) 83 Cal.App.4th 228, and applied a "totality of the circumstances" test.

Appellant contends that because the *Burton* case has never been overruled, it is still binding law in California. Review should be granted.

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 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, the California Supreme 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, invokes the minor's Fifth Amendment privilege. Upon such request, the police must cease the interrogation immediately.

As discussed below, appellant contends that the rule created by the *Burton* case remains good law and that the trial court erred in not applying the *Burton* standard. Appellant further argues that, 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. Finally, the government's argument that appellant's request could not invoke his *Miranda* rights because it was before he was formally advised of his rights is without merit.

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

A. In Deciding Whether The Admissions Violated Appellant's *Miranda* Rights, The Trial Court Was Bound By The California Supreme Court's Holding in the *Burton* Case.

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 at issue here 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, appellant submits the *Burton* case is the binding authority in California.

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, at which time he indicated 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*, the Court observed that:

> 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, the 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.)

Appellant acknowledges that 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].) However, a review of the *Burton* decision makes clear that *Burton* was decided based upon the defendant's *federal*

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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 the California Supreme Court cannot mis-characterize its own rule.

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 the California Supreme 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.

Nevertheless, the trial court 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.) According the Court in the *Fare* case, this 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 the California 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 719.) The Court distinguished the roles of the probation officer and the attorney. In this regard, the Court noted 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 the Court in the *Fare* case 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. (Wel. and Inst. Code, section 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 that 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 U.S. Supreme Court will change its position in the future, notwithstanding indications in recent cases that it may do so].)

Thus, the trial erred in refusing to apply the *Burton* rule to the facts in the present case.

B. Under The *Burton* Rule, The Detectives Were Required to Stop The Interrogation As Soon As Appellant Asked to Speak to His Father.

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 also told appellant that when they arrived at the police station, he would have the opportunity to call anyone he wanted. 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 told the detective 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 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.

C. 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 whether in light of 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, 221 Cal. Rptr. 562, 710 P.2d 362, (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 People 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.)
But, the court must independently determine from the undisputed facts, and those properly found by the trial court, whether the. (*Ibid.*)

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 the 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 three months after his release the first time, he was confined 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. 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. 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* Wel. and Inst. Code, section 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.) It does not seem reasonable that after having just been told that before he could use the phone, the "papers" must be completed, appellant would think it possible 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.

D. The Fact That Appellant's Request to Call His Father Was Made Before He Received His Miranda Warnings Does Not Mean That Appellant Could Not Have Invoked His Fifth Amendment Rights.

At trial, the prosecution further argued appellant's request to contact his father could not invoke his *Miranda* rights because the request was prior to the *Miranda* advisements. (2RT 51-52.) Quite simply, this is not the law. In *McNeil v. Wisconsin* (1991) 501 U.S. 171, the defendant claimed that his request for an attorney at his initial court appearance invoked his *Miranda* rights. The Court disagreed, stating: "[w]e have in fact never held that a person can invoke his Miranda rights anticipatorily, *in a context other than "custodial interrogation."* (*Id.* at p. 182, note 3 [emphasis added].) The *McNeil* case, however, does not stand for the proposition that a defendant can never invoke his *Miranda* rights before he is give the formal admonishments. As stated by the Fourth District, Division Three, "[w]e do not suggest defendant must await a police officer's formal recitation of the Miranda admonition before invoking the right to counsel. Rather, a suspect may invoke Miranda's protections if custodial interrogation is impending or imminent." (*People v. Nguyen* (2005) 132 Cal. App. 4th 350, 357, citing *United States v. LaGrone* (7th Cir. 1994) 43 F.3d 332, 339; *United States. v. Grimes* (11th Cir. 1998) 142 F.3d 1342, 1348; and *Alston v. Redman* (3d Cir. 1994) 34 F.3d 1237, 1249.)

In the present case, appellant's request to call his father occurred while he was sitting in the interrogation room and was made to the two detectives who were there for the purpose of interrogating him. As the request appears in the transcript two pages before the page that documents the *Miranda* warnings, it is reasonable to assume the request to call his father was made only seconds before the warnings. Nothing in the *Miranda* warnings would cause a reasonable person to conclude that in order to invoke his rights he needed to repeat, to the same two people, the same request that he had made only seconds earlier. Because appellant's request was made at a time when custodial interrogation was impending and imminent, the fact that he had not yet been formally advised of his rights does not mean that his request could not have invoked his rights.

IV. 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 III, 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.

V. 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.)

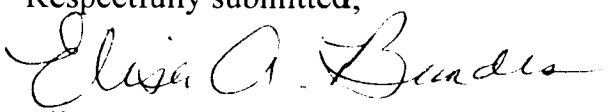
Moreover, in the present case, but for appellant's admissions, there was virtually no evidence that appellant was involved in the shooting. Indeed, not a single witness identified appellant as even being at the scene, much less as having been the person who fired the gun. The weapon was never found, 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 grant review of the decision of the Court of Appeal to settle the important questions of law as explained above.

May 10, 2008

Respectfully submitted,



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APPENDIX A

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. TONY LESSIE, Defendant and Appellant.	D050019 (Super. Ct. No. SCN200740)

APPEAL from a judgment of the Superior Court of San Diego County, Joan P. Weber, Judge. Affirmed.

Elisa A. Brandes, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Ronald Jakob and Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Tony Lessie of second degree murder (Pen. Code,[1] § 187, subd. (a)) and found true allegations that during its commission Lessie had intentionally and

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1 All statutory references are to the Penal Code unless otherwise specified.

personally used and discharged a firearm, proximately causing great bodily injury and death to a person (§§ 12022.5, subd. (a), 12022.53, subd. (d)).[2] The trial court sentenced Lessie to prison for a total term of 40 years to life.

Lessie's sole contention on appeal is that the trial court erred in denying his motion to suppress his pretrial admissions made during two interviews on September 20 and 21, 2005, which were allegedly obtained in violation of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Lessie, who was 16 years old at the time of those interviews, essentially asserts that because *People v. Burton* (1971) 6 Cal.3d 375, 383-384 (*Burton*), which specifically holds that a minor's request to consult with a parent "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," is still binding authority in California, the trial court's failure to follow this per se rule of *Burton*, instead of determining under the "totality of the circumstances" test of *Fare v. Michael C.* (1979) 442 U.S. 707, 728 (*Fare*) and *People v. Hector* (2000) 83 Cal.App.4th 228 (*Hector*) that he did not invoke his *Miranda* rights to remain silent or ask for an attorney by requesting to speak to his father before he was read those rights during questioning at the first police station interview, constitutes reversible error. Alternatively, Lessie contends that even under the totality of

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2 The trial court declared a mistrial on a gang allegation under section 186.22, subdivision (b)(1) when the jury said it was hopelessly deadlocked on whether Lessie had committed the murder "for the benefit of, or at the direction of, or in association with any criminal street gang with the specific intent to promote or further or assist in any criminal conduct by gang members. . . ."

the circumstances standard of *Fare* and *Hector* there was insufficient evidence to support the court's determination that his request to call his father was merely to notify him of his arrest. Lessie further asserts that because his request to talk to his father at the first interview invoked his right to counsel, his admissions at the second interview the next day at juvenile hall were required to be suppressed under *Edwards v. Arizona* (1981) 451 U.S. 477 (*Edwards*).

We agree with the reasoning and conclusion in *Hector* that the holdings of *Burton, supra*, 6 Cal.3d 375 and *Fare, supra*, 442 U.S. 707 are reconcilable and both "demand consideration of the circumstances surrounding a minor's request to speak to a parent to determine whether that request constitutes an invocation of the right to remain silent or a request for an attorney." (*Hector, supra*, 83 Cal.App.4th at p. 230.) Accordingly, we determine that under the "totality of the circumstances" test of those cases that Lessie knowingly and voluntarily waived his *Miranda* rights and did not invoke them by requesting to speak to his father during the first police interview on September 20, 2005. Consequently, because Lessie did not invoke his right to counsel at that time, the second interview the next day did not violate the *Edwards* rule. We therefore conclude that the trial court properly denied Lessie's suppression motion and affirm the judgment.

BACKGROUND

Lessie does not challenge the sufficiency of the evidence to support the jury's verdict and findings he fired the gun that killed Rusty Seau on June 9, 2005, in Oceanside, California. Rather, the facts pertinent to our discussion of his appellate issues

come from the suppression motion documents, the transcripts of the custodial interviews on September 20 and 21, 2005,[3] and the record of the hearing on the matter.

In limine, Lessie filed a motion to exclude his pretrial statements made during interviews that took place on September 20, 21, and December 27, 2005, on grounds the arresting detectives willfully deprived him of his statutory right under Welfare and Institutions Code section 627, subdivision (b)[4] to make telephone calls to his father and attorney within one hour of being taken into custody and continued to question him after he invoked his right to remain silent by asking to call his father. The People filed opposition and a countermotion to admit Lessie's post-*Miranda* statements, asserting Lessie had knowingly, intelligently and voluntarily waived his *Miranda* rights at both his first and second interviews, and claiming there was no statutory violation of the notice requirements of Welfare and Institutions Code section 627 because Lessie had been arrested at a family member's home and his indication he wanted to call his father was not an invocation of his *Miranda* rights based on the totality of the circumstances test set out in *Fare, supra*, 442 U.S. 707 and *Hector, supra*, 83 Cal.App.4th 228.

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3 Although the People originally asserted Lessie was improperly relying on the transcript of the police interview on September 21, 2005 for some of his contentions on appeal because it was not entered into evidence or transcribed by the court reporter, the People subsequently filed a supplemental letter brief conceding they were wrong.

4 Welfare and Institutions Code section 627, subdivision (b) states, in pertinent part: "Immediately after being taken to a place of confinement . . . 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."

At the hearing on the matter, the parties clarified that the motion would only pertain to the statements from the September 20 and 21, 2005 interviews, and the prosecutor called the detective who had arrested Lessie to testify about the timing of various admonishments and Lessie's requests to talk to his father.

Oceanside Police Detective Kelly Deveney testified that Lessie was arrested on September 20, 2005, around 6:40 a.m., at the home of his aunt and uncle in Hemet, California. Deveney first talked with Lessie about 40 minutes after his arrest as he sat in the back of the police car. At that time, she identified herself and told him he was "under arrest for J.D.O. from his probation officer," i.e., a warrant issued by probation, and that he was being transported back to Oceanside. She also told him that once they got to Oceanside "he could make as many phone calls as he wanted to whomever he wanted. And then I told him I understand your aunt and uncle know that you're in custody; is there anyone else we need to notify and he said yes, his father." Lessie did not have his father's telephone number with him.

After an approximate hour and a half transport from Hemet to the Oceanside Police Department, Lessie was placed in an interview room that was being recorded "digitally . . . and via VHS tape." Deveney had viewed the tape and explained it showed Lessie sat there for the first 10 to 15 minutes with his hands underneath his shirt before Oceanside Police Detective Gordon Govier arrived with breakfast for him. Deveney estimated another 10 or 15 minutes passed before she and Govier arrived in the room to begin the first interview, which was later transcribed. Deveney recalled that at that time she told Lessie a phone number for his father had been located and asked him if he

wanted her "to make the call to his father advising that [Lessie] was in custody, or if he wanted to make that call himself." Lessie told her "he wanted to make the call." Deveney then continued with the "process."

On cross-examination, Deveney said that Lessie had been given a telephone to call his father before the interview ended when he actually asked to talk to his father for a minute and the officers took a break and "gave him a Nextel[l, a cellular phone]." Upon looking at the transcript of the interview, Deveney clarified that the request to talk to his father came at page 41 of the 50-page transcript, and that Lessie had continued talking up to that point in time. The videotape showed Lessie then making several telephone calls, not just one to his father.

The parties then submitted the matter on the transcript of that interview,[5] which showed that after some initial "small talk" and Deveney's query as to whether Lessie wanted the detectives to make the call to notify his father, Deveney again asked Lessie whether he wanted to call his father himself in response to Lessie's reply that he would like to be the one to call his father. When Lessie responded, "M-hm," Deveney said, "Okay. So in the meantime, we've just got to fill out these papers. You go by Tony Lessie, right?" After Deveney asked more general questions concerning Lessie's age,

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5 Although the parties and court at the hearing only concentrated on the circumstances of the first interview, the court noted at the beginning of the hearing that it had reviewed the parties' pleadings, which included as exhibits both of the interviews on September 20 and 21, 2005.

height, weight, birth place, school, work and father's name and address, the following exchange took place.

> "DEVENEY: Okay. [Lessie] because you're under age, you're only sixteen, and because you're in our facility, I have to read you your rights. Alright. So, it's 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 that?
>
> "LESSIE: Yeah.
>
> "DEVENEY: So you understand those rights?
>
> "LESSIE: Yeah."

Deveney then asked several more general questions regarding Lessie's appearance and clothing before asking him if his father worked or whether she would be able to reach him at home. Lessie explained that the detective had the cell phone number for his father. Deveney proceeded to then question Lessie about knowing a man named "Black Jack," at whose house the detectives had found two birth certificates in Lessie's name. After admitting that both certificates were his, Lessie proceeded to give his family background, explaining that his name had been changed after his birth when his grandparents adopted him; that he originally grew up in Oceanside before moving to

Perris, California, and then came back to Oceanside to live with his father after he got in trouble in school there; and that he left his father's house after fighting with his sister and went to stay with James Turner (Black Jack), whom he knew through a friend. Lessie knew that Turner was involved in some fraudulent dealings like identity theft, but denied that he was also involved in them. He claimed he left Turner's home because of the identity scams and went up to Hemet to live with his relatives.

Lessie also told Deveney that he had violated his probation when he got into the fight with his sister, that his probation officer was "evil," and that the last time he had violated probation, he had been locked up, having "to do four months out of six." After talking some more about the fraud schemes and whether Turner's cousins had also been involved in them, Deveney then questioned Lessie about his awareness of gangs in Oceanside and whether he knew that Turner was involved in a gang. When Lessie explained that that was one reason he was done with Turner and his whole crowd, Deveney told him that that was good because there were rumors Turner and his cousin were around "when that other shooting happened in June. A kid over by the back gate got killed."

When Lessie immediately asked, "You're talking about Rusty?," the interchange between Deveney and Lessie turned to whether Lessie was with Turner that day when a crowd of youths, many gang members, was on the street fighting before Rusty was shot. After Lessie claimed he had nothing to do with the fight or shooting, Deveney asked him whether he would be surprised to know that "some people in your family have said that you told them [about your involvement in the incident]."

When Deveney then asked whether there was a good reason Lessie had become involved in the incident, Lessie stated, "[w]ell 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 the other people." Lessie explained that "it was like an initiation thing. So like if I didn't do this, they were going to get me." He further explained that the incident stemmed from an earlier incident that day when he and Turner and some people got into a disagreement about Turner's girlfriend at a Vons store. They were to meet the other people on the block where the shooting occurred. After picking up some other people, Lessie was given a gun in the car, taught how to shoot it and told he would be the one to use it. When they arrived at the block and found that the other people did not want to fight, Turner saw Seau walking down the street, started jumping him, and when he ran, ordered Lessie to shoot him. Lessie shot twice at Seau when Turner walked toward him after again ordering him to shoot. When Lessie claimed that Turner then shot the gun at least two more times, Deveney told him that witnesses saw only one person shooting who afterwards ran back to the car with the gun still in his hand. Lessie conceded, "[y]eah, I shot," and nodded that he was the only shooter.

When Deveney then asked whether Lessie was alright or needed a break, Lessie said, "I would like to talk to my dad." Before Deveney left the room to allow Lessie to "compose" himself, Lessie asked, "[c]an I make a phone call to my dad?" Deveney replied, "Yes, you can. I'm going to bring a cell phone into you and you can use it. In fact you can use it while we're taking the break okay. Do you have the number or do you

want me to bring you the number. . . ?" When Lessie said he needed the number, Detective Govier told him "[o]kay, we'll be right back."

After a long pause, Lessie asked to use the bathroom and Deveney advised him that they were getting him "a Nextell, a phone, we're charging it up so you can call your dad in privacy. Okay." After another pause, Deveney told Lessie that while they were getting the phone ready, they were going to ask him a couple of quick questions before leaving him alone to have whatever conversation he wanted with his father. After getting clarification as to who was in the car with Lessie that day, that he was the only shooter, and a description of the events in reference to a diagram of the crime scene, Deveney told Lessie, "[o]kay. Let me go see what's going on with that phone. We got your number for your dad."

Moments later, the detectives returned with the Nextell and attempted to call Lessie's father for him, but the number they had did not work. During that same time, when the detectives asked Lessie about the family members he had talked to about the shooting, Lessie said he had talked with his aunt, uncle, and dad. When a working number for his father could not be found, Lessie asked to call his cousin for his dad's number. The detectives then left Lessie alone to make his calls.

The transcript reflects that during the first call, Lessie left a voice mail message for his father, telling him he was in jail and to call him back at that number as soon as he got the message. During the second call to an unidentified person, Lessie asked whether the person had heard from his dad and for his dad's phone number. After telling the person he was in jail for murder and explaining about some of the witnesses, Lessie told

the person, "[b]ut I'm gonna talk to you later, I'm about to go try to get in contact with my dad." Lessie tried a third call but there was no answer.

The transcript of the September 21, 2005 interview with Lessie at juvenile hall revealed that the detectives initiated that interrogation to obtain more details about the Vons incident and the shooting after again advising him of his *Miranda* rights and offering to notify his father of his next court date in Vista. Lessie expressly acknowledged he understood his rights and wanted to talk to the detectives. He also indicated he had talked with his father since their last interview. During the second interview, which lasted 45 minutes, Lessie described in fuller detail the people and events leading up to the shooting. Lessie maintained that the only reason he shot the gun at Seau was because he was scared and Turner was telling him to do it. Lessie felt sick when he heard that Seau had died and had called his dad to let him know about it. His dad had told him to turn himself in, but Lessie did not do so because he did not want "to go to jail for something [he] didn't want to do. . . ." Near the end of the interview, Deveney explained to Lessie that he would get his attorney the next day in court and later helped Lessie again get in contact with his father.

After considering the evidence and arguments of counsel, which were basically directed to the questions of whether a violation of Welfare and Institutions Code section 627, subdivision (b) required suppression of Lessie's statements at the first interview and whether his request to call his father at that time was a per se invocation of his right to remain silent, the court denied Lessie's motion to suppress. In doing so, the court noted that although it shared some concerns with defense counsel about the delay in getting a

telephone to Lessie after saying he wanted his dad called and wanted to be the one to make the call, which was "probably at a minimum a technical violation of this Welfare and Institutions Code provision," it disagreed that suppression was a remedy for that. Even though *Hector, supra*, 83 Cal.App.4th 228 did not directly deal with that statute, the trial judge found such post-proposition 8 case "very instructive in saying that under federal law, the request for a parent simply is not a *Miranda* violation and should not result in the suppression of a statement. And I find that case controlling in this context. And under *Hector*, and the [United States] Supreme Court case . . . [*Fare, supra*, 442 U.S. 707], I just don't think the exclusionary rule is applicable in this context."

Nor did the trial judge see "any tie-in whatsoever between the defendant's statement that he wants to talk to his father and the *Miranda* rights." The court specifically noted that Lessie had been read his *Miranda* rights, had said he understood them and had never said "anything close to, 'I'd like to remain silent'; 'I don't want to talk;' 'can I get a lawyer'--anything that would be an invocation of his 5th or 6th Amendment rights."

The court also found that in this unusual situation, where Lessie had been living with his aunt and uncle in Hemet and they had already been notified that he was in custody, the fact Lessie said he wanted his dad called in response to Deveney's initial inquiry of who else he wanted notified, and the message Lessie left during his first telephone call for his dad advising him he was in jail, without asking for any advice from him, was circumstantial evidence of Lessie's intent to have his father merely notified about his arrest and not an invocation of his rights.

The court also agreed with the prosecutor that its ruling denying Lessie's suppression motion "would go specifically to the [prosecution] motion [because] that addresses the same issue."

DISCUSSION

Lessie essentially asserts the trial court erred in denying his motion to suppress his statements from the interviews of September 20 and 21, 2005, because it failed to follow the binding law set out in *Burton, supra*, 6 Cal.3d 375, which was affirmed in *People v. Rivera* (1985) 41 Cal.3d 388, that a juvenile's request to speak to his parent constitutes an invocation of his self-incrimination privilege after which custodial interrogation must immediately stop. Alternatively, he claims that even under the totality of the circumstances test of *Fare, supra*, 442 U.S. 707 and *Hector, supra*, 83 Cal.App.4th 228, upon which the court relied, there was insufficient evidence to support the conclusion that he did not invoke his rights to remain silent and to speak with an attorney by asking to talk with his father at the first interview. We reject his contentions.

It is well established that "[i]n considering a claim that a statement or confession is inadmissible because it was obtained in violation of a defendant's rights under [*Miranda*], we accept the trial court's resolution of disputed facts and inferences, and its evaluation of credibility, if supported by substantial evidence. [Citation.] Although we independently determine whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained [citation], we ' "give great weight to the considered conclusions" of the lower court that has previously reviewed the same evidence.' [Citations.]" (*People v. Wash* (1993) 6 Cal.4th 215, 235-236.)

Generally, under both federal and state law, a court must look at two issues to determine whether a defendant has voluntarily, knowingly, and intelligently waived *Miranda* protections. "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [Citations.]" (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) A defendant may make an effective implied waiver of *Miranda* rights by acknowledging that he understands them and then proceeding to answer questions. (*People v. Whitson* (1998) 17 Cal.4th 229, 250 (*Whitson*); *People v. Sully* (1991) 53 Cal.3d 1195, 1233.)

In *Hector, supra*, 83 Cal.App.4th 228, the defendant argued, as here, that his request to talk to a parent, there his mother, " 'was a clear invocation of his right to remain silent which required questioning to immediately cease and made his subsequently given confession inadmissible.' " (*Id.* at p. 234.) In disagreeing, the court in *Hector* examined the holding of *Burton, supra*, 6 Cal.3d 375, on which Lessie relies, and noted that eight years later, the United States Supreme Court in *Fare, supra*, 442 U.S. 707, concluded that, contrary to the holding of our Supreme Court, which was based on *Burton*, a minor's request for his probation officer during a custodial interrogation did not constitute a per se invocation of the juvenile's Fifth Amendment rights. (*Hector, supra*,

83 Cal.App.4th at pp. 234-235.) Rather, the high court concluded, " 'the determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel. [Citation.]' [Citation.] When determining whether a juvenile's waiver is voluntary, courts should consider the juvenile's 'age, experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. [Citation.]' [Citation.]" (*Id.* at p. 235.)

The court in *Hector* further considered the passage of Proposition 8, which added section 28, subdivision (d) to article I of the California Constitution, *In re Lance W.* (1985) 37 Cal.3d 873, 896, and *People v. Peevy* (1998) 17 Cal.4th 1184, 1188, before concluding the question of whether a minor's claim that his request to speak to his parent was an invocation of his *Miranda* rights must be considered under the totality of the circumstances test set forth in *Fare, supra*, 442 U.S. 707. (*Hector, supra*, 83 Cal.App.4th at p. 235.) The court in *Hector* additionally noted that contrary to the arguments of the juvenile there, that the holding of *Burton* was actually congruous with the totality of the circumstances test of *Fare*. (*Hector, supra*, 83 Cal.App.4th at p. 237.) "We do not doubt that a juvenile's request to speak to his or her parent must be considered as an indication that the minor wishes to invoke his or her *Miranda* rights. However, *Burton* does *not* set forth a per se rule; it does not state that whenever a juvenile asks to speak to his or her

parent, interrogation must cease. Instead, a juvenile's request to speak to a parent must be construed as an invocation of his or her Fifth Amendment privileges *unless* there is 'evidence demanding a contrary conclusion.' [Citation.] Thus, application of the *Burton* rule requires consideration of the circumstances surrounding the minor's request. Viewed in this way, the rules of [*Burton*] and [*Fare*] are not irreconcilable." (*Hector, supra*, at p. 237, original italics.)

We agree with the analysis and conclusion in *Hector, supra,* 83 Cal.App.4th 228, that since the adoption of Proposition 8, the federal standard is to be applied to a minor defendant's claim that his or her statements were elicited in violation of *Miranda* and that the totality of the circumstances test of *Fare* is reconcilable with the rule set forth in *Burton, supra,* 6 Cal.3d 375. Moreover, our Supreme Court in *People v. Lewis* (2001) 26 Cal.4th 334, has reaffirmed the application of this test to waivers of rights by minors (*id.* at p. 383), and, while not reaching the exact issue here presented regarding whether the minor's request to speak to a parent was an invocation of his Fifth Amendment right, the court recognized both *Burton* and *Hector* as relevant authority for such issue when properly raised. (*Lewis, supra*, at p. 385.) We believe *Lewis* is fully supportive of the conclusion that with regard to claimed violations of federal constitutional rights under *Miranda*, the totality of the circumstances test of *Fare* is compatible with the application of rules under *Burton* and *Fare* as explained in *Hector*. Therefore, contrary to Lessie's assertion otherwise, the trial court here did not ignore the law set forth in *Burton*. Rather, it properly applied the federal law required after the passage of Proposition 8 based on the totality of the circumstances surrounding Lessie's first custodial interrogation to

determine whether he was invoking his *Miranda* privileges by saying he wanted his father notified and wanted to be the one to call him before being admonished about his rights and by actually asking to talk to his father near the end of the interview.

Moreover, on this record, we conclude that the trial court did not err in determining that Lessie's statements during his September 20 and 21, 2005 interviews were admissible. We have reviewed the transcripts of those custodial interrogations as well as the testimony of Deveney at the hearing on the countermotions to admit and suppress Lessie's statements. The totality of the circumstances, including Lessie's age, intelligence and experience, lead us to conclude that he did not invoke his *Miranda* rights, but instead impliedly waived them. Although Lessie was 16 years old at the time of the interviews, he had completed the tenth grade and, at the time of his arrest, was on probation and essentially on the run so he would not have to face being in custody a second time. Because of such earlier dealings with the law, we may presume that Lessie was not naïve or inexperienced with respect to police procedures.

The record shows that after Deveney provided full and adequate admonitions to Lessie, he answered "yeah" to each one. Because there was no evidence that Lessie lacked sufficient intelligence to understand his rights and the consequences of giving them up, his voluntary responses to the subsequent questions asked of him without hesitation affirmatively evidences that he understood his *Miranda* rights and impliedly waived them. Lessie's willingness to speak with the detectives is readily apparent from the transcripts of the interviews and nothing about those interrogations suggests the detectives resorted to any physical or psychological pressure to elicit statements from

him. (See *Whitson, supra*, 17 Cal.4th at pp. 248-249.) Lessie does not challenge the voluntariness of his statements.

Although, the trial court found that the detectives technically violated the notification statute of Welfare and Institutions Code section 627, subdivision (b) by not providing a telephone to Lessie to call his father before a break near the end of the interview when he finally actually asked to talk with his father, it also found that such technical violation was but one factor to consider in this unusual case where Lessie was arrested at his aunt and uncle's home in Hemet and they were already "notified" of where and why he was being taken for confinement. We agree and find, as the trial court did, that Lessie's responses to Deveney's questions of who else he wanted notified and whether he wanted to be the one to call his father, were merely circumstantial evidence of Lessie's intent to have his father notified about his arrest and not an invocation of his *Miranda* rights.[6] Even after Lessie actually did ask whether he could talk to his father, he still did not hesitate to answer questions while the detectives sought to get him a charged cell phone to make his calls. At no time did Lessie refuse to answer any questions, request an attorney or say he would not answer any questions until after he

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6 Contrary to Lessie's representation on appeal, he did not specifically ask to call his father before he was read his *Miranda* rights. As noted earlier, he merely answered Deveney's questions about who else should be notified and whether he wanted to be the one to call his father. Although the court found a technical violation of the notification statute due to the delay in getting the telephone for Lessie, it did not make any finding that the officers were willful in that violation.

talked to his father. Under these circumstances, Lessie's request to talk to his father did not demonstrate an intent to invoke his rights at the first interview.

Because Lessie's challenge to the admissibility of his statements at the second interview on September 21, 2005 is premised upon a finding that he had invoked his right to counsel at the first interview by asking to talk with his father, such assertion necessarily fails.

In sum, on this record, the trial court did not err in concluding Lessie had not invoked his *Miranda* rights and that his statements at the two interviews were admissible.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

HUFFMAN, Acting P. J.

WE CONCUR:

McDONALD, J.

McINTYRE, J.

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Court of Appeal
Case Number: D050019

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 Court of Appeal case number D050019, 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 7551. 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 May 10, 2008.

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Court of Appeal Case
Number: D050019

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 PETITION FOR REVIEW 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 May 10, 2008.

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

Executed on May 10, 2008 at San Diego County, California.

Elisa A. Brandes