IN THE SUPREME COURT OF TEXAS

NO. 06-0005

IN THE MATTER OF H.V.

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

Argued April 12, 2007

JUSTICE BRISTER delivered the opinion of the Court, in which JUSTICE O'NEILL, JUSTICE MEDINA, JUSTICE JOHNSON, and JUSTICE WILLETT joined.

CHIEF JUSTICE JEFFERSON filed an opinion concurring in part and dissenting in part, in which JUSTICE WAINWRIGHT and JUSTICE GREEN joined, and in which JUSTICE HECHT joined as to Parts I, III and V.

This is the first appeal under a 2003 statute allowing appellate review of certain orders suppressing evidence in juvenile justice cases.[1] Because the statute contains no express grant of jurisdiction to this Court, we may review such interlocutory orders only if they fall within our general jurisdictional statutes, which were also amended in 2003. Finding that we have such jurisdiction, we affirm the court of appeals' opinion in part and reverse in part.

I. Background

Evidence presented at the suppression hearing here showed that sixteen-year-old H.V. bought a gun on September 7, 2003. Two days later he was seen leaving North Crowley High School with

[1] *See* TEX. FAM. CODE § 56.03(b)(5).

Daniel Oltmanns. The next day, Oltmanns's body was found at a construction site with wounds indicating he had been shot in the head.

The following morning, a police detective met with H.V. at the high school and asked him to accompany her downtown for questioning. He agreed and was taken to a juvenile processing center. After receiving the required warnings from a magistrate,[2] H.V. waived his rights and gave a statement admitting he had bought a gun but claiming he had returned it before Oltmanns was shot. The statement was typed up and H.V. signed it, after which he was returned to school.

That afternoon, police officers visited H.V. and his father at their home and asked them to leave the premises pending arrival of a search warrant. They did so, but shortly thereafter H.V. returned, and an off-duty policeman saw him carrying a bloodstained carpet over the back fence of the home. H.V. was arrested on a charge of evidence tampering, and again taken to the juvenile processing facility where he was again given warnings by a magistrate.[3]

When asked whether he wanted to waive his rights and speak to police, H.V. said he wanted to speak to his mother, but was told he could not. H.V. then responded that he "wanted his mother to ask for an attorney." When the magistrate responded that only he (not his mother) could ask for an attorney, H.V. replied, "But, I'm only sixteen." The magistrate then reiterated that only he could ask for an attorney, after which H.V. eventually said he would talk to the police. In a second written

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[2] *See id.* § 51.095(a)(1) (providing that children be warned of their rights by a magistrate); *see also In re R.J.H.*, 79 S.W.3d 1, 4 (Tex. 2002) ("The Texas Family Code provides that a juvenile can waive his rights once he is in custody only if joined by his attorney or if done in the presence of a magistrate.").

[3] The State concedes that if H.V.'s statements to the magistrate constitute an invocation of his right to counsel, it is immaterial that it was not also made to police.

statement, H.V. claimed Oltmanns accidentally shot himself with H.V.'s gun, after which H.V. placed him in a bathtub where he bled to death. Based on a drawing by H.V., police recovered the gun from a storm sewer close to H.V.'s home.

Finding that H.V. had invoked his right to counsel during custodial interrogation, the trial court suppressed both H.V.'s second written statement and the gun, and the court of appeals affirmed.[4] The State brings this appeal from a juvenile court order suppressing evidence in a case involving a violent offender.[5] As this question does not turn on an evaluation of demeanor or credibility (as discussed below), we review the question de novo.[6]

II. Jurisdiction of Pretrial Suppression Orders

The parties both assume we have jurisdiction, but that of course does not dispose of the matter.[7] In a single paragraph, the State alleges jurisdiction based on an error of law that requires correction.[8] But that jurisdiction does not include most interlocutory appeals,[9] which this pretrial

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[4] 179 S.W.3d 746. The trial court denied suppression on "[a]ll other grounds."

[5] *See* TEX. FAM. CODE §§ 56.03(b)(5), 53.045.

[6] *See In re R.J.H.*, 79 S.W.3d at 6.

[7] *See Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 358 (2004) ("[A] court is obliged to ascertain that subject matter jurisdiction exists regardless of whether the parties have questioned it.").

[8] *See* TEX. GOV'T CODE § 22.001(a)(6).

[9] *Id.* at § 22.225(b)(3) (providing that generally "a judgment of a court of appeals is conclusive on the law and facts, and a petition for review is not allowed to the supreme court . . . from other interlocutory appeals that are allowed by law").

suppression order surely is.[10] Our sister court, the Court of Criminal Appeals, routinely reviews pretrial suppression orders in criminal cases involving adults.[11] But the jurisdictional statute for that Court appears to be broader than ours,[12] and in any event does not expressly limit interlocutory appeals — as ours does.

We have not addressed this question before because this appeal is the first of its kind. Although government appeals of suppression orders are common in criminal cases,[13] similar appeals in juvenile justice cases became available in Texas only in 2003, when the Family Code was amended to allow them in cases involving violent or habitual offenders:

> (b) The state is entitled to appeal an order of a court in a juvenile case in which the grand jury has approved of the petition under Section 53.045 [concerning violent or habitual offenders] if the order . . . grants a motion to suppress evidence, a confession, or an admission and if:
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> (A) jeopardy has not attached in the case;
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> (B) the prosecuting attorney certifies to the trial court that the appeal is not taken for the purpose of delay; and

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[10] *See United States v. Loud Hawk*, 474 U.S. 302, 307 n.8 (1986) (describing similar appeal by federal prosecutor under 18 U.S.C. § 3731 as interlocutory); *see also* BLACK'S LAW DICTIONARY 106 (8th ed. 2004) ("*interlocutory appeal*. An appeal that occurs before the trial court's final ruling on the entire case.").

[11] *See, e.g.*, *State v. Stevens*, 235 S.W.3d 736 (Tex. Crim. App. 2007); *State v. Dixon*, 206 S.W.3d 587 (Tex. Crim. App. 2006); *State v. Cullen*, 195 S.W.3d 696 (Tex. Crim. App. 2006); *Kothe v. State*, 152 S.W.3d 54 (Tex. Crim. App. 2004); *State v. Kurtz*, 152 S.W.3d 72 (Tex. Crim. App. 2004); *State v. Steelman*, 93 S.W.3d 102 (Tex. Crim. App. 2002); *Martinez v. State*, 91 S.W.3d 331 (Tex. Crim. App. 2002); *State v. Perez*, 85 S.W.3d 817 (Tex. Crim. App. 2002); *State v. Scheineman*, 77 S.W.3d 810 (Tex. Crim. App. 2002).

[12] *See* TEX. CODE CRIM. PROC. art. 4.04, § 2 ("In addition, the Court of Criminal Appeals may, on its own motion, with or without a petition for such discretionary review being filed by one of the parties, review any decision of a court of appeals in a criminal case.").

[13] *See State v. Medrano*, 67 S.W.3d 892, 897–99 (Tex. Crim. App. 2002) ("All fifty states, as well as the District of Columbia, have provisions permitting the government to appeal adverse rulings of a question of law. Many of those states . . . permit the State to appeal any pretrial ruling suppressing evidence if that evidence is likely to be outcome determinative. Other states explicitly grant the prosecution a broad right to appeal any pretrial suppression, evidentiary or other legal ruling which is likely to determine the outcome of the case.") (citations omitted).

> (C) the evidence, confession, or admission is of substantial importance in the case.[14]

The new statute contemplates review in this Court,[15] but there is no grant of jurisdiction other than as in civil cases generally:

> An appeal from an order of a juvenile court is to a court of appeals and the case may be carried to the Texas Supreme Court by writ of error or upon certificate, as in civil cases generally.[16]

In the absence of a specific statutory grant, or of a dissent in the court of appeals,[17] we thus have jurisdiction of this interlocutory appeal only if (as in civil cases generally) the court of appeals opinion "holds differently from a prior decision of another court of appeals or of the supreme court."[18]

This presents two interesting questions here. First, because this is the first appeal of a suppression order in a juvenile justice case, there can be no conflicts if the scope of comparison is limited to just those appeals. But our conflicts jurisdiction is no longer limited to rulings that are "so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision

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[14] TEX. FAM. CODE § 56.03(b); *see* Act of June 2, 2003, 78th Leg., R.S., ch. 283, § 25, 2003 Tex. Gen. Laws 1221, 1228 (eff. Sept. 1, 2003).

[15] TEX. FAM. CODE § 56.03(i) ("The Texas Rules of Appellate Procedure apply to a petition by the state to the supreme court for review of a decision of a court of appeals in a juvenile case.").

[16] *Id*. at § 56.01(a).

[17] The State reports that Justice Holman dissented in an original opinion in this case, but apparently withdrew that dissent on rehearing as the opinion before us is unanimous.

[18] TEX. GOV'T CODE § 22.225(c).

in the other."[19] For cases filed after 2003 (as this one was),[20] a conflict is sufficient for jurisdiction "when there is inconsistency in the[] respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants."[21]

Second, our conflicts jurisdiction is generally limited to cases that conflict with "a prior decision of another court of appeals or of the supreme court."[22] Juvenile cases, though classified as civil proceedings, are quasi-criminal in nature and frequently concern constitutional rights and procedures normally found only in criminal law.[23] This Court rarely addresses issues like the one here concerning the warnings required by *Miranda v. Arizona*;[24] indeed, our citation to that case in this sentence is only the second in the Court's history,[25] compared to almost 2,000 cases citing it by other Texas state courts. Instead, the law governing such issues is generally found in opinions from the United States Supreme Court and the Court of Criminal Appeals — two courts that are *not* listed

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[19] *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 701 (Tex. 2003).

[20] Oltmanns died September 11, 2003, and all proceedings herein occurred thereafter. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 1.02, 2003 Tex. Gen. Laws 847, 848 (expanding conflicts jurisdiction for cases filed after September 1, 2003).

[21] TEX. GOV'T CODE § 22.225(c), (e).

[22] *Id*.

[23] *See, e.g.*, *In re R.J.H.*, 79 S.W.3d 1 (Tex. 2002) (addressing whether juvenile's oral confession violated *Miranda* rights); *In re D.A.S.*, 973 S.W.2d 296 (Tex. 1998) (addressing whether *Anders* procedures applied to juvenile appeals).

[24] 384 U.S. 436 (1966).

[25] *See also In re R.J.H.*, 79 S.W.3d at 3 n.3.

in our jurisdictional statute. While this is perhaps a matter for legislative attention, it is not one we can disregard.[26]

Accordingly, we have jurisdiction in this case if the court of appeals has held differently from a prior decision of another court of appeals on an issue that should be clarified to remove uncertainty or unfairness. We believe there is such a conflict. In suppressing the alleged murder weapon for a *Miranda* violation, the court of appeals held differently from other courts of appeals that have followed *Baker v. State*, an opinion by the Court of Criminal Appeals.[27] While these other cases did not involve juveniles, the conflict requires clarification for several reasons.

First, rules governing hundreds of out-of-court investigations must provide guidance that is clear and easy for law enforcement personnel to apply;[28] variations between the rules for juveniles and adults, or between the rules in one part of the state and another, may confuse those investigations and jeopardize many future cases. Second, we do not have the luxury of waiting for a final appeal to address these issues; if evidence is improperly suppressed, double jeopardy prevents the state from

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[26] *See* TEX. CONST. art. V, § 1 ("The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof . . . ."). Because there are conflicts with Texas courts of appeals' opinions, we do not reach the question whether interlocutory appeals are within our previous holdings that conflicts with opinions of the United States Supreme Court are sufficient for jurisdiction. *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 400 (Tex. 1979); *see also Mayhew v. Caprito*, 794 S.W.2d 1, 2 (Tex. 1990); U.S. CONST. art. VI, cl. 2; TEX. CONST. art. I, § 1.

[27] 956 S.W.2d 19, 23 (Tex. Crim. App. 1997); *see Garmon v. State*, No. 07-05-0298-CR, 2007 WL 148836, at *1 n.2 (Tex. App.—Amarillo Jan. 22, 2007, pet. ref'd) (noting conflict between *H.V.* and *Baker*); *Rodriguez v. State*, 191 S.W.3d 428, 456 (Tex. App.—Corpus Christi 2006, pet. ref'd); *Brown v. State*, No. 07-03-00347-CR, 2005 WL 1742984, at *5 (Tex. App.—Amarillo July 25, 2005, no pet.); *Marsh v. State*, 115 S.W.3d 709, 715 (Tex. App.—Austin 2003, pet. ref'd). Of these, only those prior to the decision here establish conflicts jurisdiction. *See* TEX. GOV'T CODE § 22.225(c) ("This section does not deprive the supreme court of jurisdiction of a civil case . . . in which one of the courts of appeals holds differently from a *prior* decision of another court of appeals or of the supreme court . . . .") (emphasis added); *Collins v. Ison-Newsome*, 73 S.W.3d 178, 180 (Tex. 2001).

[28] *Davis v. United States*, 512 U.S. 452, 461 (1994).

appealing after a juvenile is acquitted or the case dismissed for lack of admissible evidence.[29] Finally, we are especially cognizant of rendering fairness to the litigants in a case like this involving the most serious of crimes, an alleged murder.

Despite the expansion of our conflicts jurisdiction, we remain reticent to address unsettled questions that may be clarified by developments during trial and thoughtful consideration by several intermediate courts. But the unique circumstances of juvenile proceedings — "an unlikely and sometimes perplexing hybrid of civil and criminal law"[30] — convince us that the conflicts involved here must be clarified "to remove unnecessary uncertainty in the law and unfairness to litigants."[31] Accordingly, we have jurisdiction to consider the State's appeal.

III. Did H.V. Invoke His Right to Counsel?

Miranda v. Arizona requires that suspects in custody be informed before questioning begins of their right to consult with an attorney.[32] If a suspect invokes that right, there can be no further interrogation unless the accused initiates it.[33] If *Miranda* warnings are not given or a request for

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[29] *Schall v. Martin*, 467 U.S. 253, 263 (1984); *Breed v. Jones*, 421 U.S. 519, 531 (1975); *In re J.R.R.*, 696 S.W.2d 382, 384 (Tex. 1985).

[30] *State v. C.J.F.*, 183 S.W.3d 841, 847 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

[31] TEX. GOV'T CODE § 22.225(c), (e).

[32] 384 U.S. 436, 469–70 (1966) ("[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. . . . Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires."); *see* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

[33] *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981).

counsel is ignored, any subsequent statements by the suspect cannot be introduced at trial during the prosecution's case-in-chief.[34]

These rights apply to juveniles just as they do to adults.[35] Thus, the State concedes in this case that if H.V. properly invoked his right to counsel, the second statement he made thereafter should be suppressed. The only dispute is whether he invoked that right.

In *Davis v. United States*, the United States Supreme Court established a "bright line" between suspects who *might* be asking for a lawyer and those who actually *do* ask for one, holding that only the latter have invoked their right to counsel:

> To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry. Invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning. Rather, the suspect must unambiguously request counsel. As we have observed, a statement either is such an assertion of the right to counsel or it is not. Although a suspect need not speak with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.[36]

Applying this standard, courts have held that it is not enough for a suspect to say:

- "Maybe I should talk to a lawyer";[37]

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[34] *Davis v. United States*, 512 U.S. 452, 458 (1994); *Edwards*, 451 U.S. at 487; *Miranda*, 384 U.S. at 479.

[35] *In re R.J.H.*, 79 S.W.3d 1, 4 (Tex. 2002) (citing *In re Gault*, 387 U.S. 1, 41 (1967)).

[36] *Davis*, 512 U.S. at 458–59 (internal quotations and citations omitted) (italics in original).

[37] *Id.*; *accord, Dinkins v. State*, 894 S.W.2d 330, 352 (Tex. Crim. App. 1995) ("Maybe I should talk to someone").

- "I might want to talk to an attorney";[38]
- "I think I need a lawyer";[39]
- "Do you think I need an attorney here?";[40] or
- "I can't afford a lawyer but is there anyway I can get one?"[41]

Nor is it enough for a suspect to ask to see someone other than a lawyer, such as a probation officer,[42] or a parent.[43]

At the same time, a suspect does not have to use the precise words "I want a lawyer."[44] Courts have held the right to counsel was invoked when a suspect said:

- he did not "want to make a statement at this time without a lawyer";[45]
- "Uh, yeah. I'd like to do that" in response to a question whether he understood his right to counsel;[46]

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[38] *United States v. Zamora*, 222 F.3d 756, 765–66 (10th Cir. 2000).

[39] *Burket v. Angelone*, 208 F.3d 172, 198 (4th Cir. 2000).

[40] *Mueller v. Angelone*, 181 F.3d 557, 573–74 (4th Cir. 1999); *accord*, *Soffar v. Cockrell*, 300 F.3d 588, 595 (5th Cir. 2002); *Diaz v. Senkowski*, 76 F.3d 61, 63–65 (2d Cir. 1996).

[41] *Lord v. Duckworth*, 29 F.3d 1216, 1219–21 (7th Cir. 1994); *accord*, *Soffar*, 300 F.3d at 595.

[42] *Fare v. Michael C.*, 442 U.S. 707, 724 (1979).

[43] *Dewberry v. State*, 4 S.W.3d 735, 747 (Tex. Crim. App. 1999); *Randall v. State*, 712 S.W.2d 631, 632 (Tex. App.—Beaumont 1986, pet. ref'd).

[44] *Montoya v. Collins*, 955 F.2d 279, 283 (5th Cir. 1992) ("This holding does not require a defendant to utter the magic words, 'I want a lawyer,' in order to assert his right to counsel."); *Dewberry*, 4 S.W.3d at 747 n.9 ("There are no magic words required to invoke an accused's right to counsel.").

[45] *United States v. Johnson*, 400 F.3d 187, 195 (4th Cir. 2005).

[46] *Smith v. Illinois*, 469 U.S. 91, 93, 99–100 (1984).

- "Maybe I should talk to an attorney by the name of William Evans" and proffering that attorney's business card;[47]
- "Can I get an attorney right now, man?";[48] or
- "I'd just as soon have an attorney 'cause, you know — ya'll say there's been a shooting."[49]

While police often carry printed cards to ensure precise *Miranda* warnings,[50] the public is not required to carry similar cards so they can give similarly precise responses.

The parties here disagree whether *Davis* requires us to consider H.V.'s circumstances — his youth, Bosnian extraction, and lack of previous experience with police. On this issue, the Court's opinion in *Davis* gives somewhat mixed signals. On the one hand, the Court said a statement must be "sufficiently clear[] that a reasonable police officer *in the circumstances* would understand the statement to be a request for an attorney."[51] But the Court also said invocation should not turn on the suspect's personal characteristics:

> We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who — because of fear, intimidation, lack of linguistic skills, or a variety of other reasons — will not clearly articulate their right to counsel although they actually want to have a lawyer present.[52]

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[47] *Abela v. Martin*, 380 F.3d 915, 919, 926–27 (6th Cir. 2004).

[48] *Alvarez v. Gomez*, 185 F.3d 995, 998 (9th Cir. 1999).

[49] *Kyger v. Carlton*, 146 F.3d 374, 376, 379 (6th Cir. 1998).

[50] *See, e.g.*, *Oregon v. Elstad*, 470 U.S. 298, 314–15 & n.4 (1985); *Arabzadegan v. State*, 240 S.W.3d 44, 46 (Tex. App.—Austin 2007, pet. ref'd); *Fineron v. State*, 201 S.W.3d 361, 364 (Tex. App.—El Paso 2006, no pet.).

[51] *Davis v. United States*, 512 U.S. 452, 459 (1994) (emphasis added).

[52] *Id*. at 460.

There appear to be no cases answering whether a juvenile's age is among the "variety of other reasons" courts cannot consider when deciding whether an accused has requested counsel. Long before *Davis*, the Supreme Court held that "a juvenile's age, experience, education, background, and intelligence, and . . . capacity to understand the warnings" must be considered when deciding whether a juvenile waived *Miranda* rights.[53] As the question here is not whether H.V. *waived* his right to counsel but whether he *invoked* it, it is not entirely clear which rule applies.

But we need not decide in this case whether the court of appeals erred in considering H.V.'s age, as we agree with its ultimate conclusion. It is hard to construe H.V.'s statement that he "wanted his mother to ask for an attorney" as anything other than "an expression of a desire for the assistance of an attorney."[54] This is not a case in which H.V. simply wanted to see his mother; the only reason he said he wanted her was for the purpose of getting him an attorney. If he wanted private counsel, his request would have been technically correct, as his age at least hindered if it did not prevent him from doing so himself.[55]

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[53] *Fare v. Michael C.*, 442 U.S. 707, 725 (1979); *see Delao v. State*, 235 S.W.3d 235 (Tex. Crim. App. 2007).

[54] *Davis*, 512 U.S. at 459.

[55] *See In re D.A.S.*, 951 S.W.2d 528, 529 (Tex. App.—Dallas 1997)("[A] minor does not have the legal capacity to employ an attorney . . . ."), *rev'd on other grounds*, 973 S.W.2d 296 (Tex. 1998); *accord, Lee v. Colorado City, Texas*, No. 04-CV-00028, 2004 WL 524923 *2 n.2 (N.D. Tex. Mar. 4, 2004); *Francine v. Dallas Indep. Sch. Dist.*, No. 02-CV-1853, 2003 WL 21501838, at *2 (N.D. Tex. June 25, 2003); *Byrd v. Woodruff*, 891 S.W.2d 689, 704 (Tex. App.—Dallas 1994, writ denied); *In re Martel*, No. 12-06-00397-CV, 2007 WL 43616, at *3 (Tex. App.—Tyler Jan. 8, 2007, orig. proceeding); *Coleson v. Bethan*, 931 S.W.2d 706, 712 (Tex. App.—Fort Worth 1996, no writ); *see also Dairyland County Mut. Ins. Co. of Tex. v. Roman*, 498 S.W.2d 154, 158 (Tex. 1973) (holding contract of a minor, while not void, is voidable at minor's election). The dissent cites a nineteenth-century case for the rule that a minor can employ an attorney as a "necessary" because "it would be unreasonable to deny him the power to secure the means of defending himself." *Askey v. Williams*, 11 S.W. 1101, 1101 (Tex. 1889). We need not decide today whether that case survives the rule announced 78 years later that juveniles have a constitutional right to counsel, *see In re Gault*, 387 U.S. 1 (1967); we merely note that it remains the duty of a parent in the first instance to pay for such necessaries. *See* TEX. FAM. CODE § 151.001(c) ("A parent who fails to discharge the duty of support is liable to a person who provides necessaries to those

This case is a close one because, when the magistrate followed up by instructing H.V. that only he could ask for an appointed attorney, H.V. never did. But while ambiguous requests for counsel may be clarified by further questioning,[56] unambiguous ones cannot:

> No authority, and no logic, permits the interrogator to proceed . . . on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all.[57]

As the objective circumstances surrounding H.V.'s statement rendered it an unambiguous request for an attorney, further "clarification" could not change it.

Accordingly, we agree with the courts below that H.V.'s second statement to the police was properly suppressed.

IV. Should the Gun Have Been Suppressed?

The court of appeals held that suppression of H.V.'s statement also required suppression of the gun as "fruits of the poisonous tree," a legal doctrine first recognized in the context of the Fourth Amendment.[58] But both the United States Supreme Court and the Court of Criminal Appeals have

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to whom support is owed.").

[56] *Davis*, 512 U.S. at 453.

[57] *Smith v. Illinois*, 469 U.S. 91, 98–99 (1984).

[58] *Wong Sun v. United States*, 371 U.S. 471, 487 (1963); *Kothe v. State*, 152 S.W.3d 54, 60 (Tex. Crim. App. 2004); *see* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

rejected this doctrine in the Fifth Amendment context of physical evidence obtained after failing to give *Miranda* warnings.[59]

The court of appeals held otherwise, distinguishing cases in which *Miranda* rights were not read from cases like this one in which an invocation of those rights was ignored.[60] That distinction was expressly rejected by the Court of Criminal Appeals in *Baker v. State*:

> Both *Tucker*[61] and *Elstad*[62]involved the failure to give the required warnings rather than the failure to scrupulously honor warnings given. Neither the Supreme Court nor this Court has addressed whether the *Tucker*/*Elstad* rule applies to the fruits of statements made in the latter context. But the principle is the same: mere noncompliance with *Miranda* does not result in a carryover taint beyond the statement itself . . . . We hold that the *Tucker*/*Elstad* rule applies to the failure to scrupulously honor the invocation of *Miranda* rights. In the absence of actual coercion, the fruits of a statement taken in violation of *Miranda* need not be suppressed under the "fruits" doctrine . . . .[63]

The court of appeals pointed out that *Elstad* made a distinction between unread rights and ignored rights in a footnote.[64] But *Elstad* was not based on that distinction, but on reasoning that

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[59] *United States v. Patane*, 542 U.S. 630, 634 (2004) (plurality opinion); *id.* at 645 (Kennedy, J., concurring); *Baker v. State*, 956 S.W.2d 19, 23–24 (Tex. Crim. App. 1997).

[60] 179 S.W.3d 746, 758.

[61] *Michigan v. Tucker*, 417 U.S. 433 (1974).

[62] *Oregon v. Elstad*, 470 U.S. 298 (1985).

[63] *Baker*, 956 S.W.2d at 23–24.

[64] *See Elstad*, 470 U.S. at 312–13 n.3 (stating that as current case involved mere failure to give *Miranda* warnings, "[l]ikewise inapposite are the cases the dissent cites concerning suspects whose invocation of their rights to remain silent and to have counsel present were flatly ignored while police subjected them to continued interrogation"). *But see Oregon v. Hass*, 420 U.S. 714, 723 (1975) (refusing to distinguish between unread rights and ignored rights when allowing statements that violate *Miranda* to be used for impeachment).

Miranda does not involve a constitutional violation.[65] The court of appeals also pointed out that in 2000 the Supreme Court abandoned its characterization of *Miranda* as a prophylactic rather than a constitutional rule.[66] But the Court held four years later that this did not change the rule that physical evidence was admissible even if gained from questioning that violated *Miranda*.[67]

More relevant to the question here is a different principle stated by the Supreme Court in *Elstad* and since: the Self-Incrimination Clause concerns compelled testimony, not physical evidence.[68] The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case *to be a witness against himself*";[69] thus, there can be no Fifth Amendment violation when a person's testimony is excluded.[70] Physical evidence that does not compel a defendant to testify against himself cannot be a violation of the Fifth Amendment rights that *Miranda* protects, which is precisely what the Supreme Court held in 2004.[71]

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[65] *See Elstad*, 470 U.S. at 306–07 ("[A] procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment . . . . The *Miranda* exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself . . . *Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.").

[66] *See Dickerson v. United States*, 530 U.S. 428, 444 (2000) ("In sum, we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively.").

[67] *See United States v. Patane*, 542 U.S. 630, 643 (2004) (plurality opinion); *id.* at 645 (Kennedy, J., concurring).

[68] *Elstad*, 470 U.S. at 304 ("The Fifth Amendment, of course, is not concerned with nontestimonial evidence.").

[69] U.S. CONST., amend. V (emphasis added).

[70] *Patane*, 542 U.S. at 643 (plurality opinion) ("Introduction of the nontestimonial fruit of a voluntary statement, such as respondent's Glock, does not implicate the Self-Incrimination Clause. The admission of such fruit presents no risk that a defendant's coerced statements (however defined) will be used against him at a criminal trial."); *id.* at 645 (Kennedy, J., concurring) ("Admission of nontestimonial physical fruits . . . does not run the risk of admitting into trial an accused's coerced incriminating statements against himself.").

[71] *Id.* at 634.

The court of appeals expressed concern that suppressing testimonial statements but not physical evidence might encourage police to reject a request for counsel deliberately in the hope of getting something they could use.[72] But evidence obtained through deliberate violations of constitutional rights is usually inadmissible on that basis alone.[73]

In this case, H.V.'s counsel does not argue that his disclosure of the gun's location was involuntary or coerced for any reason other than violation of his *Miranda* request for counsel. The warnings and invocation of counsel here all occurred in court before a magistrate without police involvement, so there could have been no police coercion.[74] Because violations of *Miranda* do not justify exclusion of physical evidence resulting therefrom, we hold the courts below erred in excluding the gun that brought about Daniel Oltmanns's death.

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[72] 179 S.W.3d 746, 763; *see also Patane*, 542 U.S. at 645 (Souter, J., dissenting) ("The issue actually presented today is whether courts should apply the fruit of the poisonous tree doctrine lest we create an incentive for the police to omit *Miranda* warnings.").

[73] *Missouri v. Seibert*, 542 U.S. 600, 620–21 (2004) (Kennedy, J., concurring); *Patane*, 542 U.S. at 639 (plurality opinion) (stating that fruits "of actually compelled testimony" must be excluded); *Oregon v. Hass*, 420 U.S. 714, 723 (1975) ("One might concede that when proper *Miranda* warnings have been given, and the officer then continues his interrogation after the suspect asks for an attorney, the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material . . . . If, in a given case, the officer's conduct amounts to an abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness."); *cf. Fellers v. United States*, 540 U.S. 519, 524 (2004) (requiring suppression of information gained by deliberate violation of suspect's Sixth Amendment right to counsel). *But see Moran v. Burbine*, 475 U.S. 412, 423–24 (1986) ("Granting that the 'deliberate or reckless' withholding of information is objectionable as a matter of ethics, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.").

[74] *See* TEX. FAM. CODE § 51.095(a)(1) (providing for admissibility of statements by a child when a magistrate "has examined the child independent of any law enforcement officer or prosecuting attorney").

Accordingly, we affirm the judgments below to the extent they exclude H.V.'s second statement to police, reverse the judgments to the extent they exclude the gun found as a result, and remand this case to the trial court for further proceedings consistent with this opinion.

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Scott Brister
Justice

OPINION DELIVERED: April 11, 2008