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

CHIEF JUSTICE JEFFERSON, joined by JUSTICE WAINWRIGHT and JUSTICE GREEN, and joined by JUSTICE HECHT as to parts I, III, and V, concurring and dissenting.

We cannot construe H.V.'s statement that he "wanted his mother to ask for an attorney" without first addressing the considerable body of precedent on this subject. If we were writing on a clean slate, I would agree that the statement invokes his right to counsel. But the Supreme Court has held that anything short of an unambiguous request will not suffice. *Davis v. United States*, 512 U.S. 452, 459 (1994)("[A] statement either is such an assertion of the right to counsel or it is not."). "Maybe I should talk to a lawyer" is not an unambiguous invocation of right to counsel. *Davis*, 512 U.S. at 462. Nor does one invoke the right by saying "I think I need a lawyer," or "I can't afford a lawyer but is there anyway I can get one?" ___ S.W.3d ___, ___ (citing *Burket v. Angelone*, 208 F.3d 172, 198 (4th Cir. 2000); *Lord v. Duckworth*, 29 F.3d 1216, 1219-21 (7th Cir. 1994)). In light of these precedents, H.V.'s statement was ambiguous, and the magistrate properly attempted to

clarify H.V.'s wishes. Once she did so, it became clear that H.V. declined counsel. Because the Court concludes otherwise, I respectfully dissent from part III of its opinion.

I

In *Flamer v. Delaware*, 68 F.3d 710, 725 (3d Cir. 1995), the Third Circuit concluded that an adult defendant's "request to call his mother 'to inquire about . . . possible representation' . . . was insufficient to trigger *Edwards* under the Supreme Court's decision in *Davis*." Then-Judge Alito, writing for the court, concluded:

> [T]he [*Davis*] Court held that *Edwards* applies only if a defendant 'unambiguously' requests counsel. '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,' *Edwards* does not come into play. Here, Flamer's request to telephone about possible representation 'failed to meet the requisite level of clarity' that *Davis* demands.

Id. (citations omitted). Although *Flamer* involved a request made at an arraignment, rather than prior to custodial interrogation, the court's analysis of *Davis* and *Edwards* would be equally applicable in either context.

The precedent in this area is muddled,[1] but the Supreme Court's directive seems relatively clear, and lower courts have followed suit. It is hard to see a distinction between Flamer's request to call his mother "to inquire about . . . possible representation" and H.V.'s statement that he

[1] For example, one court concluded that "Can I ask for a lawyer now?" was not an unambiguous request for counsel, while another held that "Can I call my attorney?" was. *Compare Loredo v. State*, 130 S.W.3d 275, 284-85 (Tex. App.—Hous. [14 Dist.] 2004, pet. ref'd) (deciding that party's "question about a lawyer was not an unambiguous invocation of his right to counsel"), *certificate of appealability denied*, *Loredo v. Quarterman*, No. H-06-2138, 2007 U.S. Dist. LEXIS 63208, 49-51 (S.D. Tex. Aug. 23, 2007) (concluding, on habeas review, that Texas state court's decision did not violate "established Supreme Court precedent or constitute[] an unreasonable determination of the facts in light of the evidence presented in state court") *with United States v. De la Jara*, 973 F.2d 746, 752 (9th Cir. 1992) (holding that question "clearly invoked the right to counsel").

"wanted his mother to ask for an attorney." *Id.*; *see also Davis*, 512 U.S. at 459; *State v. Hyatt*, 566 S.E.2d 61, 71 (N.C. 2002) (defendant's request to speak to his father and statement that his father wanted him to have an attorney present "[did] not, as a matter of law, constitute an unambiguous request for counsel"). The Court has enumerated examples of statements that courts have held are insufficient to invoke the right to counsel as well as examples of those that sufficed. The statement here is more like the former examples[2] than the latter. As *Davis* held, interrogations need not cease in the face of an ambiguous or equivocal reference to an attorney that "might" invoke the right to counsel. *Davis*, 512 U.S. at 459; *see also Dinkins v. State*, 894 S.W.2d 330, 351 (Tex. Crim. App. 1995) ("An invocation must be clear and unambiguous; the mere mention of the word 'attorney' or 'lawyer' without more, does not automatically invoke the right to counsel."). Unless a suspect actually requests an attorney, questioning may continue. *Davis*, 512 U.S. at 462.

The magistrate appropriately attempted to clarify H.V.'s ambiguous statement. *Davis*, 512 U.S. at 461 (holding that, "when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney" but declining to adopt a rule requiring clarifying questions). She testified that, before administering the warnings, she asked the investigating officers to leave the room, and her conversation with H.V. was private. She advised him of his rights and "made sure that he

[2] To those, I would add: *Clark v. Murphy*, 331 F.3d 1062, 1066 (9th Cir. 2003) (holding that "I think I would like to talk to a lawyer" was ambiguous; thus, on habeas review, Arizona court's determination neither violated Supreme Court precedent nor was objectively unreasonable); *Diaz v. Senkowski*, 76 F.3d 61, 63 (2d Cir. 1996) (concluding that "I think I want a lawyer" and "[d]o you think I need a lawyer" were ambiguous within the meaning of *Davis*); *United States v. Ogbuehi*, 18 F.3d 807, 813 (9th Cir. 1994) (noting that defendant's question, "Do I need a lawyer" or "Do you think I need a lawyer" did not "rise to the level of even an equivocal request for an attorney").

understood" them and that he "understood the English language and spoke it and read it. I made sure he understood what he was there for." H.V. said he understood his rights. He then asked to talk to his mother. The magistrate testified:

Magistrate: I explained to him that at that time that we were here in the, we were here down at the facility and that Detective Carroll was asking for him to make a statement and that he had essentially three options at that time: That he could ask for an attorney, that he could make a statement to Detective Carroll, or he could choose not to make any statement.

Ass't D.A.: Did you inform him he had the right to hire an attorney if he chose to do so?

Magistrate: I did.

Ass't D.A.: Did you inform him he had the right to have counsel appointed for him if he couldn't afford one?

Magistrate: I did.

Ass't D.A.: What was his response to this information?

Magistrate: He said he wanted to talk to his mother and wanted her to ask about an attorney.

Ass't D.A.: And what was your response as a magistrate to that question?

Magistrate: I told him that at this time his mother was not present, that we needed to finish up what we were doing there, and that meant that he needed to make a decision about asking for an attorney or making a statement or not making a statement; that those were the three things at that point that we could take care of at that point.

. . .

Ass't D.A.: Knowing that, what did you do after the Respondent asked about talking to his mother about an attorney?

Magistrate: I told him, we also had a brief conversation, he asked, well, I explained to him that if he chose not to make a statement at that time, that was fine, that he was currently being held in custody for tampering with physical evidence, and that he was being under investigation for murder, and that if he wanted to speak to his mother, that he

would be taken back down to the Juvenile facility at that time. I said, I don't know what timeframe would be involved as far as your being able to see your mother.

Ass't D.A.: Once you briefed him on those rights, what was his response?

Magistrate: That he wanted to make a statement to Detective Carroll.

Ass't D.A.: Did he mention anything about his age?

Magistrate: He did say I'm only 16, and I said, I understand that, H., but I think you're very well-educated and articulate, and you understand everything, and if you want to ask for an attorney, I think you can do that. I mean, you have the right to do that for yourself.

. . .

Ass't D.A.: And what was his response?

Magistrate: That he would talk to Detective Carroll.

Ass't D.A.: And were you fully convinced that that was his intention at that time?

Magistrate: If I hadn't been fully convinced that that was what he wanted, I wouldn't have let him do it.

Her notes reflected the following:

> [H.] was very articulate and appeared well-educated. He was very aware of his circumstances and the charges. After reading the first mag warning, I explained that he could ask for an attorney, choose not to make a statement, or choose to speak to Detective Carroll. He stated he wanted to call his mother. I told him that at this time that was not an option. He said he wanted his mother to ask for an attorney. I explained to him that he would have to be the one to ask for an attorney. He stated, but I'm only 16. I said yes, but if he wanted an attorney, he would have to ask for one. I again told him he had three options: Ask for an attorney, make a statement to Detective Carroll, or not to make a statement. At that time, he said he would speak to Detective Carroll.

Thus, by the end of the exchange, H.V. made it clear that he wanted to speak to law enforcement officers and thereafter gave a statement. He again met privately with the magistrate,

who read his statement and listened as H.V. subsequently read it aloud. He made a single correction—adding the word "shoes" where it had been omitted—and signed the statement. At no time during this process did he unambiguously invoke his right to counsel.

II

H.V. admits that he knew of his rights, having been advised of them earlier in the day, but contends that he did not know how to invoke them. He urges the Court to examine the "totality of the circumstances," including his age, when deciding whether his requesting his mother to seek counsel should be construed as his own request. The Court, however, sidesteps the issue, noting only that because it agrees with the court of appeals' ultimate conclusion, it "need not decide in this case whether the court of appeals erred in considering H.V.'s age." By failing to decide whether H.V.'s age may be considered, however, the Court does a disservice both to H.V. and to future litigants: the Court does not explain why taking H.V.'s age into account would apparently not affect the outcome here,[3] nor does the Court provide any guidance to courts grappling with this issue in future cases.

While I agree that it is "not entirely clear which rule applies," ___ S.W.3d at ___, I would hold that a juvenile's age may be taken into account when deciding whether he invoked his right to counsel. In *Fare v. Michael C.*, 442 U.S. 707, 725 (1979), the Supreme Court held that courts evaluating a juvenile's waiver of his *Miranda* rights must examine the totality of the circumstances, including a "juvenile's age, experience, education, background, and intelligence, and . . . whether he

[3] The Court's conclusion that H.V.'s age "at least hindered if it did not prevent him" from retaining private counsel suggests that, in fact, the Court does take his age into account to conclude that he invoked his right to counsel. ___ S.W.3d at ___.

has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights."

Davis, decided after *Fare*, established an objective test for invoking those rights. *Davis*, 512 U.S. at 459. One of the driving forces behind *Davis*'s objective test, however, was the desire to provide a clear rule for police officers during interrogations. The Supreme Court balanced the *Edwards* test with an adult suspect's invocation of his rights and concluded:

> In considering how a suspect must invoke the right to counsel, we must consider the other side of the Miranda equation: the need for effective law enforcement. Although the courts ensure compliance with the *Miranda* requirements through the exclusionary rule, it is police officers who must actually decide whether or not they can question a suspect. The *Edwards* rule — questioning must cease if the suspect asks for a lawyer — provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information. But if we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney, this clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong. We therefore hold that, after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.

Id. at 461. But under Texas law, magistrates, not law enforcement officers, give *Miranda* warnings to juveniles.[4] TEX. FAM. CODE § 51.095. To be admissible in evidence, statements given by juveniles must be signed in the presence of the magistrate, generally without any law enforcement

[4] Thus, the standard must be one of a "reasonable magistrate," not a "reasonable police officer." That is, the *Davis* test for juveniles in Texas must be whether the statement is "sufficiently clear[] that a reasonable [magistrate] in the circumstances would understand the statement to be a request for an attorney." *Davis*, 512 U.S. at 459.

officers or prosecuting attorneys present.[5] *Id*. § 51.095(a)(1)(B)(i). In contrast to warnings administered by police officers during the heat of interrogation, then, juvenile warnings administered before police questioning ever begins, by an experienced magistrate who is obviously aware of the juvenile's age, do not raise the same concerns cited by the *Davis* court. In this context, a magistrate's consideration of a suspect's age would not "unduly hamper[] the gathering of information." *Davis*, 512 U.S. at 461.

Moreover, *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004), in which the Supreme Court held that a suspect's age or experience need not be considered in determining whether he is in custody, does not necessarily foreclose consideration of a juvenile's age when determining whether he invoked his right to counsel. *Yarborough* did not overrule *Fare*, and at least one Justice who joined *Yarborough* noted that age could be considered as part of the objective custody inquiry.[6] *See Yarborough*, 541 U.S. at 669 (O'Connor, J., concurring) (noting that, despite objective nature of inquiry, "[t]here may be cases in which a suspect's age will be relevant to the 'custody' inquiry under *Miranda*"); *see also People v. Roquemore*, 31 Cal. Rptr. 3d 214, 223 (Cal. Ct. App. 2005) (applying *Fare* factors but nonetheless concluding that eighteen-year-old's statement "Can I call a lawyer or

---

[5] A magistrate may require the presence of a bailiff or a law enforcement officer if the magistrate determines that the presence of the bailiff or law enforcement officer is necessary for the personal safety of the magistrate or other court personnel, provided that the bailiff or law enforcement officer does not carry a weapon in the presence of the child. TEX. FAM. CODE § 51.095(a)(1)(B)(i).

[6] The *Fare* court explained at length why, contrary to the California Supreme Court's conclusion, a request to speak to his probation officer did not invoke a juvenile's right to counsel; if the juvenile's age had been irrelevant to the inquiry, certainly the Supreme Court would have said so. *Fare*, 442 U.S. at 723-24 ("[S]ince a probation officer does not fulfill the important role in protecting the rights of the *accused juvenile* that an attorney plays, we decline to find that the request for the probation officer is tantamount to the request for an attorney.") (emphasis added).

my mom to talk to you?" was not an unambiguous request for counsel); *Dinkins*, 894 S.W.2d at 351 (applying *Davis* but nonetheless concluding that "[w]hen reviewing alleged invocations of the right to counsel, we typically look at the totality of the circumstances"). While *Davis*, silent on whether *Fare*'s factors should come into play, gives somewhat mixed signals on this point, I would hold that age should be considered when evaluating a juvenile's invocation of his right to counsel, particularly in light of the statutory warning procedure required for juveniles in Texas.

III

But even if age is a pertinent consideration, the circumstances of this case—H.V.'s youth, his Bosnian extraction, and his lack of prior experience with the police—do not compel a different result. The magistrate testified that H.V., then three months shy of his seventeenth birthday, was "very articulate and appeared well educated." *Cf. Yarborough*, (O'Connor, J., concurring) (noting that "17 1/2-year-olds vary widely in their reactions to police questioning, and many can be expected to behave as adults"). She noted that he read and understood the English language and was a junior at a local high school. He had earlier that day been taken into custody for another interrogation, and, after having his rights explained to him at that time, chose to waive them. In this case, then, none of these factors weigh in favor of a conclusion that H.V. invoked his right to counsel.

One can imagine circumstances, however, in which a defendant's youth would be significant. Here, H.V. was near majority. What if he had been six years old? *See* Barry C. Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 99 (2006) (noting that while juveniles aged sixteen and older exhibited an understanding of *Miranda* warnings on a par with adults, juveniles under fifteen frequently misunderstood

warnings). Ignoring this fact would lead to the ironic result that the younger the accused, the less likely he would be to invoke his constitutional rights. *Davis* drew a "bright line" between suspects who might be asking for a lawyer and those who actually do, but that test leaves room for consideration of a juvenile's age.

IV

Finally, both H.V.[7] and the Court erroneously conclude that H.V.'s age "at least hindered if it did not prevent him from [hiring private counsel] himself." ___ S.W.3d at ___. We have long recognized (and never disavowed)[8] that minors may retain counsel in criminal proceedings, and such contracts are neither void nor voidable. *Askey v. Williams*, 11 S.W. 1101, 1101 (Tex. 1889) ("The contracts of an infant for necessaries are neither void nor voidable, and we are of opinion that the services of an attorney should be held necessary to an infant, where he is charged by an indictment with crime. His life or his liberty and reputation are at stake, and it would be unreasonable to deny him the power to secure the means of defending himself."); *see also Johnson v. Newberry*, 267 S.W. 476, 478 (Tex. Comm'n App. 1924, judgm't adopted) (noting that "'reasonable attorney fees in

[7] H.V. asserts that his statement to the magistrate was "an effort to explain . . . that, while he desire[d] counsel, he [was] incapable of obtaining an attorney being merely a sixteen year old."

[8] It is curious that the Court, citing only court of appeals and federal district court opinions, questions whether *Askey* is still good law. Not only is *Askey* precedent from our Court, but we reaffirmed the rule thirty-five years later in *Johnson v. Newberry*, and leading commentators cite *Askey* as accurately stating the Texas rule. *See* WILLIAM V. DORSANEO III, ET AL., 14 TEXAS LITIGATION GUIDE § 210A.04 (2007); 1 BARRY P. HELFT & JOHN M. SCHMOLESKY, TEXAS CRIMINAL PRACTICE GUIDE § 1.101 (2008); JOHN D. MONTGOMERY, ET AL., 3 TEXAS FAMILY LAW: PRACTICE & PROCEDURE U2.03 (2d ed. 2007). And the venerable policy the rule promotes is as forceful today as it was in 1889. Thus, it is unclear why a minor's constitutional right to counsel, recognized by the Supreme Court in 1967, would weaken, rather than strengthen this rule. Nor is this tenet affected by a parent's duty to pay for such necessaries. *See* JOSEPH M. PERILLO, 7 CORBIN ON CONTRACTS § 27.8 (rev. ed. 2002) (noting that "[a]n infant is liable in quasi contract for necessaries furnished the infant" and "[t]he basis of this liability is thus considerably different from the liability of *parents* for necessaries furnished their children").

defense of a criminal action brought against an infant are necessaries'" but if agreed-upon price is excessive, contract is enforceable only to the extent of "'a just compensation for the necessaries received by him'") (quoting *Askey*, 11 S.W. at 1101). In any event, it is not necessary to revisit our established caselaw, because the particular warning given here advised H.V. (as mandated by the Family Code) that he had a right to appointed counsel if he was "unable to employ an attorney." TEX. FAM. CODE § 51.095. Thus, even if H.V. believed that his age prevented him from hiring private counsel himself, he was told that he could speak with a court-appointed attorney.

V

I agree that we have jurisdiction over this case and join parts I and II of the Court's opinion. I would not reach the suppression issue decided by the Court in part IV. Because H.V. did not unambiguously invoke his right to counsel, I would reverse the court of appeals' judgment suppressing the statement and the gun and therefore dissent from that part of the Court's judgment that holds otherwise.

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: April 11, 2008