By
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

Juvenile's request for his mother to get a lawyer considered unequivocal request for counsel during magistrate admonishments. [In the Matter of H.V.](05-2-14)

On March 17, 2005, the Fort Worth Court of Appeals held that a juvenile's request to call his mother to be an unambiguous request for an attorney when request was followed by statement that he wanted his mother to ask for an attorney.

05-2-14. In the Matter of H.V., No. 2-04-029-VC, 2005 Tex.App.Lexis 2088, (Tex.App.– Fort Worth) 3/17/05.

Facts: This is an interlocutory appeal by the State from the juvenile court's order granting a motion to suppress a confession and a gun obtained as a result of that confession. n1 In three points, the State contends that (1) Appellee H.V.'s second written statement should not have been suppressed because H.V. did not make an unequivocal request for counsel, (2) there was no justification for suppression of the firearm as alleged "fruit" of H.V.'s second written statement, and (3) section 52.02 of the Texas Family Code did not provide a basis to suppress either H.V.'s second written statement or the fruit of that statement.

Held: Affirmed

Opinion: On September 10, 2003, police began investigating the death of Daniel Oltmanns, a North Crowley High School student, whose body was found at a construction site. Daniel's wounds revealed that he had been shot in the head with a small caliber gun.

The next day, police and school administrators began interviewing students at North Crowley High School about the incident. A student at another high school notified the police that H.V. had purchased a gun a few days before the victim was shot. n2 On September 12, 2003, an officer questioned H.V. at the high school, and he stated that he thought that Daniel might have owed somebody money for drugs and that this debt may have caused his death.

> n2 During the week following the initial investigation, the police spoke to witnesses who saw H.V. purchase the gun.

Detective Cheryl Johnson said that she wanted to take H.V. from school to the Youth Division and question him, and he agreed to go. Upon arrival, Municipal Judge [*3] Alicia Johnson read H.V. the *Miranda n3* warnings. H.V.'s only concern was that his parents did not know where he was, so Detective Johnson made an effort to contact H.V.'s parents. Detective Johnson interviewed H.V. regarding the gun or his knowledge of the gun. H.V. admitted having bought a gun but said that he had returned it to the

seller before Daniel's body was found. Detective Johnson did not believe H.V.'s statement and suspected that the gun was at H.V.'s house. After H.V. and Judge Johnson signed H.V.'s statement, Detective Johnson took H.V. back to North Crowley High School and then drove to H.V.'s house, where she had requested that Officer Petrovic meet her. n4

> n3 *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*.
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> n4 Detective Johnson requested Officer Petrovic's presence because she knew that H.V. had moved to the United States from Bosnia when he was in the fifth grade and suspected that she might need a translator when speaking with H.V.'s parents.

[*4]

By the time the police arrived at H.V.'s house, H.V. was home from school, and H.V.'s father was home also. n5 Police asked for consent to search the home. Officer Petrovic translated for Detective Johnson as she introduced herself to H.V.'s father, explained that she was investigating the murder of Daniel Oltmanns, stated that officers had spoken with H.V. that morning and that he admitted to having bought a weapon, and said that she would like to search the house for the weapon. H.V.'s father initially gave his consent but then spoke to his wife by phone and withdrew his permission to search the house. The police secured the residence while Detective Johnson went to obtain a search warrant.

> n5 H.V. made a phone call after Detective Johnson returned him to the school, and then he left campus.

The officers securing the house told H.V. and his father that they could not reenter the house. Despite this instruction, H.V. and his father tried a couple of times to gain access to the house but then left in a pickup [*5] truck. Later, an off-duty officer, who lived near H.V., spotted H.V. jumping over H.V.'s backyard fence. H.V. was carrying a rolled-up piece of carpet, and the off-duty officer told H.V. to drop the carpet and return to the front yard. n6 H.V. complied. The officers securing the house noticed that the carpet appeared to have blood on it. They arrested H.V. for tampering with evidence, handcuffing him and placing him in the back of a patrol unit. H.V. spent approximately ninety minutes in the patrol car before he arrived at the juvenile processing office downtown. Before being transported to the juvenile processing office, H.V. made a spontaneous statement: "I didn't kill anyone. He shot himself with my gun." n7

> n6 Officers did not see H.V. enter the house; the off-duty officer spotted him as he was leaving the residence.
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> n7 The trial court did not suppress this statement.

After H.V. arrived at the juvenile processing office, he was interviewed by Municipal Judge Bendslev around 7:30 p.m. and was given [*6] *Miranda* warnings. Judge Bendslev appeared as a witness at the hearing on H.V.'s motion to suppress. She testified as follows:

> Q. Okay, and at this point, you read him his rights: He had the right to remain silent, right to an attorney, okay?
>
> A. (Nods affirmatively).
>
> Q. And it's at this point when he said he didn't know; he would have to call his mom?
>
> . . . .

A. He said, *I want to call my mother.*

Q. Okay.

A. *I want her to ask for an attorney.*

Q. Okay, and you said that he could not call his mother?

A. I said at that point I was in the process of giving him his magistrate warnings, and that calling his mother was not an option at that time.

Q. Okay, and you again advised him that he could ask for an attorney, make a statement, or not make a statement?

A. That's correct.

Q. And it's at this point that he said, but I'm only 16?

A. That's correct.

Q. As in, I'm only 16; I don't know how to contact an attorney?

A. No, I think he - - I'm not sure what he meant when he said that. I mean, my impression was that he thought because of his age that he wasn't allowed to ask for an attorney, and I indicated to him that that was not a problem, that he was 16 and he [*7] could ask for an attorney if he wanted to ask for an attorney.

Q. And is it possible that he simply did not know the manner in which one goes about contacting an attorney?

A. It's possible. [Emphasis added.]

Judge Bendslev testified that, after H.V. said he wanted to talk to his mother; he wanted her to ask for an attorney,

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 time frame would be involved as far as your being able to see your mother.

Thereafter, H.V. agreed to make a statement, and Detective Carroll sat down to talk with H.V. about Daniel's death. H.V. inquired about the "worst-case scenario" of what could happen to him, and Detective Carroll said that was for the court to decide. H.V. then gave his version of the events surrounding Daniel's death, stating that it was an accident and [*8] that Daniel had shot himself. H.V. drew a diagram of where he had disposed of the gun, and police subsequently located it. After H.V. signed his statement, along with the judge, police secured a warrant to arrest him for murder.

Based on the above testimony, the trial court made the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On September 12, 2003, Fort Worth Police officers attempted to secure a search warrant for the Respondent's residence. During that time, the Respondent and his father were advised not to re-enter the residence pending the search. Respondent was arrested after exiting his residence with a rug.

2. Respondent was placed in the back of a patrol car for approximately one hour. He was later taken out to remove his handcuffs. The Respondent was then placed back into the patrol car for approximately another thirty minutes before being transported to the Fort Worth Police Department to be interviewed by Detective Carroll. At no point while Respondent was in the patrol car was any attempt made by Fort Worth Police to contact Respondent's parents as required by Texas Family Code Section 52.02.

3. Upon arrival, Fort Worth Magistrate [*9] Judge Gabrielle Bendslev interviewed the Respondent, and advised him of the warning required by Texas Family Code Section 51.095.

4. *In response to questioning by Judge Bendslev regarding an attorney, the Respondent advised that he was only sixteen, that he did not know how to obtain an attorney, and that he wanted to contact his mother because he "wanted his mother to ask for an attorney."*

5. Judge Bendslev advised the Respondent that he was not entitled to contact his mother at that time.

6. Following this, Respondent indicated that he would speak with police.

7. Respondent made a written statement, Exhibit 4, that among other things, indicated the location of the firearm involved in the death of Daniel Oltmanns. The police were able to locate the weapon.

CONCLUSIONS OF LAW

. . . .

3. *The Respondent's request to speak to his mother was an unambiguous request for counsel.*

4. *Because of the foregoing conclusions of law, and considering the totality of the circumstances, the statement made by Respondent, Exhibit 4, following his arrest was obtained improperly and is inadmissible in trial.*

5. The firearm recovered by the Fort Worth Police Department was [*10] only obtained as a result of improper questioning of Respondent, and therefore, is a "fruit of the poisonous tree" and is likewise inadmissible. [Emphasis added.]

III. INVOCATION OF RIGHT TO COUNSEL

In its first point, the State contends that the trial court erred by concluding that H.V.'s comments to Judge Bendslev constituted an unequivocal invocation of counsel. Specifically, the State argues that the trial court misapplied the law to the facts when it suppressed H.V.'s second written statement because its conclusion--that H.V. unambiguously invoked his right to counsel--is incorrect as a matter of law. H.V. responds that the trial court properly concluded that he made an unambiguous request for counsel, which should have ended the interview, when H.V. requested to speak to his mother so that she could ask for

an attorney.

A. Standard of Review for Motion to Suppress

We review a trial court's ruling on a motion to suppress evidence under a bifurcated standard of review. *Carmouche v. State, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000)*; *Guzman v. State, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)*. In reviewing the trial court's [*11] decision, we do not engage in our own factual review. *Romero v. State, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990)*; *Best v. State, 118 S.W.3d 857, 861 (Tex. App.--Fort Worth 2003, no pet.)*. At a suppression hearing, the trial judge is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *Ross v. State, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000)*. Therefore, we give almost total deference to the trial court's rulings on (1) questions of historical fact and (2) application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor. *Johnson v. State, 68 S.W.3d 644, 652-53 (Tex. Crim. App. 2002)*; *Best, 118 S.W.3d at 861-62*. However, we review de novo a trial court's rulings on mixed questions of law and fact if they do not turn on the credibility and demeanor of witnesses. *Johnson, 68 S.W.3d at 652-53*.

B. Law Regarding Unambiguous Request for Counsel

Prior to a custodial interrogation, a suspect must be advised that he has a right to consult with an attorney. *Miranda, 384 U.S. at 467-68, 86 S. Ct. at 1624-25.* [*12] Interrogation must cease immediately if the suspect states that he wants an attorney. *Id. at 474, 86 S. Ct. at 1628*; *see also Edwards v. Arizona, 451 U.S. 477, 485, 101 S. Ct. 1880, 1885, 68 L. Ed. 2d 378 (1981)*; *McCarthy v. State, 65 S.W.3d 47, 51 (Tex. Crim. App. 2001)*, *cert. denied*, *536 U.S. 972, 153 L. Ed. 2d 862, 122 S. Ct. 2693 (2002)*; *Dinkins v. State, 894 S.W.2d 330, 350 (Tex. Crim. App. 1995)*, *cert denied*, *516 U.S. 832, 133 L. Ed. 2d 59, 116 S. Ct. 106 (1995)*. A request for counsel must be unambiguous, meaning the suspect 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." *Davis v. United States, 512 U.S. 452, 459, 114 S. Ct. 2350, 2355, 129 L. Ed. 2d 362 (1994)*. This standard, applied to adult suspects, also applies to juvenile suspects. *Fare v. Michael C., 442 U.S. 707, 725, 99 S. Ct. 2560, 2572, 61 L. Ed. 2d 197 (1979)*.

As explained in *Miranda*, a suspect may waive his rights, including his right to counsel. *384 U.S. at 467-68, 86 S. Ct. at 1624-25.* [*13] But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. *Id. at 475, 86 S. Ct. at 1628*. Presuming waiver from a silent record is impermissible. *Id.* The record must show, or there must be an allegation and evidence which shows, that an accused was offered counsel but intelligently and understandingly rejected the offer. *Id.* Anything less is not waiver. *Id.* The question whether the accused waived his rights is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. *Fare, 442 U.S. at 724-25, 99 S. Ct. at 2571-72*. Thus, 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 forego his right to remain silent and to have the assistance of counsel. *Id.* (citing *Miranda, 384 U.S. at 475-77, 86 S. Ct. at 1628-29*); [*14] *see also Lucas v. State, 791 S.W.2d 35, 45-46 (Tex. Crim. App. 1989)* (holding court must look at totality of circumstances surrounding the interrogation and the alleged invocation of right to counsel to determine whether right to counsel was invoked).

The United States Supreme Court, in holding that the totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even when interrogation of juveniles is involved,

explained,

There is no reason to assume that such courts--especially juvenile courts, with their special expertise in this area--will be unable to apply the totality-of-the-circumstances analysis so as to take into account those special concerns that are present when young persons, often with limited experience and education and with immature judgment, are involved. *Where the age and experience of a juvenile indicate that his request for his probation officer or his parents is, in fact, an invocation of his right to remain silent, the totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination.* At the same time, that approach refrains from imposing [*15] rigid restraints on police and courts in dealing with an experienced older juvenile with an extensive prior record who knowingly and intelligently waives his Fifth Amendment rights and voluntarily consents to interrogation.

Fare, 442 U.S. at 725-26, 99 S. Ct. at 2572 (emphasis added). This test includes an evaluation of the juvenile's age, experience, education, background, and intelligence. *Id. at 725, 99 S. Ct. at 2572*; *In re R.D., 627 S.W.2d 803, 806-07 (Tex. App.--Tyler 1982, no writ)*.

C. Totality of the Circumstances

Here, the trial court heard live testimony from seven witnesses, and H.V. was present throughout the hearing, allowing the trial court to view his demeanor. The trial court found that before police transported H.V. to the police department where he made his second statement, he was detained for approximately one hour and thirty minutes in the back of a patrol car and was handcuffed for the majority of that time. H.V. was arrested and placed in the patrol car at approximately 4:30 p.m. At approximately 7:30 p.m., Judge Bendslev arrived to provide warnings to H.V., and she spent approximately ten [*16] minutes with him before she turned him over to police for interrogation. During H.V.'s ten minutes with Judge Bendslev, he stated that he wanted to talk to his mother; he wanted her to ask for an attorney; he was only sixteen. Judge Bendslev did not inform police that H.V. had asked to speak with his mother. She told police that "she did advise [H.V.] of his rights at that point, he had no questions, and he was agreeing to talk with [officers] at that point."

Thereafter, police began questioning H.V. Police spoke to H.V. "for probably over an hour, 45 minutes to an hour, before the statement was actually taken." Detective Carroll testified, "We talked about things such as soccer [and] the number of languages he spoke." At approximately 9:50 p.m., Detective Carroll began typing H.V.'s statement, and he finished at 10:35 p.m. Judge Bendslev reviewed the statement with H.V. at approximately 11:00 p.m.

The totality of the circumstances surrounding the interrogation reflects that H.V. was a sixteen-year-old junior in high school. H.V. is from Bosnia; he had lived in the United States fewer than six years when he was arrested. There is no evidence that H.V. had been in trouble before [*17] or had any prior juvenile record that would have familiarized him with the criminal justice system. n8 H.V. was in custody for more than four hours before he made the statement, was handcuffed for one hour, and had no prior juvenile record. During the ten minutes that he received warnings from Judge Bendslev, he specifically asked to talk with his mother and said he wanted her to ask for an attorney. Judge Bendslev told him that he could not talk to his mother; if he did not want to talk to police, he would be returned to the juvenile facility, and she did not know what the time frame was for H.V. to be able to speak to his mother. When Judge Bendslev tried to explain to H.V. that he himself could ask for an attorney, he said, "But I am only sixteen," clearly indicating that he did not understand how a sixteen-year-old person could ask for and go about contacting an attorney. n9 Judge Bendslev did not testify that H.V. affirmatively indicated that he did not want an attorney. Nor did she indicate that H.V. affirmatively stated that he wanted to talk to police despite his right to an attorney. *Cf. Dewberry v. State, 4 S.W.3d*

735, 747 (Tex. Crim. App. 1999) (holding trial [*18] court properly denied motion to suppress confession when defendant was advised of right to counsel and responded by stating he had not "done anything wrong. I don't need a lawyer."), *cert. denied*, *529 U.S. 1131, 146 L. Ed. 2d 958, 120 S. Ct. 2008 (2000)*. Police chatted with H.V. for forty-five minutes to an hour before moving to the issue of the disappearance of Daniel Oltmanns.

> n8 The State points to H.V.'s initial contact with the magistrate judge on the morning of September 12, 2003 to show that he was familiar with the magistrate warning process. The trial court as sole trier of the facts and judge of the credibility of the witnesses, however, was free to determine the weight to be accorded this fact in light of the totality of the circumstances. *See Ross, 32 S.W.3d at 855*.
>
> n9 The trial court heard the witnesses, including Judge Bendslev, testify and the trial court interpreted H.V.'s statement that he was only sixteen as meaning, "that he did not know how to ask for an attorney." *See* Finding of Fact Number 4.

[*19]

The record demonstrates that H.V. articulated his desire to have counsel present sufficiently clearly that a reasonable magistrate judge in the circumstances would understand H.V.'s request to call his mother to be an unambiguous request for an attorney when such request was followed by his statement that he wanted his mother to ask for an attorney and his exclamation that he was only sixteen in response to Judge Bendslev's comment that he could ask for an attorney. *See Davis, 512 U.S. at 459, 114 S. Ct. at 2355*. This is not a situation in which the juvenile requested only to speak with his mother. *Compare R.D., 627 S.W.2d at 806-07* (applying totality-of-circumstances test to hold that in light of defendant's juvenile record and experience on probation, psychologist's report indicating defendant was functioning in average cognitive range, and lack of evidence juvenile was worn down by improper interrogation tactics or lengthy questions, juvenile's statement that "he wanted to talk to his mother" standing alone was not invocation of right to counsel). The undisputed evidence establishes that H.V. said, "I want to call my mother. I want her to ask for [*20] an attorney." When H.V. was told that he could ask for an attorney, he said, "But I am only sixteen." Consequently, this is more than a situation in which the defendant, with regard to hiring an attorney, equivocally says, "I want to talk to my mother *about whether to hire* an attorney"; this is a situation in which H.V. unequivocally indicated that he wanted an attorney--he wanted to call his mother; he wanted her to ask for an attorney. *Accord Loredo v. State, 130 S.W.3d 275, 284 (Tex. App.--Houston [14th Dist.] 2004, pet. ref'd)* (holding appellant's question of whether he could ask for a lawyer, followed by a police officer's comment that he could and that if he did the interrogation would cease, did not constitute an unambiguous invocation of the right to counsel when appellant thereafter continued to speak with the officer).

Moreover, the totality of the circumstances surrounding the interrogation supports the trial court's determination that H.V. invoked his right to counsel. The facts at bar are the type of facts contemplated by the United States Supreme Court in *Fare. 442 U.S. at 724-25, 99 S. Ct. at 2571-72*. Here, H.V.'s age and [*21] lack of experience indicate that his request to call his mother, coupled with his statement that he wanted her to ask for an attorney and his exclamation that he was only sixteen, was in fact an invocation of his right to counsel, and the totality-of-the-circumstances approach allows the juvenile court the necessary flexibility to take this into account in making a waiver determination. *See id.*

The cases relied upon by the State are distinguishable. The State cites *State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61 (N.C. 2002)*, *cert. denied*, *537 U.S. 1133, 154 L. Ed. 2d 823, 123 S. Ct. 916 (2003)*. But in *Hyatt*, evidence at the suppression hearing conclusively established that the defendant "whispered" to his father that he wanted his father to get an attorney for him. *Id. at 70-71*. In *Hyatt*, both officers testified

that they did not hear the defendant ask his father to obtain an attorney, and the trial court made a specific finding of fact that "neither Agent Shook nor Detective Benjamin heard defendant's alleged invocation of his right to counsel." *Id*. Here, there is no question that Judge Bendslev heard H.V. state that he wanted to call his mother, [*22] he wanted her to ask for a lawyer, he was only sixteen.

The State also relies upon *Fare. 442 U.S. at 719-20, 99 S. Ct. at 2569*. But in *Fare*, the juvenile did not state that he wanted to call his mother because he wanted her to ask for a lawyer; the juvenile said he wanted to call his probation officer. *Id.* The United States Supreme Court held that the rule in *Miranda* is based on the critical position lawyers occupy in our legal system because of a lawyer's unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation. *Id.* Because of a lawyer's special ability to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege." *Id.* (quoting *Miranda, 384 U.S. at 469, 86 S. Ct. at 1625*). Here, H.V. specifically indicated that he wanted to talk to his mother; he wanted her to ask for a lawyer. Through this request, H.V. sought a lawyer's unique ability and assistance, not simply the assistance of his mother or a probation officer. [*23] The State also cites *Flamer v. Delaware, 68 F.3d 710, 725 (3d Cir. 1995)*, *cert. denied*, *516 U.S. 1088, 133 L. Ed. 2d 754, 116 S. Ct. 807 (1996)*. *Flamer* involved a twenty-five-year-old adult suspect. *Id. at 719*. At his arraignment hearing, Flamer asked permission to call his mother "to inquire about bail and possible representation by counsel." *Id. at 725*. The Third Circuit held that "a request for an attorney at arraignment is, in itself, insufficient to invoke the Fifth Amendment right to counsel at subsequent custodial interrogation." *Id. at 726*. Here, H.V. did not request an attorney at arraignment; he indicated he wanted his mother to ask for an attorney prior to custodial interrogation.

Because the trial court is the sole judge of the credibility of the witnesses and the weight of their testimony, we hold that the trial court's findings and conclusions are supported by the record. *Ross, 32 S.W.3d at 855*. Viewing the totality of the circumstances, we hold that the trial court did not abuse its discretion in suppressing H.V.'s second written statement when it properly determined that H.V. [*24] 's request to talk to his mother because he wanted her to hire an attorney was a request for counsel. n10 *Compare R.D., 627 S.W.2d at 805-07* (applying totality of the circumstances and holding that bare request to talk to mother, without more, was not request for counsel). We overrule the State's first point.

> n10 The dissent, in our view, reweighs the testimony and evidence to support suppressing H.V.'s second statement instead of giving deference to the historical facts set forth in the trial court's findings of fact, including finding of fact number four.

IV. SUPPRESSION OF WEAPON

In its second point, the State argues that even if H.V.'s second written statement is suppressed, the trial court erred by suppressing the firearm as the alleged "fruit" of H.V.'s second written statement. H.V. responds that the violation of his Fifth Amendment right to counsel mandates the suppression of not only his second statement but also the derivative evidence obtained from that statement. n11 [*25]

> n11 The Sixth Amendment right to counsel does not attach until a prosecution is commenced, that is, "at or after the initiation of adversary judicial proceedings against the defendant." *Green v. State, 934 S.W.2d 92, 97 (Tex. Crim. App. 1996)* (quoting *United States v. Gouveia, 467 U.S. 180, 187, 104 S. Ct. 2292, 2297, 81 L. Ed. 2d 146 (1984)*, *cert. denied*, *520 U.S. 1200, 137 L. Ed. 2d 707, 117 S. Ct. 1561 (1997)*. In this case, no charges had been brought against H.V. prior to the custodial interrogation at issue. Accordingly, we analyze the issue under the Fifth Amendment.

In his second statement, which the trial court suppressed, H.V. explained that he "threw the gun in the gutter close to [his] house." n12 At the suppression hearing, Detective Carroll indicated that, as a result of H.V.'s second statement, police located the gun. During Detective Carroll's questioning, he said that H.V. told him that he took the gun and placed it in a sewer near his house, that H.V. drew a diagram of the gun's [*26] location, and that police found the gun.

> n12 In H.V.'s first statement, which was not suppressed, he admitted purchasing a gun from a friend and identified the individuals present when he purchased it as well as the individuals to whom he subsequently showed the gun. In this first statement, H.V. claimed that he returned the gun to the seller because he decided he did not want it.

Once an accused in custody has requested the assistance of an attorney, officers must terminate all interrogation until counsel is made available or the accused voluntarily reinitiates communication. *See Minnick v. Mississippi, 498 U.S. 146, 153, 111 S. Ct. 486, 491, 112 L. Ed. 2d 489 (1990)*; *Edwards, 451 U.S. at 484-85, 101 S. Ct. at 1885*; *Cross v. State, 144 S.W.3d 521, 526 (Tex. Crim. App. 2004)*. An accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease. *Edwards, 451 U.S. at 485, 101 S. Ct. at 1885*; [*27] *Fare, 442 U.S. at 719, 99 S. Ct. at 2569*; *Rhode Island v. Innis, 446 U.S. 291, 298, 100 S. Ct. 1682, 1688, 64 L. Ed. 2d 297 (1980)*. The presence of counsel insures the process of police interrogation conforms to the dictates of the Fifth Amendment privilege by insuring that an accused's statements made in a government-established atmosphere are not the product of compulsion. *Miranda, 384 U.S. at 466, 86 S. Ct. at 1623*; *see also Fare, 442 U.S. at 719, 99 S. Ct. at 2569*. Any statement taken after a person invokes his Fifth Amendment privilege "cannot be other than the product of compulsion, subtle or otherwise." *Fare, 442 U.S. at 717, 99 S. Ct. at 2568*. Here, the trial court found that H.V. invoked his right to counsel. Deferring, as we must, to the historical facts found by the trial court and not challenged by the State, we have held that the trial court did not abuse its discretion by concluding that H.V. invoked his Fifth Amendment right to counsel. Consequently, all interrogation should have ceased. *Edwards, 451 U.S. at 485, 101 S. Ct. at 1885*; *Fare, 442 U.S. at 719, 99 S. Ct. at 2569*; [*28] *Innis, 446 U.S. at 298, 100 S. Ct. at 1688*. H.V.'s subsequent statement, "cannot be other than the product of compulsion, subtle or otherwise." *Fare, 442 U.S. at 717, 99 S. Ct. at 2568*. The remaining question is whether our holdings that H.V.'s statement disclosing the location of the gun was compelled in violation of his invoked Fifth Amendment privilege mandates suppression of the gun as determined by the trial court.

The State points out, and we agree, that the "fruit of the poisonous tree" doctrine articulated in *Wong Sun* n13 does not apply to a mere failure to provide *Miranda* warnings to a suspect prior to custodial interrogation when the suspect makes a voluntary statement: while the statement must be suppressed, other evidence subsequently obtained as a result of that unwarned statement, that is the "fruit" of the statement, need not be suppressed. *United States. v. Patane, ___ U.S. ___, 159 L. Ed. 2d 667, 124 S. Ct. 2620, 2628 (2004)* (holding failure to give suspect *Miranda* warnings did not require suppression of physical fruits of suspect's unwarned but voluntary statement); *Oregon v. Elstad, 470 U.S. 298, 307, 105 S. Ct. 1285, 1292, 84 L. Ed. 2d 222 (1985)* [*29] (holding uncompelled statements taken without *Miranda* warnings may be used to impeach defendant's testimony at trial); *see also Michigan v. Tucker, 417 U.S. 433, 452, 94 S. Ct. 2357, 2368, 41 L. Ed. 2d 182 (1974)*; *Baker v. State, 956 S.W.2d 19, 22 (Tex. Crim. App. 1997)*. Here, however, H.V.'s second statement was not simply an "unwarned" statement; H.V. invoked his right to counsel. Because H.V.'s post-invocation-of-counsel statement was the product of compulsion, subtle or otherwise, n14 the cases cited by the State--holding that the fruit-of-the-poisonous-tree doctrine does not apply to cases in which *Miranda* warnings are not given and the accused makes an "uncompelled" statement--do not apply. *Patane, 124 S. Ct. at 2628*; *Elstad, 470 U.S. at 314, 105 S. Ct. at 1296*; *Marsh v. State, 115 S.W.3d 709, 715 (Tex. App.--Austin 2003, no pet.)* (involving allegation of post-arrest interrogation before receiving *Miranda* warnings); *Montemayor v. State, 55 S.W.3d 78, 90 (Tex. App.--Austin 2001, pet. ref'd)* (same). Nor was evidence introduced at the

suppression hearing that the gun [*30] would have been, n15 or was, discovered by means sufficiently distinguishable to be purged of the violation of H.V.'s Fifth Amendment privilege. *Compare Thornton v. State, 145 S.W.3d 228, 233-34 (Tex. Crim. App. 2004)* (holding sufficient attenuating factors existed dissipating taint of illegal arrest from derivative evidence obtained as a result of arrest). And finally, the "fit" between H.V.'s invocation of his Fifth Amendment privilege and suppression of the gun is a proper "fit" between the violation of H.V.'s Fifth Amendment constitutional right and an exclusionary rule to protect it. *Accord Patane, 124 S. Ct. at 2628* (articulating need for close fit between Fifth Amendment privilege and exclusionary rule implemented to protect it and recognizing that strong deterrence-based argument exists for exclusion of fruits obtained through violation of constitutional rights).

n13 *Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)*.

n14 *See Fare, 442 U.S. at 717, 99 S. Ct. at 2568*.

n15 Texas does not recognize the inevitable discovery doctrine. *State v. Daugherty, 931 S.W.2d 268, 269 (Tex. Crim. App. 1996)*; *see also Roquemore v. State, 60 S.W.3d 862, 870 n.12 (Tex. Crim. App. 2001)* (same).

[*31]

For these reasons, we hold that the trial court did not abuse its discretion by granting H.V.'s motion to suppress the gun located by police as a result of his second statement. *See also* TEX. FAM. CODE ANN. § 54.03(e) (Vernon Supp. 2004-05) (stating that evidence illegally seized or obtained is inadmissible in an adjudication hearing). We overrule the State's second point. n16

n16 In its third point, the State contends that the violation of Texas Family Code section 52.02 found by the trial court does not provide a basis for suppressing H.V.'s statement or the fruit of that statement. Because we have upheld the trial court's suppression rulings as set forth above, we need not address this argument. *See* TEX. R. APP. P. 47.1.

Conclusion: We affirm the trial court's order suppressing H.V.'s second written statement and the gun obtained as a result of that statement.