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Fifth Amendment--Responding to Abiguous Requests for Counsel During Custodial Interrogations

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FIFTH AMENDMENT—RESPONDING TO AMBIGUOUS REQUESTS FOR COUNSEL DURING CUSTODIAL INTERROGATIONS

Davis v. United States, 114 S. Ct. 2350 (1994)

I. INTRODUCTION

In *Davis v. United States*,[1] the United States Supreme Court resolved how law enforcement officers should respond during custodial interrogation of a suspect, when that suspect makes an ambiguous or equivocal request for counsel. The Court held that, after suspects knowingly and voluntarily waive the rights articulated in *Miranda v. Arizona*,[2] law enforcement officers may continue questioning them until and unless they *clearly request* an attorney.[3] The Court in *Davis* believed that the suspect's remark, "Maybe I should talk to a lawyer," was not a clear request for counsel and, thus, held that the law enforcement officers did not violate the suspect's Fifth Amendment privilege against compulsory self-incrimination by continuing to question him.[4]

This Note first addresses Supreme Court precedent safeguarding the Fifth Amendment and then explores the three approaches to ambiguous requests for counsel that state and circuit courts developed prior to *Davis*. This Note then argues that the Court's ruling ignores the central precepts of the *Miranda* case law and fails to provide adequate measures to counter the realities of custodial interrogations. Additionally, this Note argues that the Court should have promulgated a rule that obligates law enforcement officers to clarify any ambiguity before further questioning suspects. To effectively safeguard suspects' privileges under the Fifth Amendment, this obligation to clarify should prohibit law enforcement officers from badgering suspects into converting their previously ambiguous request for counsel into a clear waiver of the right to counsel. If any ambiguity remains, the officers should consider the request an invocation of the right to

1 114 S. Ct. 2350 (1994).
2 384 U.S. 436 (1966).
3 *Davis*, 114 S. Ct. at 2356.
4 *Id.* at 2357.

counsel.

II. BACKGROUND

The Fifth Amendment to the United States Constitution guarantees to all people the privilege to be free from compulsory self-incrimination.[5] Since 1966, *Miranda* has served as the touchstone for the exploration of the scope of that privilege during a period of custodial interrogation.[6] To safeguard the Fifth Amendment privileges, *Miranda* specifically requires at the outset that authorities clearly inform persons in custody that they have the right to remain silent, that anything they say can and will be used against them in court, that they have the right to consult with an attorney and to have an attorney with them during the interrogation, and that if they cannot afford an attorney, the court will appoint an attorney to represent them.[7] After receiving these warnings, they may "voluntarily, knowingly, and intelligently" waive these rights.[8] However, if the individual "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him."[9]

Prosecutors cannot use statements obtained from a suspect in custody against the suspect in court unless the prosecution demonstrates that authorities effectively applied the *Miranda* procedural safeguards to preserve the suspect's Fifth Amendment rights.[10] The Court in *Miranda* created these procedural safeguards to adequately ensure that the accused know their rights and that the police honor them.[11] The Court clearly recognized that "[a]n individual swept from . . . familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to . . . techniques of persuasion . . . cannot be otherwise than under compulsion to speak."[12] Without such safe-

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5 The Fifth Amendment provides: "[N]o person shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

6 *See* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 292-93 (1993).

7 *Miranda*, 384 U.S. at 467-72.

8 *Id.* at 444.

9 *Id.* at 444-45.

10 *Id.* at 444.

11 *Id.* at 467.

12 *Id.* at 461. The Court detailed a history of police brutality and torture and concluded that such practices "are undoubtedly the exception now, but . . . are sufficiently widespread to be the object of concern." *Id.* at 447. The Court then described the psychological aspects of modern interrogative techniques. *Id.* "Even without employing brutality, the 'third degree' or . . . specific stratagems . . . the very fact of custodial interrogation exacts a

guards, the "inherently compelling pressures" of custodial interrogations will undermine suspects' resistance and compel them to speak where they would otherwise remain silent or request the assistance of counsel.[13]

In *Edwards v. Arizona*,[14] the Court fine-tuned the application of *Miranda*. The Court in *Edwards* held that when an accused invokes the right to counsel, all questioning must cease until counsel arrives or until the accused initiates further conversation.[15] According to the Court in *Edwards*, the fact that suspects respond to additional police-initiated questioning does not establish a valid waiver of their rights even though they had been advised of those rights.[16] The Court in *Edwards* emphasized that "it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel."[17]

Miranda and *Edwards* clearly mandate that a custodial interrogation cease immediately when the suspect asserts the right to counsel. The assertion of this right is a "significant event" that calls for an end to the interrogation until an attorney is present.[18] Indeed, the Court described *Miranda* as a "rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease"[19] and has recognized the "undisputed right" to remain silent and to be free from questioning "until he ha[s] consulted with a lawyer."[20]

Before *Davis*, state and federal courts applied three different standards to determine whether a suspect's ambiguous or equivocal reference to an attorney invoked the right to counsel. Courts in some jurisdictions held that any reference to counsel by the accused, how-

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heavy toll on individual liberty and trades on the weakness of individuals." *Id.* at 455. *See also* Ainsworth, *supra* note 6, at 294.

13 *Id.* at 467.

14 451 U.S. 477 (1981).

15 *Id.* at 484. Specifically, the Court held that:

> [A]dditional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id.

16 *Id.*

17 *Id.* at 485.

18 *Id.* (citing Miranda v. Arizona, 384 U.S. 436, 474 (1966)).

19 *Id.* (quoting Fare v. Michael C., 442 U.S. 707, 719 (1979)).

20 *Id.* (quoting Rhode Island v. Innis, 446 U.S. 291, 298 (1980)).

ever ambiguous or equivocal, requires the immediate cessation of the interrogation.[21] Other jurisdictions required a suspect's mention of counsel to meet a "threshold standard of clarity,"[22] with comments falling short of the threshold not sufficient to invoke the right to counsel.[23] Still other jurisdictions held that all questioning must immediately cease in response to an ambiguous reference to counsel, but the interrogators may ask questions designed to clarify the individual's desires concerning counsel.[24]

The Supreme Court had previously declined to promulgate a uniform rule with respect to a suspect's ambiguous or equivocal request for or reference to counsel.[25] In *Smith v. Illinois*,[26] a suspect had responded to *Miranda* warnings by stating to the police "Uh, yeah. I'd like to do that."[27] Concluding that this was an unambiguous request for counsel, the Court determined that it was unnecessary to formulate a rule to handle ambiguous statements.[28] In *Connecticut v. Barrett*,[29] the Court once again found that the defendant's statements did not represent an ambiguous or equivocal response to the *Miranda*

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21 *See, e.g.*, Maglio v. Jago, 580 F.2d 202, 205-07 (6th Cir. 1978); State v. Furlough, 797 S.W.2d 631 (Tenn. Crim. App. 1990); Ochoa v. State, 573 S.W.2d 796, 800 (Tex. Crim. App. 1978); People v. Superior Court, 542 P.2d 1390, 1394-95 (Cal. 1975), *cert. denied*, 429 U.S. 816 (1976); People v. Randall, 464 P.2d 114, 118-20 (Cal. 1970) (en banc), *overruled by* People v. Cahill, 853 P.2d 1037 (1993).

22 Smith v. Illinois, 469 U.S. 91, 96 n.3 (1984) (per curium).

23 *See, e.g.*, Dean v. Commonwealth, 844 S.W.2d 417, 420 (Ky. 1993), *cert. denied*, 114 S. Ct. 2737 (1994); Eaton v. Commonwealth, 397 S.E.2d 385, 389 (Va. 1990), *cert. denied*, 502 U.S. 824 (1991); People v. Krueger, 412 N.E.2d 537, 540 (Ill. 1980), *cert. denied*, 451 U.S. 1019 (1981).

24 *See, e.g.*, United States v. March, 999 F.2d 456, 461-62 (10th Cir.), *cert. denied*, 114 S. Ct. 483 (1993); United States v. Mendoza-Cecelia, 963 F.2d 1467, 1472 (11th Cir.), *cert. denied*, 113 S. Ct. 436 (1992); Poyner v. Murray, 964 F.2d 1404, 1411 (4th Cir.), *cert. denied*, 113 S. Ct. 419 (1992); United States v. Gotay, 844 F.2d 971, 975 (2d Cir. 1988); United States v. Fouche, 776 F.2d 1398, 1404-05 (9th Cir. 1985), *cert. denied*, 486 U.S. 1017 (1988); United States v. Porter, 776 F.2d 370, 370 (1st Cir. 1985), *cert. denied*, 481 U.S. 1048 (1987); United States v. Cherry, 733 F.2d 1124, 1131 (5th Cir. 1984), *cert. denied*, 479 U.S. 1056 (1987); Thompson v. Wainwright, 601 F.2d 768, 771-72 (5th Cir. 1979); Nash v. Estelle, 597 F.2d 513, 517 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 981 (1979); State v. Walkowiak, 515 N.W.2d 863, 867 (Wis. 1994); People v. Johnson, 859 P.2d 673, 685 (Cal. 1993), *cert. denied*, 115 S. Ct. 1133 (1994); Crawford v. State, 580 A.2d 571, 576-77 (Del. 1990); Martinez v. State, 564 So. 2d 1071, 1073 (Fla. 1990); State v. Robinson, 427 N.W.2d 217, 223 (Minn. 1988); People v. Benjamin, 732 P.2d 1167, 1171 (Colo. 1987).

25 *See* Connecticut v. Barrett, 479 U.S. 523, 529-30 n.3 (1987); Smith v. Illinois, 469 U.S. 91, 96 n.3 (1984) (per curiam).

26 469 U.S. 91 (1984).

27 *Id.* at 94.

28 *Id.* at 99-100. Specifically, the Court stated: "We do not decide the circumstances in which an accused's request for counsel may be characterized a ambiguous or equivocal as a result of events preceding the request or of nuances inherent in the request itself, nor do we decide the consequences of such ambiguity or equivocation." *Id.*

29 479 U.S. 523 (1987).

warnings and thus, left open the question it finally addressed in *Davis*.[30]

A. THE THRESHOLD OF CLARITY RULE

The threshold of clarity rule required that suspect's mention of counsel meet a "threshold standard of clarity."[31] Under this approach, suspects would not invoke their right to counsel—and law enforcement officers would not be obligated to stop the interrogation or clarify the situation—if the assertion fell short of this threshold.[32] In *People v. Krueger*,[33] the leading case promoting the threshold of clarity rule,[34] the defendant had been convicted of murder and sentenced to serve twenty to fifty years in prison.[35] Prior to his trial, Krueger moved to suppress inculpatory statements that he made to the police during a custodial interrogation.[36] Krueger had received his *Miranda* warnings at the start of the investigation, but subsequently waived his rights both orally and in writing.[37] The detectives began the interrogation with questions concerning unrelated burglaries.[38] When the detectives started to question him about the killing, Krueger said, "Wait a minute. Maybe I ought to have an attorney. You guys are trying to pin a murder rap on me, give me 20 to 40 years."[39] One of the detec-

30 *Id.* at 529-30 n.3.

31 Smith v. Illinois, 469 U.S. 91, 96 n.3 (1984) (per curiam).

32 Davis v. United States, 114 S. Ct. 2350, 2356 (1994).

33 412 N.E.2d 537 (Ill. 1980), *cert. denied*, 451 U.S. 1019 (1981).

34 *See Smith*, 469 U.S. at 96 n.3.

35 *Krueger*, 412 N.E.2d at 538.

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.* The testimony of the other detectives present at the interrogation was substantially similar. On cross-examination, the defendant basically conceded that the detectives' testimonies were accurate:

> Q. Why did you continue talking to them after you say you said, "I think I should have an attorney"?
> A. Have you ever been interrogated by three Rockford Police Detectives?
> Q. No, I haven't, but I want to know why you continued talking to them.
> A. Because I believed it was self-defense. I still do. They wanted a statement of what happened to clear it up. I wanted to get it off my chest, so I gave them a statement.
> Q. But you know you had a right to have an attorney there if you wanted one, didn't you?
> A. Yes, I did.
> Q. You ever insist on having an attorney contacted?
> A. I asked for an attorney before I began the statement, and I saw that it was not going to get me anywhere, so I just ceased on that line, because I just knew I wasn't going to get an attorney anyways.
> Q. Did it occur to you not to talk any further?
> A. Yes, but it occurred to me I might be up all night and be badgered by these three detectives.

Id. at 539.

tives replied that the news media, not the police, were calling it murder and that only two people knew what really happened and one of them was dead.[40] Krueger then asked the officers how they knew the stabbing was not in self-defense.[41] The detectives said they did not know the circumstances and that was the reason they wanted to talk to him about it.[42] Krueger then signed a statement implicating himself in the murder.[43]

The Illinois Supreme Court held that because Krueger's ambiguous request did not reach the threshold of clarity, interrogating officers did not violate his *Miranda* rights.[44] According to that court, "a more positive indication or manifestation of a desire for an attorney was required than was made here."[45] Although the court in *Krueger* acknowledged that the phrase "in any manner" asserted in the Court's holding in *Miranda* permits assertions of the right to counsel that are not unmistakably clear, the court did not read *Miranda* as requiring every reference to an attorney, no matter how ambiguous, to constitute an invocation of the right to counsel.[46]

The court in *Krueger* noted that the defendant was not subjected to any coercion in excess of what is inherent in all custodial interrogations.[47] Furthermore, the court believed that the detectives apparently acted in good faith in not judging the defendant's statements to be a request for counsel.[48] While the court felt that it should not unduly emphasize the detectives' subjective beliefs, it recognized the importance of allowing law enforcement officials some discretion in this determination.[49] The court then found the officers' beliefs to be reasonable under the circumstances.[50] Because the defendant's manifestation of his right to an attorney failed to reach some requisite level of clarity, the court concluded that the police had not violated the defendant's *Miranda* rights.[51]

B. THE PER SE RULE

Under the per se rule, any reference to counsel in a custodial

40 *Id.* at 538-39.
41 *Id.* at 539.
42 *Id.*
43 *Id.*
44 *Id.* at 540.
45 *Id.*
46 *Id.*
47 *Id.*
48 *Id.*
49 *Id.*
50 *Id.*
51 *Id.*

interrogation, without regard to its ambiguity or equivocality, precludes further questioning.[52] In *Maglio v. Jago*,[53] the leading case adopting this approach,[54] the Sixth Circuit, relying on both *Miranda* and *Michigan v. Mosley*,[55] held that the police violate a defendant's Fifth Amendment right to counsel when they do not cease questioning after that defendant makes an ambiguous request for counsel.[56] The court believed that the following language in *Miranda* suggested this per se rule:

> If the individual states that he wants an attorney, the interrogation must cease *until an attorney is present.* At that time, the individual must have an opportunity to confer with the attorney and to have him present during *any* subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.[57]

The court also found support for the per se rule in Supreme Court case law that distinguished between asserting the right to remain silent and the right to counsel.[58] Specifically,

> the reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney.[59]

Based on these precedents and the circumstances of the case, the court in *Maglio* concluded that the prosecution failed to show a knowledgeable and voluntary waiver.[60] A police officer read the defendant his rights at the time of the arrest, but continued to question the defendant despite his remark that "[m]aybe I should have an attorney."[61] The officer told the defendant that an attorney would not be available until the next day.[62] The officer once again told the defendant that he was not required to talk without an attorney, but the officer continued to question him until he confessed to the murder.[63]

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52 Maglio v. Jago, 580 F.2d 202, 205 (6th Cir. 1978).

53 *Id.*

54 *See* Crawford v. State, 580 A.2d 571, 575 (Del. 1990).

55 423 U.S. 96 (1975).

56 *Maglio*, 580 F.2d at 205.

57 *Id.* (quoting Miranda v. Arizona, 384 U.S. 436, 474 (1966)) (emphasis added by *Maglio*).

58 *Id.*

59 *Id.* (quoting Michigan v. Mosley, 423 U.S. 96, 110 n.2 (1975) (White, J., concurring)).

60 *Id.* at 206.

61 *Id.* at 203.

62 *Id.*

63 *Id.* at 204. Specifically

Maglio was told first that he had a right to counsel before any questioning, and when

When the district attorney arrived less than an hour later, he explained the defendant's rights and recorded the confession. Even though this second confession occurred after the defendant's confusion was clarified, the court held it to be equally inadmissible. While the defendant's subsequent statement indicated that he finally understood his rights, the district attorney nonetheless violated those rights by continuing to interrogate him without defense counsel present.[64]

C. THE CLARIFICATION RULE

The Fifth Circuit developed the clarification rule in *Nash v. Estelle*,[65] where it held that when suspects express their desires ambiguously, law enforcement officials may make further inquiry aimed only at clarifying the suspect's desires.[66] The court in *Nash* believed that the Supreme Court contemplated this situation in *Miranda*.[67] The Court in *Miranda* noted that "[i]f [a suspect] is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing Agent."[68] Furthermore, the Court's holding in *Mosely* shunned any attempt to impose "permanent immunity from further interrogation . . . ."[69] In *Nash*, after the district attorney informed the suspect of his rights, the suspect expressed both a desire for counsel and a desire to continue the interview with-

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he expressed a desire to talk to a lawyer, was promptly told that if he couldn't afford a lawyer, he would have to wait until the next day to have one appointed for him. Then, with scarcely a pause, let alone a cessation of questioning, and without honoring his request for counsel, the police continued interrogation about the car, and the confession ensued.

Id.

64 *Id.* at 207. The following interrogation starkly illuminates the legitimacy of the "cat out of the bag" theory:

Q. Okay, I have just explained what your rights are, and, Dan I am going to ask you this, Dan, at this time. Do you wish to go ahead and tell us what you know about this death . . . and talk to us now without a lawyer present?
A. Am I just supposed to start talking or?
Q. No, do you want to talk to us without a lawyer being present?
A. Yes. You two are lawyers anyway.
Q. Yes, but I'm, do you want a lawyer yourself before you talk to us? You have to say no, you can't just shake your head.
A. Yeah, I know, I forgot. It doesn't matter now.
Q. In other words, you are willing at this point to go ahead and tell [us] about what happened out there without having your own lawyer here with you, is that correct?
A. Yeah, it's the same story, it doesn't much matter.

Id.

65 597 F.2d 513 (5th Cir.), *cert. denied*, 444 U.S. 981 (1979).

66 *Id.* at 517.

67 *Id.*

68 *Id.* (quoting Miranda v. Arizona, 384 U.S. 436, 485 (1966)).

69 *Id.* (quoting Michigan v. Mosely, 423 U.S. 96, 102 (1975)).

out counsel.[70] After the suspect heard his rights, he stated, "[w]ell, I don't have the money to hire one [an attorney], but I would like, you know, to have one appointed."[71] The prosecutor acknowledged the defendant's request and told him that the interrogation would have to end immediately. This prompted the defendant to say, "I would like to have a lawyer, but I'd rather talk to you."[72] Soon thereafter, the prosecutor obtained both a waiver and a confession from the defendant.[73] The district court concluded that the defendant asked for an attorney.[74]

The Fifth Circuit reversed the district court, concluding that the defendant never requested the assistance of counsel during questioning.[75] Rather, the Fifth Circuit felt that the defendant only wanted assurance that he could still have counsel appointed in the future if he discussed his involvement in the murder with the prosecutor at that moment.[76] The court looked to the transcript of the interrogation and the surrounding circumstances to hold that the district court was clearly erroneous in its interpretation. The defendant had been ap-

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[70] *Id.* at 517. The following is the relevant part of the interrogation between the defendant (NASH) and the prosecutor (FILES):

NASH: If I want a lawyer present, I just put down [on the waiver form] I want him present?
FILES: Please just tell us about it. Any time we are talking and you decide that you need somebody else here, you just tell me about it and we will get somebody up here.
NASH: Well, I don't have the money to hire one, but I would like, you know, to have one appointed.
FILES: You want one to be appointed for you?
NASH: Yes, sir.
FILES: Okay. I hoped that we might talk about this, but if you want a lawyer appointed, then we are going to have to stop right now.
NASH: But, uh, I kinda, you know, wanted, you know, to talk about it, you know, to kinda, you know, try to get it straightened out.
FILES: Well, I can talk about it with you and I would like to, but if you want a lawyer, well, I am going to have to hold off, I can't talk to you. It's your life.
NASH: I would like to have a lawyer, but I'd rather talk to you.
FILES: Well, what that says there is, it doesn't say that you don't ever want to have a lawyer, it says that you don't want to have a lawyer here, now. You got the right now, and I want you to know that. But if you want to have a lawyer here, well, I am not going to talk to you about it.
NASH: No, I would rather talk to you.
FILES: You would rather talk to me? You do not want to have a lawyer here right now?
NASH: No, sir.
FILES: You are absolutely certain of that?
NASH: Yes, sir.
FILES: Go ahead and sign that thing.

Id. at 516-17.

[71] *Id.* at 516.

[72] *Id.*

[73] *Id.* at 517.

[74] *Id.* at 518.

[75] *Id.*

[76] *Id.*

prehended a week earlier and had orally confessed to the murder at that time. To stop the interrogation at that moment, according to the court, "would have denied to [the defendant] his true desire to explain himself and to continue with the interview."[77] Moreover, it would be improper to assume that the prosecutor was a "devious trickster, who desired to subtly manipulate"[78] the defendant, when in fact the transcript disclosed that he "fairly and evenly" apprised the defendant of his rights and clarified the situation.[79]

III. Facts and Procedural History

On the evening of 2 October 1988, Robert L. Davis and Keith Shackleton,[80] both members of the United States Navy, played a game of pool at the Enlisted Men's Club on the Charleston (South Carolina) Naval Base.[81] Shackleton lost the game and a thirty dollar wager, which he refused to pay.[82] Early the next morning his body was found behind the commissary, a short distance from the club.[83] He had been beaten to death with a blunt object.[84]

During their investigation of the crime, agents for the Naval Investigative Service (NIS) discovered that Davis visited the club that evening and that he was absent without leave from his responsibilities the next morning.[85] The agents also learned that only privately-owned pool cues could be taken from the club, and that only four people, including Davis, had their own cues at the club that night.[86]

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77 *Id.* at 519-20.

78 *Id.* at 520.

79 *Id.* The dissent in *Nash* rejected the clarification approach and disagreed with the majority's application of this rule to the facts of the case. *Id.* at 52 (Godbold, J., dissenting). According to the dissent, after the suspect's request for counsel, the prosecutor did not limit his questioning to clarification, but instead intended to elicit a waiver and confession. *Id.* at 526 (Godbold, J., dissenting). The equivocal nature of the defendant's request resulted only from further questioning after an unambiguous and unequivocal request. *Id.* at 524 (Godbold, J., dissenting). The dissent considered the relevant exchange as follows:

> NASH: If I want a lawyer present, I just put down [on the waiver form] I want him present?
>
> FILES: Please just tell us about it. Any time we are talking and you decide that you need somebody else here, you just tell me about it and we will get somebody up here.

Id. at 525 (Godbold, J., dissenting).

80 Justice Souter's concurrence, the Petitioner's Brief, and the Respondent's Brief identify the victim as "Keith Shackleton." The Majority opinion identifies the victim as "Keith Shackleford."

81 Davis v. United States, 114 S. Ct. 2350, 2352 (1994).

82 *Id.* at 2352-53.

83 *Id.* at 2353.

84 Brief for Petitioner at 2, Davis v. United States, 114 S. Ct. 2350 (1994) (No. 92-1949).

85 *Id.*

86 *Id.* at 8, 10.

NIS agents first interviewed Davis on 20 October 1988.[87] Davis admitted that he was at the club that night and that he had played pool with Shackleton.[88] Davis then explained that he had heard from Wade Bielby and Bonnie Krusen that Shackleton was beaten with a pool stick.[89] At the end of the interview, Davis turned over his pool cues to the NIS agents and explained that the stain on the case was probably catsup, but possibly his own blood.[90] Later, various sailors told the agents that Davis "either had admitted committing the crime or had recounted details that clearly indicated his involvement in the killing."[91]

On 4 November 1988, NIS agents arrested Davis at the Naval Hospital, where he had been held in the psychiatric ward since October 28.[92] The agents escorted him to the NIS office and handcuffed him to a chair.[93] The agents told Davis that he was a suspect in the killing, that he had the right to remain silent, that anything he said could be used against him, and that he had the right to counsel and to have counsel present during the interrogation.[94] Davis waived these rights, both orally and in writing.[95]

During the first part of the interrogation, Davis described his activities on 1 October and 2 October 1988.[96] The NIS agents asked Davis questions that suggested his account conflicted with statements made by other people and implied that he was involved in the murder.[97] For example, the agents told Davis that his girlfriend denied being at the Enlisted Men's Club on the night of the murder.[98] The agents also said that they had a report indicating that Shackleton owed him thirty dollars.[99] At this point—about an hour and a half into the interview—Davis said, "Maybe I should talk to a lawyer."[100]

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87 *Id.* at 5.

88 *Id.*

89 Brief for Respondent at 3, Davis v. United States, 114 S. Ct. 2350 (1994) (No. 92-1949).

90 Petitioner's Brief at 5, *Davis* (No. 92-1949).

91 *Davis*, 114 S. Ct. at 2353.

92 Petitioner's Brief at 7, *Davis* (No. 92-1949).

93 *Id.*

94 *Davis*, 114 S. Ct. at 2353.

95 *Id.*

96 Respondent's Brief at 6, *Davis* (No. 92-1949).

97 *Id.* at 7.

98 *Id.*

99 *Id.*

100 Davis v. United States, 114 S. Ct. 2350, 2353 (1994). Davis testified at the suppression hearing to a different version of the events: "Well, [the agents] were talking to me, and I said 'Well, I'd like a lawyer,' and they said 'We'll take a break,' and they walked out and left me handcuffed to the chair." Respondent's Brief at 10, *Davis* (No. 92-1949). Davis also testified that after a short break "[t]hey came back in and started questioning me again."

According to the uncontradicted testimony of one of the agents, at that point:

> [We m]ade it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, [']No, I'm not asking for a lawyer,' and then he continued on, and said, 'No, I don't want a lawyer.'[101]

After a short break, the agents reminded petitioner of his right to remain silent and his right to counsel.[102] Nearly an hour later, Davis stated that if he had killed Shackleton, he would have had to have told someone about it.[103] When the agents confronted Davis with evidence that he had in fact told someone that he killed Shackleton, Davis said, "I think I want a lawyer before I say anything else."[104] At that moment the agents ceased questioning him.[105]

At the general court-martial, the military judge denied Davis' motion to suppress the statements he made during his interrogation.[106] The court held that "the mention of a lawyer by the accused during the course of the interrogation [was] not in the form of a request for counsel and . . . the agents properly determined that the accused was not indicating a desire for or invoking his right to counsel."[107] The general court-martial convicted Davis of unpremeditated murder[108] and sentenced him to life in prison.[109]

The United States Navy-Marine Corps Court of Military Review affirmed the findings and sentence of the trial court.[110] Without comment, the court rejected all of Davis' arguments as meritless.[111]

The United States Court of Military Appeals granted discretionary review and affirmed.[112] The court recognized the three different approaches to a suspect's ambiguous or equivocal request for counsel:

> Some jurisdictions have held that any mention of counsel, however ambiguous, is sufficient to require that all questioning cease. Others have attempted to define a threshold standard of clarity for invoking the right

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Id. The trial court resolved this question of fact against Davis, and the Court of Military Appeals affirmed, finding no clear error. United States v. Davis, 36 M.J. 337, 342 (1993).

101 *Davis*, 114 S. Ct. at 2353.

102 *Id.*

103 Petitioner's Brief at 9, *Davis* (No. 92-1949).

104 Respondent's Brief at 9, *Davis* (No. 92-1949).

105 *Davis*, 114 S. Ct. at 2353.

106 *Id.*

107 Respondent's Brief at 10, *Davis* (No. 92-1949).

108 10 U.S.C. § 918 (1988).

109 *Davis*, 114 S. Ct. at 2353.

110 *See* United States v. Davis, 36 M.J. 337, 342 (1993).

111 Respondent's Brief at 10, *Davis* (No. 92-1949).

112 *Davis*, 36 M.J. at 342.

> to counsel and have held that comments falling short of the threshold do not invoke the right to counsel. Some jurisdictions, including several federal circuits, have held that 'all interrogation' about the offense 'must immediately cease' whenever a suspect mentions counsel, but they allow interrogators to ask 'narrow' questions designed to 'clarify' the earlier statement and the accused's desires respecting counsel.[113]

Noting that the Supreme Court had not resolved the issue, the court simply chose to apply the third approach and held as a matter of law that the statement, "Maybe I should talk to a lawyer," did not invoke Davis' right to counsel, and that the NIS agents properly proceeded with questions designed to clarify Davis' desires.[114]

The United States Supreme Court granted certiorari[115] to decide how law enforcement officers should respond when a suspect makes an ambiguous reference to counsel during a custodial interrogation.[116]

IV. Summary of Opinions

A. THE MAJORITY OPINION

Justice O'Connor, writing for the majority,[117] affirmed the decision of the United States Court of Military Appeals.[118] Justice O'Connor held that, after suspects knowingly and voluntarily waive their *Miranda* rights, law enforcement officers may continue questioning them until and unless they clearly request an attorney.[119] Although Justice O'Connor recognized that it will often be good police practice for interviewing officers to clarify whether or not a suspect desires counsel, she refused to require officers to ask such clarifying questions.[120] Thus, if a suspect does not unambiguously request counsel, law enforcement officers need not stop questioning them.[121]

Justice O'Connor began by reviewing the cases setting forth procedural safeguards insuring the right against compulsory self-incrimination.[122] Justice O'Connor noted that under *Miranda v. Arizona*[123] a suspect faced with custodial interrogation has the right to consult with

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113 *Id.* at 341 (quoting Smith v. Illinois, 469 U.S. 91, 96 n.3 (1984) (per curiam)).
114 *Id.* at 341-42.
115 Davis v. United States, 114 S. Ct. 379 (1993).
116 Davis v. United States, 114 S. Ct. 2350, 2352 (1994).
117 Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas joined Justice O'Connor.
118 *Davis*, 114 S. Ct. at 2357.
119 *Id.* at 2356-57.
120 *Id.* at 2356.
121 *Id.*
122 *Id.* at 2354.
123 384 U.S. 436 (1966).

an attorney and to have counsel present during questioning.[124] Justice O'Connor further recognized that *Miranda* requires that police explain these rights to a suspect before beginning questioning.[125]

Justice O'Connor then noted that *Edwards v. Arizona*[126] created "a second layer of prophylaxis for the *Miranda* right to counsel."[127] Specifically, if a suspect invokes the right to counsel at any time, the police must immediately cease questioning until an attorney is present or the suspect re-initiates the conversation.[128] Justice O'Connor believed that *Edwards,* which held that the knowing and intelligent waiver standard protects the right to counsel, was "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights."[129] Justice O'Connor believed that this prohibition on further questioning, like other aspects of *Miranda,* "is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose."[130]

Justice O'Connor next focused on the application of *Miranda* and *Edwards* to *Davis.*[131] Justice O'Connor determined that courts faced with the question of whether a suspect actually invoked the right to counsel must make an objective inquiry to avoid difficulties of proof and to provide guidance to officers conducting interrogations.[132] To invoke the *Miranda* right to counsel, a suspect must "at a minimum [make a] statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney."[133] Most significantly, Justice O'Connor determined that Supreme Court precedent does not require clarifying questions or the cessation of an interrogation unless the suspect articulates a clear desire to have counsel present—*i.e.,* clear enough for a reasonable police officer under the circumstances to interpret the statement as a request for an attorney.[134] Justice O'Connor noted that the Court had previously concluded that "a statement either is such an assertion of the right to counsel or it is not."[135] Justice O'Connor interpreted later Supreme Court case law to explain that *Edwards* does not mandate that the in-

124 Davis v. United States, 114 S. Ct. 2350, 2354 (1994).
125 *Id.*
126 451 U.S. 477 (1981).
127 *Davis,* 114 S. Ct. at 2355.
128 *Id.* at 2354-55 (citing United States v. Edwards, 451 U.S. 477, 484-85 (1988)).
129 *Id.* at 2355 (quoting Michigan v. Harvey, 494 U.S. 344, 350 (1990)).
130 *Id.* (citing Connecticut v. Barrett, 479 U.S. 523, 528 (1987)).
131 *Id.* at 2355.
132 *Id.*
133 *Id.* (quoting McNeil v. Wisconsin, 501 U.S. 171, 178 (1991)).
134 *Id.*
135 *Id.* (quoting Smith v. Illinois, 469 U.S. 91, 97-98 (1984)).

terrogation cease.[136]

Justice O'Connor rejected Davis' suggestion to broaden the scope of *Edwards* to require that police officers stop questioning at the moment a suspect makes an ambiguous or equivocal reference to counsel.[137] Justice O'Connor reasoned that such a rule "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity,"[138] and would needlessly prevent police officers from questioning an unrepresented suspect if the suspect did not wish to have the assistance of counsel.[139] Furthermore, Justice O'Connor noted that the Court in *Miranda* stated that "if a suspect is 'indecisive in his request for counsel,' the officers need not always cease questioning."[140]

Justice O'Connor recognized that a rule "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 although they actually want to have a lawyer present."[141] However, Justice O'Connor believed that the *Miranda* warnings were sufficient to "dispel whatever coercion is inherent in the interrogation process."[142] And the suspect must affirmatively invoke the additional protection of *Edwards* by requesting an attorney.[143]

Justice O'Connor then focused on "the other side of the *Miranda* equation: the need for effective law enforcement."[144] *Edwards* provides a bright line for officers that does not unduly hamper real-world investigation.[145] According to Justice O'Connor, a rule that requires police officers to cease their questioning if a suspect makes an ambiguous statement that may or may not be a request for an attorney would force police officers to engage in guesswork.[146]

Justice O'Connor recognized that when a suspect makes an ambiguous statement "it will often be good police practice for the interviewing officer to clarify whether or not he actually wants an attorney."[147] However, Justice O'Connor declined to adopt a rule re-

136 *Id.* (citing Moran v. Burbine, 475 U.S. 412, 433 n.4 (1986)).
137 *Id.*
138 *Id.* at 2356 (quoting Michigan v. Mosley, 423 U.S. 96, 102 (1975)).
139 *Id.*
140 *Id.* (quoting Miranda v. Arizona, 384 U.S. 436, 485 (1966)).
141 *Id.*
142 *Id.* (quoting Moran v. Burbine, 475 U.S. 412, 427 (1986)).
143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.*
147 *Id.*

quiring officers to ask clarifying questions. In the end, the Court was unwilling to create "a third layer of prophylaxis" beyond *Miranda* and *Edwards* that would prevent police questioning when the suspect might want a lawyer.[148]

Justice O'Connor then deferred to the lower court's conclusion that Davis' statement, "Maybe I should talk to a lawyer," was not a reasonably clear request for counsel.[149] Justice O'Connor saw no reason to disturb that conclusion.[150] Thus, the NIS agents did not have to cease questioning Davis.

B. JUSTICE SCALIA'S CONCURRENCE

Although Justice Scalia joined with the majority, he wrote a separate concurring opinion to address the separation of powers issue that the majority ignored.[151] Justice Scalia believed that 18 U.S.C. § 3501, "the statute governing the admissibility of confessions in federal prosecutions,"[152] should apply.[153] The majority declined to consider this statute because the government expressly declined to argue it and because the issue was one of first impression involving the interpretation of a federal statute.[154] However, Justice Scalia disagreed with the Court's refusal to consider the statute, arguing that legal analysis of the admissibility of a confession without reference to the statute was "an unreal exercise."[155]

Justice Scalia noted that every presidential administration has generally avoided this provision since its enactment in 1968.[156] Even though Justice Scalia ultimately agreed with the Court that judgment

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148 *Id.* at 2356-57.

149 *Id.* at 2357.

150 *Id.*

151 *Id.* (Scalia, J., concurring).

152 *See id.* (Scalia, J., concurring) (quoting United States v. Alvarez-Sanchez, 114 S. Ct. 1599, 1600 (1994)).

153 18 U.S.C. § 3501 (1988) provides that: "a confession . . . shall be admissible in evidence if it is voluntarily given." 18 U.S.C. § 3501(a). Courts shall determine voluntariness on the basis of:

> all the circumstances surrounding the giving of the confession, including . . . whether or not [the] defendant was advised or knew that he was not required to make any statement[;] . . . whether or not [the] defendant had been advised prior to questioning of his right to the assistance of counsel; and . . . whether or not [the] defendant was without the assistance of counsel when questioned . . . .
>
> The presence or absence of any of the above-mentioned factors . . . need not be conclusive on the issue of voluntariness of the confession.

18 U.S.C. § 3501(b) (1988).

154 *See* Davis v. United States, 114 S. Ct. 2350, 2354 (1994).

155 *See id.* at 2357 (Scalia, J., concurring).

156 *Id.* at 2357 (Scalia, J., concurring) (citing OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON LAW OF PRE-TRIAL INTERROGATION 72-73 (1986)).

may be properly rendered here, he warned that as far as he was concerned, the next time the Court is confronted with this predicament, it will consider the statute.[157] According to Justice Scalia, while the Executive has the power to nullify some provisions of law by the mere failure to prosecute, once a prosecution has been commenced and a confession introduced, the Executive has neither the power nor right to determine what objections to the admissibility of a confession are valid in law.[158] In sum, Justice Scalia believed that the Court's continuing refusal to consider § 3501 was not consistent with the Judiciary's obligation to decide according to the law.[159]

C. JUSTICE SOUTER'S CONCURRENCE

Justice Souter[160] concurred in the judgment. Justice Souter voted to affirm Davis' conviction because he believed that the Constitution does not prevent law enforcement officers from asking questions limited to clarifying whether suspects intend to assert their Fifth Amendment right to counsel.[161] Justice Souter upheld Davis' conviction because he believed that Davis had made the self-incriminating statements only after the officers had apparently clarified his desire to continue without an attorney.[162] However, Justice Souter disagreed with the Court's ruling that the officers had no obligation to clarify what a suspect meant by an equivocal statement that could reasonably be understood as a request for counsel.[163] Justice Souter could not join in establishing a rule that would allow the investigators to disregard a suspect's reference to a lawyer—even if that reference, though ambiguous, could reasonably be understood as a request for counsel.[164]

Justice Souter noted that Supreme Court precedent and a substantial body of state and circuit court law argue against the majority's differentiation between suspects who ambiguously assert their right to counsel and those who do so unambiguously.[165] In Justice Souter's view, "[t]he concerns of fairness and practicality that have long anchored our *Miranda* case law point to a different response: when law enforcement officials 'reasonably do not know whether the suspect wants a lawyer,' they should stop their interrogation and ask him

157 Davis, 114 S. Ct. at 2358 (Scalia, J., concurring).
158 *Id.* at 2358 (Scalia, J., concurring).
159 *See id.* (Scalia, J., concurring).
160 Justices Blackmun, Stevens, and Ginsburg joined Justice Souter's concurrence.
161 *Davis*, 114 S. Ct. at 2359 (Souter, J., concurring).
162 *Id.* (Souter, J., concurring).
163 *Id.* (Souter, J., concurring).
164 *Id.* (Souter, J., concurring).
165 *Id.* (Souter, J., concurring).

to make his choice clear."[166]

According to Justice Souter, a rule requiring investigators to determine the meaning of a suspect's equivocal statement before initiating further interrogation would satisfy the two ambitions of nearly thirty years of case law addressing the relationship between police and criminal suspects in custodial interrogation. First, it would ensure that the individual's right to choose between speech and silence remains unfettered throughout the interrogation process.[167] Second, it would ensure that the justification for *Miranda* rules remain consistent with practical realities.[168]

Justice Souter then demonstrated how the Court's approach fails to adhere to these two principles.[169] According to Justice Souter, suspects who are "'thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures' would seem an odd group to single out for the Court's demand of heightened linguistic care."[170] The many suspects who lack a confident command of the English language will be sufficiently intimidated or overwhelmed by their predicament that they will lose the ability to speak assertively.[171] Justice Souter further argued that the standard governing waivers of the right to counsel does not distinguish between initial waivers and later decisions to reinvoke them. According to Justice Souter, *Miranda*'s objective was to guarantee "a continuous opportunity to exercise [the right of silence]."[172]

Justice Souter criticized the Court's toleration of the fact that some poorly expressed requests for counsel will be disregarded.[173] Unlike the Court, Justice Souter believed that a reading of *Miranda* rights does not alleviate the inherent coercion of the interrogation.[174] Justice Souter further criticized the Court's reading of *Moran v. Burbine*,[175] which quotes *Miranda*: "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, or [if he] states that he wants an attorney, the interrogation must cease."[176] According to Justice Souter, this language does

166 *Id.* (Souter, J., concurring) (citing *id.* at 2355) (internal citation omitted).
167 *Id.* at 2360 (Souter, J., concurring).
168 *Id.* (Souter, J., concurring).
169 *Id.* (Souter, J., concurring).
170 *Id.* (Souter, J., concurring) (quoting Miranda v. Arizona, 384 U.S. 436, 457 (1966)).
171 *Id.* at 2360-61 (Souter, J., concurring).
172 *Id.* at 2361 (Souter, J., concurring) (quoting *Miranda*, 384 U.S. at 444.).
173 *Id.* (Souter, J., concurring).
174 *Id.* (Souter, J., concurring).
175 475 U.S. 412 (1986).
176 Davis v. United States, 114 S. Ct. 2350, 2362 (1994) (quoting Moran v. Burbine, 475 U.S. 412, 420 (1986)).

not readily tolerate police practice that "frustrat[es] the suspect's subjectively held (if ambiguously expressed) desire for counsel."[177]

Finally, Justice Souter focused on the threat to the core of Fifth Amendment protection.[178] He feared that the majority's approach will not adequately protect the inarticulate or intimidated suspect.[179] After attempting to invoke a right to counsel that falls short of the majority's standard, a suspect "may well see further objection as futile and confession (true or not) as the only way to end his interrogation."[180] Furthermore, Justice Souter found no precedent dictating that interrogators may presume that an ambiguous statement is not a request for counsel and continue questioning.[181] Thus, Justice Souter argued that clarification was the "intuitively sensible course."[182]

Justice Souter then challenged the Court's assertion that its rule will promote more effective law enforcement and maintain the "ease of application."[183] First, he asserted that while the confessions lost due to clarification extract a real price from society, it is a price that the Court in *Miranda* determined should be borne.[184] Second, he noted that the question "how clear is clear?" is not so easily answered in police stations and trial courts.[185] Unlike the majority rule, the clarification approach would guarantee that the "'judgment call' will be made by the party most competent to resolve the ambiguity, who our case law has always assumed should make it: the individual suspect."[186]

Turning to the petitioner's argument that even ambiguous requests require an end to all police questioning, Justice Souter stressed that he was unwilling to adopt such a rule.[187] According to Justice Souter, ceasing the interrogation when a suspect unambiguously expresses a desire for it to continue could potentially impede the strong bias favoring individual choice.[188]

Justice Souter ended with a look towards the future.[189] He noted that the Court should adopt the rule proposed by the petitioner if experience reveals that less drastic means are ineffective to safeguard

177 *Davis*, 114 S. Ct. at 2362 (Souter, J., concurring).
178 *Id.* (Souter, J., concurring).
179 *Id.* (Souter, J., concurring).
180 *Id.* (Souter, J., concurring).
181 *Id.* at 2361-63 (Souter, J., concurring).
182 *Id.* at 2363 (Souter, J., concurring).
183 *Id.* (Souter, J., concurring).
184 *Id.* (Souter, J., concurring).
185 *Id.* (Souter, J., concurring).
186 *Id.* (Souter, J., concurring).
187 *Id.* (Souter, J., concurring).
188 *Id.* at 2364 (Souter, J., concurring).
189 *Id.* (Souter, J., concurring).

suspects' rights.[190] In conclusion, Justice Souter hoped that the Court's ruling would not lead to trial courts demanding "suspects to speak with the discrimination of an Oxford don" and that interrogators would continue to follow "good police practice" and ask clarifying questions.[191]

V. ANALYSIS

Until *Davis*, state and federal courts had promulgated three distinct approaches to determine whether a suspect's ambiguous reference to an attorney invoked the Fifth Amendment right to counsel. The majority in *Davis* adopted the threshold of clarity approach: a suspect's reference to counsel must reach a high threshold level of clarity to constitute an invocation of the right to counsel.[192] If the suspect's statement is not an unambiguous or unequivocal request for a lawyer, law enforcement officers do not have an obligation to stop the interrogation.[193] Furthermore, officers are not required to attempt to clarify such ambiguities.[194] Justice Souter, in his concurrence, advocated for the clarification approach: when suspects make an ambiguous reference to an attorney, interrogators should stop their interrogation and clarify the suspect's desires.[195] The per se approach, which no member of the Court supported, regarded an ambiguous reference to an attorney as an invocation of the right to counsel.[196] The per se approach demanded the complete cessation of questioning if a suspect's ambiguous statement could be reasonably understood as a request for counsel.[197] The petitioner in *Davis* attempted to put a twist on this line of reasoning by distinguishing between ambiguous references to counsel and ambiguous requests for counsel.[198]

Ultimately, none of these approaches satisfactorily protects the constitutional rights illuminated in *Miranda*. The *Davis* threshold of clarity approach construes Supreme Court precedent too narrowly and fails to balance the competing demands of effective law enforcement and constitutional safeguards. The per se approach, including the variation advocated by the petitioner, would constrain effective

190 *Id.* (Souter, J., concurring).
191 *Id.* (Souter, J., concurring).
192 *Id.* at 2356.
193 *Id.*
194 *Id.*
195 *Id.* at 2359 (Souter, J., concurring).
196 Brief for Petitioner at 11, Davis v. United States, 114 S. Ct. 2350 (1994) (No. 92-1949).
197 *Id.* at 12.
198 Brief for Petitioner at 2, Davis v. United States, 114 S. Ct. 2350 (1994) (No. 92-1949).

law enforcement. The clarification approach similarly fails to strike a proper balance among these competing factors. A more focused version of the clarification approach would provide an effective response to ambiguous or equivocal references to counsel in the custodial setting.

A. PROBLEMS WITH THE THREE MAJOR APPROACHES

1. The Davis *Threshold of Clarity Approach*

The *Davis* threshold of clarity approach fails to adequately safeguard the constitutional rights of a suspect confronted with custodial interrogation. The Court in *Miranda*, discussing the coercive nature of these interrogations, believed that such an environment "carries its own badge of intimidation" and may not only be physically intimidating, but a threat to human dignity as well.[199] Common sense and social science suggest that people who feel powerless or intimidated are more likely to resort to unintentionally equivocal language.[200] To secure a statement that is truly the product of the suspect's free choice, adequate procedures are necessary to "dispel the compulsion inherent in custodial surroundings."[201]

The *Davis* rule has another weakness. Equivocal language is not just a product of the "inherently coercive" atmosphere of the custodial environment—it is also the everyday expression and conversation tool for many people. A serious flaw in the *Davis* rule is its "implicit assumption that direct and assertive speech . . . is, or should be, the norm."[202] Some people are less likely to speak in a direct manner or use assertive speech patterns. Such indirect speech patterns are "the hallmark of a pragmatic usage by persons without power, and can be found both in . . . female [speech patterns] and in the adaptive speech patterns of subordinated African Americans forced to deal with white authority figures."[203] Under *Davis*, these groups are more likely to inadvertently waive the right to counsel.[204] While the majority in *Davis* stated that suspects need not articulate their invocation "with the discrimination of an Oxford don,"[205] this approach nevertheless requires individuals to invoke the Fifth Amendment right to

199 Miranda v. Arizona, 384 U.S. 436, 457 (1966).

200 Davis v. United States, 114 S. Ct. 2350, 2361 n.4 (1994) (Souter, J., concurring) (citing W. O'BARR, LINGUISTIC EVIDENCE: LANGUAGE, POWER AND STRATEGY IN THE COURTROOM 61-71 (1982)).

201 *Miranda*, 384 U.S. at 458.

202 Ainsworth, *supra* note 6, at 315.

203 *Id.* at 318.

204 *Id.* at 319.

205 Davis v. United States, 114 S. Ct. 2350, 2355 (1994) (quoting *id.* at 2364 (Souter, J., concurring)).

counsel with clarity seldom found in everyday speech.[206]

The *Davis* threshold of clarity approach wrongly forces suspects, "on pain of losing a constitutional right,"[207] to select their words with a level of precision that ignores real world expression and articulation.[208] Justice Souter appropriately argued that suspects who are "'thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures' would seem an odd group to single out for the Court's demand of heightened linguistic care."[209] Indeed, resolving ambiguity against the suspect actually rewards the experienced criminal, who is less likely to be unnerved by the situation.[210] Thus, the majority's approach operates most severely on the "ignorant and unsophisticated suspect"—that is, the suspect who has the most need for constitutional safeguards.[211]

The *Davis* threshold of clarity approach will lead to the denial of counsel as a result of some poorly expressed desires for counsel.[212] The majority defends this inevitability on the ground that *Miranda* warnings sufficiently dilute the coercion inherent in the custodial setting.[213] However, even the Court in *Miranda* recognized the limits of its own rule: "a once-stated warning, delivered by those who will conduct the interrogation cannot itself suffice [to] . . . assure that the . . . right to choose between silence and speech remains unfettered throughout the interrogation process."[214] In sum, *Miranda* and *Edwards* cannot effectively safeguard rights guaranteed in the Constitution if interrogators can simply ignore a request for counsel that fails to meet a threshold level of clarity unattainable by many in the real world.[215]

2. *The Per Se Approach*

The viability of the per se approach has two significant problems. First, it imposes an unreasonable strain on reasonable law enforce-

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206 Petitioner's Brief at 17-18, *Davis* (No. 92-1949).

207 United States v. Gotay, 844 F.2d 971, 975 (1988).

208 *Id.*

209 *Davis*, 114 S. Ct. at 2360 (Souter, J., concurring) (quoting Miranda v. Arizona, 384 U.S. 436, 457 (1966)).

210 People v. Randall, 464 P.2d 114, 118 (Cal. 1970) (en banc) (dictum) *overruled by* People v. Cahill, 853 P.2d 1037 (1993). *See also* Fare v. Michael C., 442 U.S. 707, 730 (1979) (Marshall, J., dissenting) (citing Chaney v. Wainwright, 561 F.2d 1129, 1134 (5th Cir. 1977) (Goldberg, J., dissenting)).

211 *Randall*, 464 P.2d at 118.

212 *See Davis*, 114 S. Ct. at 2356.

213 *Id.*

214 *Id.* at 2361-62 (Souter, J., concurring) (quoting Miranda v. Arizona, 384 U.S. 436, 469).

215 Petitioner's Brief at 17, *Davis* (No. 92-1949).

ment, and second, it has a paternalistic element that prevents some suspects from making their intended choices. The per se rule essentially forces police officers to abandon questioning at the moment a suspect makes an ambiguous reference to counsel or even equivocally expresses a desire for counsel. This may strain reasonable law enforcement by "transform[ing] the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity"[216] and needlessly hindering police efforts without helping suspects who did not intend to invoke the right to counsel.[217] Furthermore, the Supreme Court has consistently rejected paternalistic rules that protect defendants from their own intelligent and voluntary decisions.[218] Allowing such a rule would "imprison a suspect in his privileges."[219]

While the petitioner in *Davis* distanced himself from a rule that would give talismanic power to the word "lawyer," the distinction he made between ambiguous references to counsel and ambiguous requests for counsel is insufficient. The petitioner's approach simply shifts the battlefront of future litigation to whether a statement was a request or a mere reference.[220] The most significant flaw in this approach is the burden it would place on law enforcement officers. It provides no brighter line than the threshold of clarity approach and still forces interrogators to pass judgment on quite subtle facts underlying the inquiry of whether the statement was an ambiguous request or an ambiguous reference.

3. The Clarification Approach

The chief problem with Justice Souter's clarification approach is that overzealous investigators could abuse it, and the suspects who make an ambiguous request could regard it as an attempt to suppress that request, even where interrogators act in good faith.[221] The Court in *Miranda* recognized that the goals of the interrogator and the interests of the suspect conflict in the adversarial system.[222] Safeguards must make the suspect "acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting

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216 *Davis*, 114 S. Ct. at 2355-56 (quoting Michigan v. Mosely, 423 U.S. 96, 102 (1975)).

217 *Id.* at 2356.

218 Respondent's Brief at 27, *Davis* (No. 92-1949) (quoting *Mosley*, 423 U.S. at 109 (White, J., concurring)).

219 *See Mosley*, 423 U.S. at 109 (White, J., concurring) (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 280 (1942)).

220 Respondent's Brief at 24 n.16, *Davis* (No. 92-1949).

221 Reply Brief for Petitioner at i, Davis v. United States, 114 S. Ct. 2350 (1994) (No. 92-1949).

222 Miranda v. Arizona, 384 U.S. 436, 469 (1966).

solely in his interest."[223] Otherwise, the ultimate control over the right to an attorney transfers from the suspect to the interrogator.[224] Specifically, there is a substantial risk in the clarification approach that "officers will seek to find, or even to create, equivocalness where there is none and in so doing force the suspect constantly to reassert his right to counsel."[225] The approach may also induce the interrogator to delay granting a request for counsel, "in hope that in the interim the suspect will make some statement inconsistent with the request opening up inquiry that will reveal (or produce) waiver of the right previously asserted."[226] While the law is clear that questioning must cease if a suspect asks for a lawyer,[227] the fear is that "'clarifying' questions [may] shade subtly into illicitly badgering a suspect who wants counsel."[228] Even if police act in good faith, suspects may still interpret an attempt to clarify as badgering.[229] After listening to *Miranda* warnings that acutely emphasize the right to counsel, suspects who are then questioned about their true desires are likely to view the situation as a "hesitancy to fulfill the request" or even as an "intention not to provide counsel at all."[230] Such an approach would invariably increase—not minimize—the coercion inherent in the custodial setting.[231]

B. THE "MODIFIED CLARIFICATION RULE"

A "modified clarification rule" will better balance the interests of the suspect and the interrogator. The rule was first set forth in 1994 by Judge Abrahamson of the Wisconsin Supreme Court.[232] This modified approach, like the standard clarification approach, would require interrogators to immediately cease questioning the suspect about the crime when an ambiguous reference to or request for counsel is made.[233] The interrogators' response to the ambiguity should

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223 *Id.*

224 Nash v. Estelle, 597 F.2d 513, 526 (5th Cir.) (Godbold, J., dissenting), *cert. denied*, 444 U.S. 981 (1979).

225 *Id.*

226 *Id.*

227 Davis v. United States, 114 S. Ct. 2350, 2354-55 (1994) (citing Edwards v. Arizona, 451 U.S. 477, 484 (1981)).

228 *Id.* at 2363 (Souter, J., concurring).

229 Petitioner's Brief at 29-30, *Davis* (No. 92-1949).

230 *Id.* at 30.

231 *Id.*

232 State v. Walkowiak, 515 N.W.2d 863 (Wis. 1994) (Abrahamson, J., concurring).

233 *Id.* at 870 (Abrahamson, J., concurring). Here, the issue was whether the suspect's question to the police, "Do you think I need an attorney?" was sufficient to invoke her right to counsel. *Id.* at 864. In her concurrence, Judge Abrahamson referred to this inquiry as an ambiguous *request*. *Id.* at 869 (Abrahamson, J., concurring).

be neutral and should focus solely on determining whether the suspect is invoking the right to counsel. "In other words, the police [should] inform the suspect of the consequences of the ambiguous statement and ask the suspect to decide whether to assert the right to counsel."[234] Specifically, the following language would appropriately clarify a suspect's ambiguous statement:

> I have to stop questioning you now because I am not sure whether you want a lawyer. You have a right to consult with a lawyer and to have the lawyer present during questioning. If you cannot afford a lawyer, one will be appointed to represent you. You will not be punished for deciding not to speak with me now, and you will not be rewarded for talking with me now. If you talk with me now, anything you say can be used against you in court. Do you want a lawyer?[235]

Interrogators may alter this language to fit the circumstances as long as the message and tone remain the same.[236] The clarification must simply convey to the suspect "the consequences of the ambiguous reference to consulting an attorney (questioning stops); give the warnings about the right to counsel during interrogation; [and] ask the suspect whether an attorney is wanted."[237] The success of this modified approach depends on the steps law enforcement officers take after giving this clarified warning:

> If, after hearing this warning, the suspect unambiguously requests counsel, the questioning must stop, unless and until it is reinitiated by the suspect. If on the other hand, the suspect unambiguously agrees to questioning without counsel, the questioning can continue. *If, after hearing the warning, the suspect does not respond or continues to vacillate, the questioning must stop.*[238]

This procedure minimizes the problems inherent in the original clarification approach—the risk of police badgering suspects into waiving their rights—and the problems inherent in the per se rule—the risk of crippling effective law enforcement. Limiting clarification to this one-shot approach serves the goals of *Miranda* and its progeny better than the *Davis* standard. This approach balances the competing goals of *Miranda* by effectively safeguarding the rights of a suspect while still providing for effective and reasonable law enforcement.

Additionally, Supreme Court precedent, as well as state and federal cases, support the clarification approach more than the threshold of clarity approach.[239] Furthermore, such precedent logically permits

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234 *Id.* (Abrahamson, J., concurring).

235 *Id.* at 870-71 (Abrahamson, J., concurring).

236 *Id.* at 871 (Abrahamson, J., concurring).

237 *Id.* (Abrahamson, J., concurring).

238 *Id.* at 871 (Abrahamson, J., concurring) (emphasis added).

239 Davis v. United States, 114 S. Ct. 2350, 2359 (1994) (Souter, J., concurring).

the leap to the modified clarification approach proposed in this Note. The Supreme Court has recognized that the coercive forces inherent in the custodial setting pose a direct threat to the Fifth Amendment privilege against compulsory self-incrimination, and while the procedural safeguards that the Court established "were not themselves rights protected by the Constitution," they were deemed necessary to the vitality of the Fifth Amendment.[240] To meet the demands of the Fifth Amendment, the Court issued a rigid standard in *Miranda*:[241] "[i]f . . . [an accused] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning."[242] The "indicates in any manner" language reflects a need for a broader approach than the majority in *Davis* adopted.[243]

The Supreme Court has also rejected the argument that courts must resolve any ambiguity in a request for an attorney against the suspect.[244] In *Michigan v. Jackson*,[245] the Court considered whether a defendant's request for counsel at an arraignment is effectively a request for counsel at all future proceedings or interrogations.[246] In holding for the defendant, the Court recognized that the settled approach to questions of waiver of fundamental constitutional rights demands every reasonable presumption against such a waiver.[247] While precedent does not mandate a clarification approach, modified or otherwise, the language of these opinions supports a more liberal rule than the hurdle that the majority in *Davis* erected.

VI. CONCLUSION

In sum, the modified clarification approach, giving interrogators only one chance to clarify a suspect's ambiguous request for counsel,

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240 Michigan v. Tucker, 417 U.S. 433, 444 (1974).

241 State v. Walkowiak, 515 N.W.2d 863, 866 (Wis. 1994).

242 *Id.* (quoting Miranda v. Arizona, 384 U.S. 436, 444-45 (1966)).

243 This language appears at several points in the *Miranda* opinions. *See also Miranda*, 384 U.S. at 473-74 ("If the individual indicates in any manner, at any time prior to or during questioning, that he wished to remain silent, the interrogation must cease.").

244 Brief for Petitioner at 23, Davis v. United States, 114 S. Ct. 2350 (1994) (No. 92-1949).

245 475 U.S. 625 (1985).

246 *Jackson*, 475 U.S. at 632-33.

247 *Id.* at 633. Specifically, the Court stated:

> This argument . . . must be considered against the backdrop of our standard for assessing waivers of constitutional rights. Almost a half century ago . . . the Court explained that we should "indulge every reasonable presumption against waiver of fundamental constitutional rights." . . . Doubts must be resolved in favor of protecting the constitutional claim. This settled approach to questions of waiver requires us to give a broad, rather than narrow, interpretation to a defendant's request for counsel . . . .

Id. (internal citations omitted).

most effectively balances the conflicting demands made upon the privilege against compulsory interrogation. The *Davis* threshold of clarity rule requires individuals to invoke the Fifth Amendment right to counsel with clarity seldom found in everyday speech.[248] Furthermore, the *Davis* rule ignores the overall purpose of *Miranda* rights as well as the weight of judicial precedent, by failing to create a third "prophylaxis" ensuring the vitality of the Fifth Amendment. The per se approach unduly burdens law enforcement and fails to sufficiently preserve suspects' control over their rights. The concurrence's clarification rule avoids these problems but fails to overcome problems inherent in the adversarial environment of custodial interrogations. In contrast, a modification of the clarification approach that guides interrogators confronted with ambiguous requests for or references to counsel will minimize the difficulties of the custodial interrogation and more effectively safeguard the suspect's constitutional rights.

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[248] Brief for Petitioner at 18, Davis v. United States, 114 S. Ct. 2350 (1994) (No. 92-1949).