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Davis v. United States: "Maybe I Should Talk to a Lawyer" Means Maybe Miranda is Unraveling

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I. INTRODUCTION

Extensive exposure of police stories in the media has familiarized almost everyone with the phrase: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to have an attorney present before and during any questioning. If you cannot afford an attorney, one will be appointed for you free of charge."[1] In 1966, *Miranda v. Arizona*[2] set forth these rights, now commonly known as the *Miranda* rights.[3] While most people know they can waive these rights, not many people are aware they can re-initiate them at any time during an interrogation.[4] If a suspect

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1. Detective Stewart McCarroll of the Brea Police Department gave this version of the Miranda rights. Police and other law enforcement personnel give different variations of these rights. *See, e.g.*, JOHN C. KLOTTER & JACQUELINE P. KANOVITZ, CONSTITUTIONAL LAW FOR POLICE § 6.4 (3d ed. 1977). However, all forms are substantially the same. *Constitutional Law For Police* states the Miranda rights as:

(1) "You have the right to remain silent and say nothing."
(2) "If you do make a statement, anything you say can and will be used against you in court."
(3) "You have the right to have an attorney present or to consult with an attorney."
(4) "If you cannot afford an attorney, one will be appointed for you prior to any questioning if you so desire."

Id.

2. 384 U.S. 436 (1966).

3. *Id. Miranda* involved four different cases of confessions, garnered during custodial interrogations, which led to conviction at the respective trial courts. *Id.* Three of those convictions were affirmed on appeal, and the Supreme Court granted the defendants' petition for certiorari. *Id.* In the fourth case, the State of California challenged the California Supreme Court's reversal of the conviction below. *Id.* For facts of the four cases, see State v. Miranda, 401 P.2d 721 (Ariz. 1965) (en banc), *rev'd*, 384 U.S. 436 (1966); People v. Vignera, 207 N.E.2d 527 (N.Y. 1965), *rev'd sub nom.* Miranda v. Arizona, 384 U.S. 436 (1966); Westover v. United States, 342 F.2d 684 (9th Cir. 1965), *rev'd sub nom.* Miranda v. Arizona, 384 U.S. 436 (1966); People v. Stewart, 400 P.2d 97 (Cal. 1965), *aff'd sub nom.* Miranda v. Arizona, 384 U.S. 436 (1966).

4. *See Miranda*, 384 U.S. at 474.

invokes his right to counsel at any time during the interrogation, the police must stop all questioning until an attorney is present.[5] But, what statements invoke this right?[6] The Supreme Court appeared to answer this question in 1981, with its decision in *Edwards v. Arizona*,[7] by holding that a suspect must "clearly assert" his right to have counsel present.[8] However, *Edwards* did not address what the police should do when encountering a suspect who makes an ambiguous request for counsel.[9] The Court has not yet decided this issue, even though the lower courts have all adopted one of three varying approaches.[10]

The need to finally resolve this issue appears obvious. Depending on which jurisdiction or state the police question a suspect in, the result of that suspect's ambiguous request for counsel could yield drastically different results. If police ignore a suspect's ambiguous request, one jurisdiction would *suppress* any subsequent statements, another would admit the statements only if the police determine, through clarifying questions, that the suspect intended to waive his rights, while a third would *admit* any later statements.[11] Therefore, when Davis, a murder suspect, said, "Maybe I should talk to a lawyer," the Court finally accepted the opportunity to decide the issue of ambiguous requests for counsel.[12]

This Casenote will analyze the Court's landmark decision in *Davis v. United States*[13] and discuss its possible effect on the *Miranda* rights. Part II reviews the evolution of law protecting a custodial suspect against self-incrimination and the right to have counsel present during

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5. *Id.* If the suspect requests counsel, "the interrogation must cease until an attorney is present." *Id.*

6. Courts at various levels have come up with different requirements. *Compare infra* notes 85-100 and accompanying text *with* notes 101-22 and accompanying text and *with* notes 124-34 and accompanying text.

7. 451 U.S. 477 (1981).

8. *Id.* at 485.

9. *See infra* notes 40-44 and accompanying text.

10. *See infra* text accompanying notes 82-134. The first approach requires the police to stop all questioning when a suspect makes an ambiguous request for counsel. *See infra* text accompanying notes 85-100. The second approach limits police questioning to clarifying an ambiguous request. *See infra* text accompanying notes 101-22. The third approach allows the police to ignore ambiguous requests for counsel and continue the interrogation. *See infra* text accompanying notes 124-34.

11. *See infra* notes 82-134 and accompanying text. Therefore, depending on the suspect's jurisdiction, he may be acquitted or convicted, which are extreme results.

12. Davis v. United States, 114 S. Ct. 2350 (1994). The Court has had numerous opportunities to decide this issue, as evidenced by the numerous state and federal cases involving ambiguous requests for counsel. *See infra* notes 82-134 and accompanying text.

13. 114 S. Ct. 2350 (1994).

custodial interrogations[14] and discusses the Court's future direction in terms of protecting this right. Part III summarizes the facts of the case,[15] leading into part IV, which analyzes and critiques the opinions of the Justices.[16] The consequences of the Court's decision, from promoting police efficiency to possibly signaling an end to *Miranda*, are discussed in part V.[17] Part V then continues with a discussion of the possibility and the merits of a reversal of *Davis*, as well as a recommended approach for dealing with ambiguous requests for counsel.[18] Finally, part VI concludes the casenote with some thoughts on the Court's handling of this case.[19]

II. HISTORICAL BACKGROUND

A. *Supreme Court Decisions*

The Fifth Amendment to the Constitution guarantees a criminal suspect the right against self-incrimination.[20] In order to protect this right, the Court stated in *Miranda v. Arizona* that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[21] These safeguards have become known as the *Miranda* rights, which basically require police to advise a suspect that he has the right to remain silent and to have an attorney present during interrogation.[22] The right to have an attorney present prevents the police from eliciting incriminating statements through coercion or psychological pressure.[23] Since the Court found that custodial interrogations

14. *See infra* notes 20-135 and accompanying text.
15. *See infra* notes 136-52 and accompanying text.
16. *See infra* notes 153-257 and accompanying text.
17. *See infra* notes 258-93 and accompanying text.
18. *See infra* notes 294-337 and accompanying text.
19. *See infra* notes 338-41 and accompanying text.
20. U.S. CONST. amend. V. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." *Id.*
21. 384 U.S. 436, 444 (1966). The Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.*
22. *Id.* The Court required that "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.*
23. *See id.* at 466. The Court stated that the essence of interrogations is "[t]o be

involved such a substantial risk of coercion, it declared that "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege."[24] In recognizing the importance of having counsel present during interrogations, the Court seemed to make it easy for the suspect to invoke this right.[25] A suspect is only required to indicate "*in any manner* and at any stage" that he wants an attorney present.[26] Even though the plain meaning of the words "in any manner" connotes a loose standard for invoking the right, the Court implied a need for a more rigid standard.[27] To be effective, waiver must be made "voluntarily, knowingly and intelligently,"[28] which suggests some level of certainty. However, the Court did not explicitly advocate a requisite level of clarity to invoke the right to counsel.

In 1975, the Court appeared to take a more limited reading of *Miranda* rights in *Michigan v. Mosely*.[29] Rejecting a strict application of *Miranda* to bar *all* new interrogations, the Court instead looked to "[a] review of the circumstances leading to [the] confession" to determine when a suspect waives his rights.[30] Disregarding surrounding circumstances would both deter legitimate police investigation and deprive suspects of their right to choose their course of action.[31] Thus, the

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alone with the suspect . . . to prevent distraction and to deprive him of any outside support." *Id.* at 455. Requiring a criminal suspect to have an attorney present would alleviate this problem. *See id.*

24. *Id.* at 469.

25. *See id.* at 472. Later cases show that this was not exactly the case, as confusion arose as to how a suspect could invoke the right to have an attorney present. *See infra* notes 82-134.

26. *Miranda*, 389 U.S. at 444-45 (emphasis added).

27. *See id.* at 473-74.

28. *Id.* at 444.

29. 423 U.S. 96 (1975). Mosely invoked his right to remain silent after police read him his Miranda rights. *Id.* at 97. The officers stopped their interrogation, but later, a different officer at a different location asked Mosely about an unrelated crime. *Id.* at 97-98. This new officer then read Mosely his rights again, but this time Mosely did not invoke his right to remain silent and proceeded to talk to the officer voluntarily. *Id.* at 98. Mosely claimed that the Court should suppress these statements. *Id.* at 98-99.

30. *Id.* at 104. Using the totality of circumstances standard, the Court found that Mosely's "'right to cut off questioning' was fully respected." *Id.* The Court found no *Miranda* violation because the first set of officers fully honored Mosely's request to cease questioning and the second interrogation entailed a completely new situation with a new officer, new location, and new interrogation about a different crime. *Id.* With this new situation, Mosely voluntarily waived his rights; thus, there was no *Miranda* violation. *Id.* at 105-07.

31. *Id.* at 102. The Court stated that "a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an oppor-

Court moved towards a more flexible approach permitting limited renewed interrogations, rather than an all-encompassing *Miranda* blanket.

However, two years later, the Court seemed to expand *Miranda* rights in *Brewer v. Williams*.[32] In holding that the police violated a suspect's *Miranda* right to counsel, the Court required that "courts indulge in every reasonable presumption *against* waiver."[33] The State has the burden of proving that a suspect actually gave up his rights, not just that he understood them.[34] Thus, the Court seemed to be giving broader *Miranda* protection by making waiver of the rights more difficult.

The Court appeared to change its position again two years later, in *North Carolina v. Butler*.[35] Instead of making waiver more difficult, the Court made it easier by allowing implicit waivers.[36] In striking

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tunity to make informed and intelligent assessments of their interests." *Id.*

32. 430 U.S. 387 (1977). After the police arrested Williams for abducting a 10-year old girl, they advised him of his *Miranda* rights. *Id.* at 390. The police agreed not to interrogate Williams while transporting him. *Id.* at 391-92. During the trip, Williams never expressed a willingness to talk to the police; in fact, he said several times that "[w]hen I get to Des Moines and see [my lawyer], I am going to tell you the whole story." *Id.* at 392. The detective then engaged Williams in conversation and made him feel guilty based on his religious beliefs. *Id.* at 392-93. Because of this, Williams confessed, and his lawyer sought to exclude these statements and evidence resulting from them. *Id.* at 393.

33. *Id.* at 404 (citing Brookhart v. Janis, 384 U.S. 1, 4 (1966); Glasser v. United States, 315 U.S. 60, 70 (1942)) (emphasis added). This statement implies that equivocal or ambiguous waivers are not effective to waive a suspect's *Miranda* rights. *See id.*

34. *Id.* at 404. The Court reiterated that "it was incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege.'" *Id.* (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

35. 441 U.S. 369 (1979). After the FBI agents arrested the defendant and read him his *Miranda* rights, they asked him if he understood these rights. *Id.* at 370-71. After the defendant replied that he understood these rights, the agents asked him to sign a form to waive the rights. *Id.* at 371. He refused to sign the waiver, but did say, "I will talk to you but I am not signing any form." *Id.* The suspect then made incriminating statements, which he claimed the Court should suppress because he had not waived his right to counsel. *Id.* The trial court found that Butler waived his *Miranda* rights, even though he did not sign an express waiver. *Id.* at 371-72.

36. *See id.* at 373. In reversing the trial court, the North Carolina Supreme Court relied on its rule that implicit waivers are not adequate to waive a suspect's *Miranda* rights. *See id.* at 372. The Court reversed, stating that "in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." *Id.* at 373.

down the rule that only explicit waivers, either written or oral, are effective, the Court focused on whether the suspect waived his rights "knowingly and voluntarily" rather than the form of the suspect's waiver.[37] Thus, words and actions can be sufficient to waive a suspect's rights, but the presumption is still against waiver.[38] The Court consequently returned to looking at the circumstances in determining if a waiver was voluntary.[39]

In *Edwards v. Arizona*,[40] the Court again redefined the requirements for an effective waiver. The Arizona Supreme Court applied the totality of the circumstances test in finding that Edwards waived his rights when he voluntarily spoke with police *after* he had invoked his right to counsel during an interrogation the day before.[41] The Court reversed, holding that police cannot "re-interrogate an accused in custody if he has *clearly asserted* his right to counsel."[42] The "clearly asserted" language appears to require a precise statement to invoke the right to counsel, which seems to overrule the "in any manner" language of *Miranda*. The Court, however, did not define the level required to satisfy a "clearly asserted" invocation. The holding in *Edwards* also shows the importance the Court attaches to protecting the right to counsel by requiring more than a passive waiver of that right; the suspect must "himself initiate[] further communication."[43] In rejecting the broader totality of circumstances test for the stricter knowing and intelligent

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37. *Id.* "The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case." *Id.*

38. *See id.* The Court went on to say that "courts must presume that a defendant did not waive his rights; the prosecution's burden is great." *Id.*

39. *Id.* From the Court's holding, one might argue that reinitiating the right to counsel should be given the same latitude, as it would hardly seem fair to allow a suspect to easily waive his *Miranda* rights, but make it difficult to reinitiate them.

40. 451 U.S. 477 (1981). Police interrogated Edwards after giving him his *Miranda* rights. *Id.* at 478-79. After Edwards said he wanted an attorney, the police stopped all questioning. *Id.* at 479. But the next day, the police asked him more questions. *Id.* After the police gave Edwards his *Miranda* rights again, Edwards said he wanted to talk. *Id.* Edwards confessed, but then sought to suppress his confession on the grounds that it violated his *Miranda* right to counsel. *Id.* at 479-80.

41. *See id.* at 480.

42. *Id.* at 485 (emphasis added). The Court stated that "the Arizona Supreme Court applied an erroneous standard for determining waiver where the accused has specifically invoked his right to counsel." *Id.* at 482. The standard must be a knowing and intelligent waiver. *Id.*

43. *Id.* at 484-85. In its holding, the Court has "strongly indicated that additional safeguards are necessary when the accused asks for counsel; and . . . 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." *Id.* at 484.

waiver, the Court sought to affirmatively protect a suspect's right to have counsel during interrogation.[44]

Two years later, the Court addressed the *Edwards* test in *Oregon v. Bradshaw*.[45] After the Oregon Court of Appeals held that Bradshaw had not "initiated" further conversation under *Edwards*, the Court reversed and in the process delineated the *Edwards* test.[46] The Court set out a two-part test for determining whether a suspect effectively waived his right to counsel after he had initially invoked that right.[47] First, a court must determine if a suspect "initiated" further conversation as required by *Edwards*.[48] The Court enunciated a low standard for initiating further conversation by requiring only that the statement "represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation."[49] If the court finds initiation, it must then determine whether the suspect knowingly and intelligently waived his right to counsel, based on a "totality of circumstances."[50] Because of the low threshold for initiating

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44. *See id.* at 485. After *Edwards*, the Court made it more difficult to waive *Miranda* rights, thus giving the custodial defendant greater protection against self-incrimination.

45. 462 U.S. 1039 (1983). Police arrested Bradshaw and advised him of his *Miranda* rights. *Id.* at 1041. After briefly talking with the officers, Bradshaw invoked his right by saying, "I do want an attorney before it goes very much further." *Id.* at 1041-42. The officer immediately ended the questioning. *Id.* at 1042. Sometime later, Bradshaw asked an officer, "Well, what is going to happen to me now?" *Id.* In response, the officer replied that Bradshaw did not have to say anything since he had already requested a lawyer. *Id.* After Bradshaw said he understood, the officer discussed Bradshaw's situation with him. *Id.* Subsequently, Bradshaw admitted his guilt. *Id.*

46. *Id.* at 1044.

47. *Id.* at 1045-46.

48. *Id.* at 1044. The court of appeals ruled that *Edwards* only required an "initiation" to satisfy the *Edwards* rule. *See id.* at 1045. The Court disagreed, stating that this was only the first part of the *Edwards* test. *Id.* at 1045-46.

49. *Id.* at 1045. The Court also defined "initiated" as the "ordinary dictionary sense of that word." *Id.* However, the Court stopped short of allowing all requests or statements to be initiations. *Id.* "Bare inquir[ies]" do not qualify, such as asking for water or the telephone, because these are necessary and routine inquiries arising out of the "custodial relationship" and are not indicative of a desire to discuss the investigation. *Id.* With these minimal thresholds, the Court found that Bradshaw had clearly "'initiated further conversation.'" *Id.*

50. *Id.* at 1046. The Court readopted the totality of circumstances standard enunciated in *Butler*, but only for the second prong of the *Edwards* test. *Id.* Because the state court determined that Bradshaw understood his rights and was not subject to coercion or improper police conduct, the Court agreed with the state court in finding

further conversation, fairness would seem to dictate a low threshold for reinvoking that right. However, the Court again did not address the issue of what is required to reinvoke the right to counsel.

In 1984, *Smith v. Illinois*[51] provided the Court its first opportunity to address ambiguous requests for counsel. The Illinois Supreme Court presented the Court with this issue when it held that Smith's statement of "[u]h, yeah. I'd like to do that" was an ambiguous request for counsel that did not invoke the right.[52]

The Court reiterated its position that once a suspect has invoked his right to counsel, police cannot further interrogate him unless "he validly waives" this right.[53] Since the Court had settled the valid waiver issue, it focused on the requirements to invoke the right to counsel.[54] Initially the Court showed its reluctance to define the level of clarity required to invoke the right, citing conflicting Supreme Court precedents.[55] However, the Court recognized that the question of an effective assertion is a "threshold inquiry," which may involve ambiguous requests.[56] The Court noted the three conflicting approaches to equivocal requests for counsel adopted by various state and federal courts, but declined to address the issue.[57]

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that Bradshaw's statement was voluntary and made after a knowing waiver. *Id.*

51. 469 U.S. 91 (1984) (per curiam). The police arrested Smith and detectives advised him of his *Miranda* rights. *Id.* at 92-93. After detectives advised him of his right to counsel and asked him if he understood, Smith said, "Uh, yeah. I'd like to do that." *Id.* at 93 (citing People v. Smith, 466 N.E.2d 236, 238 (Ill.), *rev'd*, 469 U.S. 91 (1984) (per curiam)). Instead of halting the interrogation, the detectives continued asking more questions about the right to counsel. *Id.* Smith replied ambiguously until he finally stated that he would talk to the detectives. *Id.* On further questioning, Smith confessed and then invoked his right to counsel. *Id.* at 93-94. The detectives stopped the interrogation immediately. *Id.* at 94. Smith sought to suppress the confession, but both the trial court and the Illinois Appellate Court denied the request, finding that Smith never made an effective request for counsel. *Id.* The Illinois Supreme Court affirmed, holding that Smith's statements were ambiguous and not an effective request for counsel. *Id.*

52. *Id.*

53. *Id.* at 94-95 (citing Edwards v. Arizona, 451 U.S. 477, 484-85 (1981)).

54. *Id.* at 95-100. The Court repeated its holding in *Edwards*, which required further initiation and a knowing and intelligent waiver. *Id.* at 95 (citing *Edwards*, 451 U.S. at 485-86, 486 n.9).

55. *Id.* The Court uses both the language of "clearly assert[ing]" the right in *Edwards*, and conflicting language of "indicate[d] in any manner" in *Miranda* in discussing the issue of invoking the right to counsel. *Id.* (quoting *Edwards*, 451 U.S. at 484-85, and Miranda v. Arizona, 384 U.S. 436, 444-45 (1966)).

56. *Id.*

57. *Id.* at 95-96, 96 n.3. The Court did not decide the issue of ambiguous requests for counsel, because the request in *Smith* is not ambiguous. *Id.* at 96-97. Therefore, the same result occurs regardless of which of the three approaches is used. *Id.* at 96. The Court could have chosen to address the issue in dicta, but it decided not to

Instead, the Court's analysis focused on the proper approach for requests for counsel.[58] The Court held that once a suspect requests counsel, all questioning must stop and further statements or responses cannot be used to determine whether the suspect effectively requested counsel.[59] The Court pointed out that subsequent statements are only relevant in determining whether a suspect made an effective waiver.[60] In stating that "[w]here nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease," the Court seemed to imply that only unambiguous requests invoke the right to counsel.[61] However, the Court left that question unanswered.

In *Michigan v. Jackson*,[62] the Court appeared to lean toward a low threshold for invoking the right to counsel.[63] The Court emphasized the importance of protecting a suspect's rights, declaring that "we presume that the defendant requests the lawyer's services at every critical stage of the prosecution."[64] If this presumption exists, one could infer that

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do so. *See id.*

58. *Id.* at 96-100.

59. *Id.* at 100. The Court emphasized that "[a] statement either is such an assertion [of the right to counsel] or it is not." *Id.* at 97-98 (quoting People v. Smith, 466 N.E.2d 236, 241 (Ill.) (Simon, J., dissenting), *rev'd*, 469 U.S. 91 (1984)). The Court also stated that "[u]sing an accused's subsequent responses to cast doubt on the adequacy of the initial request itself is even more intolerable." *Id.* at 98-99.

60. *Id.* at 98. "[A]n accused's subsequent statements are relevant only to the question of whether the accused waived the right he had invoked. Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together." *Id.*

61. *Id.* Even though the Court's statement may have implied that only unambiguous requests for counsel cut off questioning, it still left unanswered the question of whether police can narrow ambiguous requests. Even in its conclusion, the Court made clear that the "decision is a narrow one," which neither decided how to handle circumstances proceeding an ambiguous request for counsel nor the consequences of such a request. *Id.* at 99-100.

62. 475 U.S. 625 (1986). After suspects invoked their right to counsel at an arraignment, police continued the interrogation and elicited confessions. *Id.* at 627-28. The Court held that the right to counsel attaches during arraignment interrogations, and as with any custodial interrogations, any waiver after an assertion of the right is invalid. *Id.* at 636.

63. *Id.*

64. *Id.* at 633. Other statements also indicate a strong presumption for protecting a suspect's right to counsel. *Id.* For "an alleged waiver of a . . . right to counsel, the Court . . . should 'indulge every reasonable presumption against waiver of fundamental constitutional rights.'" *Id.* (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). "Doubts must be resolved in favor of protecting the constitutional claim." *Id.*

courts should presume that any request for counsel, no matter how vague or ambiguous, is a valid request.[65] Therefore, the Court's statement seemed to indicate a willingness to accept ambiguous requests to invoke the right to counsel.[66] The Court's statement that "questions of waiver require[] us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel"[67] further indicated the Court's willingness to accept ambiguous requests.

The Court did not recognize the issue of ambiguous requests for counsel until *Connecticut v. Barrett*,[68] about two years after *Smith*. The Court relegated its discussion of ambiguous requests to a footnote and simply noted that the Court need not decide the issue unresolved from *Smith*.[69] However, the Court did decide that Barrett's statement, because he refused to provide a written statement but would talk with the police, only invoked a limited right to counsel.[70] Barrett simply invoked his right to have counsel present during a written statement, but waived his right to an attorney while talking to the police.[71] The Court focused on the ordinary meaning of a suspect's statement.[72]

Even though the Court did not address ambiguous requests, its holding indicates the Court's heading. By construing some requests as invoking only limited rights to counsel, the Court may have required unambiguous requests to invoke the right to counsel.[73] However, the Court may have indicated that ambiguous requests may be valid when it stated, "[T]o conclude that respondent invoked his right to counsel for all purposes requires not a broad interpretation of an ambiguous state-

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65. *See id.*

66. *See id.*

67. *Id.*

68. 479 U.S. 523 (1987). After the police gave Barrett his *Miranda* rights, Barrett said he would talk to the police, but would not "make a written statement outside the presence of counsel". *Id.* at 525. Thirty minutes later, police gave Barrett his *Miranda* rights again, and again Barrett said he would talk, but not provide any written statement. *Id.* He then confessed to the police. *Id.* When the police discovered that they had failed to record the confession, they advised Barrett of his rights a third time. *Id.* at 525-26. After Barrett reiterated his refusal to give any written statement and his willingness to talk, he confessed again. *Id.* at 526. The trial court rejected Barrett's claim to suppress the confession, but the Connecticut Supreme Court reversed, holding that Barrett "had invoked his right to counsel." *Id.* at 526.

69. *Id.* at 529-30 n.3. The Court did not need to resolve the issue because "Barrett made clear his intentions." *Id.* at 529.

70. *Id.* at 529-30.

71. *Id.* at 529.

72. *Id.*

73. *Id.* The Court stated that "[i]nterpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous." *Id.* One can view the Court's holding as its unwillingness to expand a suspect's right to counsel from what he specifically invoked.

ment, but a disregard of the ordinary meaning of respondent's statement."[74]

In *Arizona v. Roberson*,[75] the Court provided a final indication of how it might decide the issue of ambiguous requests for counsel.[76] In holding that once a suspect invokes the right to counsel, police cannot initiate questioning, even if the officers were unaware of the earlier invocation[77] or if the questioning concerned a different crime,[78] the Court affirmatively attempted to protect a suspect's right to counsel.[79] This broad protection of the right to counsel does not seem to exclude ambiguous requests from effectively invoking that right.[80]

Therefore, even though the Court has not decided the issue of how to handle ambiguous requests for counsel, it acknowledged the issue and

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74. *Id.* at 529-30. The statement appears to suggest that if a statement does not have an ordinary meaning, i.e., the statement is ambiguous, then the statement requires a broad interpretation, which would favor accepting equivocal requests as effective assertions of the right to counsel.

75. 486 U.S. 675 (1988).

76. After police arrested Roberson for burglary and advised him of his *Miranda* rights, he replied that he "'wanted a lawyer before answering any questions.'" *Id.* at 678. Three days later, while Roberson was still in custody, a different officer questioned Roberson about a different burglary, unaware that Roberson had invoked his right to counsel earlier. *Id.* After giving Roberson his rights again, "the officer obtained an incriminating statement." *Id.* Both the trial court and the Arizona Supreme Court agreed to suppress the statement. *Id.* at 678-79.

77. *Id.* at 687-88. "Whether a contemplated reinterrogation concerns the same or a different offense, or whether the same or different law enforcement authorities are involved in the second investigation, the same need to determine whether the suspect has requested counsel exists." *Id.*

78. *Id.* at 683. "[T]he presumption raised by a suspect's request for counsel—that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance—does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation." *Id.*

79. *See id.* at 687-88. The holding requires police to determine if a suspect has already invoked his right to counsel, rather than shift the burden to the suspect to inform the officers of his earlier invocation. *Id.* In addition, the holding does not allow police to treat an invocation as only applying to the offense at hand; the Court treats a suspect's invocation as covering *all* offenses. *Id.* at 683.

80. If the Court follows its *Roberson* rationale of affirmatively protecting the right to counsel, the Court would be consistent in deciding that ambiguous requests are effective, which gives the benefit of the doubt to the suspect. At the very least, the Court could require that police inquire into the ambiguous statement, which places the burden on the police and not the suspect.

gave some indications of how it may decide the issue in the future. These indications, however, imply different results.[81]

B. State and Federal Court decisions

In contrast to the Supreme Court, the state and federal courts have directly addressed the issue of ambiguous requests for counsel. The various lower courts have adopted one of three approaches. The first is a per se approach, based on the "in any manner" language of *Miranda*, which states that a suspect's ambiguous or equivocal requests are sufficient to invoke the right to counsel, and therefore, *all* questioning must stop.[82] The second is a clarification approach, which requires the police to stop the interrogation and clarify the suspect's ambiguous request by only asking questions directed toward the clarification.[83] The third, and most conservative approach, allows the police to continue interrogating a suspect and ignore the suspect's ambiguous request for counsel.[84]

Some federal and state courts adopt the per se approach,[85] whereby police must stop all questioning when a suspect makes an ambiguous request for counsel. *Maglio v. Jago*[86] and *People v. Superior Court*[87] illustrate the rationale behind the per se approach.

In *Maglio*, the Sixth Circuit Court of Appeals found that the suspect's ambiguous statement, "'[m]aybe I should have an attorney,'" invoked his right to counsel.[88] Recognizing that some requests may be equivocal, the Sixth Circuit looked to the language in *Miranda* for the answer.[89] The Sixth Circuit asserted that the "in any manner" language of *Miranda* implies that *any* attempt to invoke the right to counsel is an

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81. *See supra* notes 29-80 and accompanying text.

82. *See infra* notes 85-100 and accompanying text.

83. *See infra* notes 101-22 and accompanying text.

84. *See infra* notes 123-34 and accompanying text.

85. *See, e.g.*, Maglio v. Jago, 580 F.2d 202 (6th Cir. 1978); People v. Superior Court, 542 P.2d 1390 (Cal. 1975), *cert. denied*, 429 U.S. 816 (1976); People v. Plyler, 272 N.W.2d 623, 626 (Mich. Ct. App. 1978) ("An ambiguous indication of an interest in having counsel requires cessation of police interrogation."); Ochoa v. State, 573 S.W.2d 796 (Tex. Crim. App. 1978).

86. 580 F.2d 202 (6th Cir. 1978). Police took Maglio, a 16-year-old runaway, to the station for questioning about a murder. *Id.* at 202-03. The police advised Maglio of his *Miranda* rights and then asked him if he would waive those rights. *Id.* at 203. After Maglio replied, "'Maybe I should have an attorney,'" the police continued the interrogation. *Id.* Subsequently, Maglio confessed. *Id.*

87. 542 P.2d 1390 (Cal. 1975), *cert. denied*, 429 U.S. 816 (1976).

88. *Maglio*, 580 F.2d at 203-04.

89. *Id.* at 205. The Sixth Circuit stated that "[o]f course, there are times when it is not clear that a suspect is in fact asserting the right to counsel . . . *Miranda* gives some guidance." *Id.*

effective invocation of the right to counsel.[90] Using this standard, the Sixth Circuit found "little difficulty" in concluding that the suspect attempted to assert his right to counsel.[91] Once the suspect asserted this right, the police must stop all questioning.[92] Recognizing the risks of coercion in a custodial interrogation, the Sixth Circuit adopted the per se bar to protect suspects who make ambiguous requests for counsel.[93]

In *People v. Superior Court*,[94] the California Supreme Court adopted a similar standard for ambiguous requests. The court held that both the statement, "'I guess we need a lawyer,'" and the police's affirmative response to the question, "'[d]o you think we need an attorney?'" were sufficient to invoke the right to counsel.[95] Using an analysis similar to *Maglio*, the court relied on the "*Miranda* mandate" of allowing invocation "in any manner."[96] The court stated that a suspect does not have to use any "particular form of words or conduct" to invoke the right to counsel.[97] A requirement that a suspect must make an unequivocal re-

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90. *Id.* The Sixth Circuit referred to *Miranda* as "mandating that questioning must stop if the defendant indicates *in any manner and at any stage of the process* that he wishes to consult with an attorney before speaking." *Id.* (emphasis added) (quoting Miranda v. Arizona, 384 U.S. 436, 444-45 (1966)).

91. *Id.*

92. *Id.* The Sixth Circuit relied on *Miranda* and on *Mosley*, which "strongly suggest that there is a per se rule barring custodial interrogation of a suspect after a request for counsel has been made." *Id.* (citing *Miranda*, 384 U.S. at 474; Michigan v. Mosley, 423 U.S. 96, 110 n.2 (1075) (White, J., concurring)). Since the police continued interrogating Maglio, they violated his *Miranda* rights, and therefore the court must suppress all evidence obtained after the invocation. *Id.* at 207-09.

93. The Sixth Circuit noted that "[t]he only plausible object of [the police's] continued questioning was to break down the suspect's attempt to assert his rights and elicit a confession." *Id.* at 205. The Sixth Circuit also indicated that the suspect was only 16 years old and confused about his rights. *Id.* at 206-07.

94. 542 P.2d 1390 (Cal. 1975), *cert. denied*, 429 U.S. 816 (1976). After questioning the two suspects and advising them of their *Miranda* rights, a police officer told the suspects that he thought the suspects were guilty. *Id.* at 1391-92. One of the suspects then said either "'I guess we need a lawyer'" or "'[d]o you think we need an attorney?'" *Id.* at 1392. The police replied affirmatively and added that the suspects "could make the officers' jobs 'easy' or 'tough.'" *Id.* After leaving the suspects alone for five or ten minutes, the police officers returned and asked the suspects if "they had made any decisions." *Id.* The suspects then confessed. *Id.*

95. *Id.* at 1395. Each statement by itself invoked the right to counsel, even though both were equivocal or ambiguous requests. *Id.*

96. *Id.* at 1394 (quoting *Miranda*, 384 U.S. at 444-45).

97. *Id.* at 1394-95 (quoting People v. Randall, 464 P.2d 114, 118 (Cal. 1970)). In declaring that "a suspect need not make an express statement that he wishes to invoke his Fifth Amendment privilege [and] 'no particular form of words or conduct is

quest would "'subvert *Miranda*'s prophylactic intent.'"[98] Since the suspects' statements sufficiently invoked their right to counsel, the police violated their rights when they continued the questioning.[99] Even though the per se bar rule seems reasonable in light of *Miranda*'s "in any manner" language, only a minority of courts adopt this approach.[100]

The majority of federal and state courts follow the clarification approach, which requires officers to immediately stop the interrogation and limit further inquiry to only clarifying the suspect's wishes when the suspect makes an ambiguous request for counsel.[101] In 1979, the Fifth Circuit Court of Appeals, in *Nash v. Estelle*,[102] was the first to adopt this approach.[103] The district court found that Nash adequately invoked his right to counsel when he said, "'I would like to talk to a lawyer, but I'd rather talk to you.'"[104] In reversing the district court's

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necessary,'" the court clearly rejected the approach requiring unequivocal statements to invoke the right to counsel. *Id.* at 1395.

98. *Id.* at 1395 (quoting *Randall*, 464 P.2d at 118). The court further showed its position on unambiguous requests when it stated that "to demand that it [the privilege] be invoked with *unmistakable clarity* (resolving any ambiguity against the defendant) would subvert *Miranda*'s prophylactic intent." *Id.* (emphasis added) (quoting Randall, 464 P.2d at 118).

99. *Id.* All questioning must stop even when a suspect makes an ambiguous request for counsel. *Id.*

100. For a list of representative cases, see *supra* note 85.

101. *See, e.g.*, United States v. March, 999 F.2d 456 (10th Cir.), *cert. denied*, 114 S. Ct. 483 (1993); United States v. Mendoza-Cecelia, 963 F.2d 1467 (11th Cir.), *cert. denied*, 113 S. Ct. 436 (1992); Howard v. Pung, 862 F.2d 1348 (8th Cir. 1988); United States v. Gotay, 844 F.2d 971 (2d Cir. 1988); United States v. Fouche, 833 F.2d 1284 (9th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988); Nash v. Estelle, 597 F.2d 513 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 981 (1979); United States v. Riggs, 537 F.2d 1219 (4th Cir. 1976); United States v. Weston, 519 F. Supp. 565 (W.D.N.Y. 1981); United States v. Chansriharaj, 446 F. Supp. 107 (S.D.N.Y. 1978); Collins v. Fogg, 425 F. Supp. 1339 (E.D.N.Y), *aff'd*, 559 F.2d 1202 (2d Cir.), *cert. denied*, 434 U.S. 869 (1977); People v. Benjamin, 732 P.2d 1167 (Colo. 1987); Crawford v. State, 580 A.2d 571 (Del. 1990); Martinez v. State, 564 So. 2d 1071 (Fla. 1990); Cannady v. State, 427 So. 2d 723 (Fla. 1983); State v. Robinson, 427 N.W.2d 217 (Minn. 1988); State v. Robtoy, 653 P.2d 284 (Wash. 1982) (en banc).

102. 597 F.2d 513 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 981 (1979).

103. Police arrested Nash and advised him of his *Miranda* rights. *Id.* at 514-15. During the interrogation, Nash said, "'I would like to have a lawyer, but I'd rather talk to you.'" *Id.* at 516. The interrogating officer then tried to determine Nash's wishes by telling him that if he wanted a lawyer, the officer would stop talking to him. *Id.* Nash replied, "'No, I would rather talk to you.'" *Id.* at 517. The officer then asked, "'You do not want to have a lawyer here right now?'" to which Nash replied, "'No.'" *Id.* The officer further inquired if Nash was "'absolutely certain'" and Nash replied in the affirmative. *Id.* Nash then signed a confession. *Id.* at 515.

104. *Id.* at 516-17. This is obviously an ambiguous request for counsel since it states both a willingness to have an attorney present *and* a willingness to continue

ruling, the Fifth Circuit adopted the approach that "[w]here the suspect's desires are expressed in . . . an equivocal fashion, it is permissible for the questioning official to make further inquiry to clarify the suspect's wishes."[105]

First, the Fifth Circuit quoted two previous Supreme Court cases to support its standard.[106] The Fifth Circuit claimed that *Miranda* itself advocated the position that officers may be required to determine the suspect's true intent when he makes an ambiguous request for counsel.[107] The Fifth Circuit then relied on the language of *Mosley* to argue that a "blanket prohibition" would both unnecessarily hinder legitimate police investigations and deprive suspects of the chance to choose whether their best interests would be served in talking to the police.[108]

Second, the court indicated that fairness requires police to clarify an ambiguous request for counsel.[109] When a suspect indicates that he is willing to continue talking, "it is sound and fully constitutional police practice to clarify" the suspect's wishes.[110] However, the Fifth Circuit realized the danger that some officers may use clarifying questions to

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the interrogation.

105. *Id.* at 517. In adopting the clarification approach, the Fifth Circuit expressly rejected the per se bar rule, which the district court used in its ruling. *Id.* The court found that a statement that "expresses both a desire for counsel and a desire to continue the interview without counsel" is ambiguous. *Id.* The Fifth Circuit also warned that merely using the word "lawyer" should not automatically invoke the right to counsel because "[i]f the word 'lawyer' were to be endowed with talismanic qualities," police would have to stop the interrogation when a suspect utters even the word "lawyer." *Id.* at 519.

106. *Id.*

107. *Id.* at 517. The *Miranda* Court stated 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." *Id.* (internal quotation marks omitted) (quoting Miranda v. Arizona, 384 U.S. 436, 485 (1966)).

108. *Id.* (quoting Michigan v. Mosley, 423 U.S. 96, 102 (1975)). In *Mosley*, the Court asserted that a "blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." *Mosley*, 423 U.S. at 102.

109. *Nash*, 597 F.2d at 517.

110. *Id.* To end the interrogation even when a suspect wishes it to continue is not fair to the suspect, because it goes against what the suspect wants. If the suspect actually wants an attorney, however, the police must immediately end the interrogation. *See id.* This appears to be the most logical approach.

coerce or intimidate a suspect.[111] Therefore, a trial court must look at all the circumstances to determine if the police infringed a suspect's "continuing option to cut off the interview."[112] The Fifth Circuit imposed a clear restriction on police actions and questions after a suspect makes an ambiguous request for counsel.[113] The Tenth Circuit required that "[t]hese clarifying questions must be purely ministerial, not adversarial, and cannot be designed to influence the subject not to invoke his rights."[114]

Numerous state courts have adopted the clarification approach.[115] In *State v. Robtoy*,[116] the Washington Supreme Court held that "[a]ny questioning after the equivocal assertion of the right to counsel must be strictly confined to clarifying the suspect's request."[117] The court stated that this approach appeared to be the "most reasonable" and provided the suspect with proper protection, while not "unduly burdening the police."[118] The Delaware Supreme Court adopted this approach for somewhat different reasons in *Crawford v. State*.[119] The court relied on *Smith*, which required a two-step test to determine if statements are admissible under *Miranda*.[120] The first part required the court to "de-

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111. *Id.* at 517-18. The Fifth Circuit emphasized that "[t]his is not to say that an interrogating officer may utilize the guise of clarification as a subterfuge for coercion or intimidation." *Id.*

112. *Id.* at 518.

113. *See id.*

114. United States v. March, 999 F.2d 456, 461-62 (10th Cir.), *cert. denied*, 114 S. Ct. 483 (1993). The court in *March* held that "when confronted with an equivocal request for counsel, the interrogating officers must cease all substantive questioning and limit further inquires to clarifying the subject's ambiguous statements." *Id.* at 461 (citing Parker v. Singletary, 974 F.2d 1562 (11th Cir. 1992)).

115. *See supra* note 101 and accompanying text.

116. 653 P.2d 284 (Wash. 1982) (en banc). After being advised of his *Miranda* rights, the suspect said, "'Maybe I should call my attorney.'" *Id.* at 286. The police attempted to clarify the request and determined that Robtoy did not want to invoke his right to counsel. *Id.* at 286-87. Robtoy subsequently confessed. *Id.* at 287.

117. *Id.* at 290.

118. *Id.* The court warned that if it adopted a per se bar rule, the "mere mention by the suspect of the word 'attorney' [would take] on talismanic significance." *Id.* The clarification approach "gives a suspect the proper amount of protection to his rights without unduly burdening the police from taking voluntary statements." *Id.*; *see* People v. Benjamin, 732 P.2d 1167, 1171 (Colo. 1987) (advocating the clarification approach because it "strikes an appropriate balance between the interests of the defendant and those of the prosecution"); State v. Robinson, 427 N.W.2d 217, 223 (Minn. 1988) (declaring that the clarification approach "is more reasonable, pragmatic and fairer to the accused as well as the state than the 'per se bright line' approach, or the less precise 'totality of the circumstances' analysis").

119. 580 A.2d 571 (Del. 1990).

120. *Id.* (citing Smith v. Illinois. 496 U.S. 91, 95 (1984)); *see supra* notes 51-61 and accompanying text.

termine whether the defendant actually invoked his right to counsel."[121] The Delaware Supreme Court held that the clarification approach was the best way to make this determination.[122]

In contrast to the vast weight of authority advocating the clarification approach,[123] only a few jurisdictions adopt the third approach, which allows police to ignore a suspect's ambiguous request for counsel.[124] The Illinois Supreme Court's decision in *People v. Krueger*[125] exemplified the reasons for this approach. Both the trial court and the appellate court held that Krueger's statement indicating that he might need an attorney did not "constitute a request for counsel under *Miranda*."[126] In affirming the appellate court, the Illinois Supreme Court asserted that not all vague or ambiguous references to an attorney effectively invoke a suspect's *Miranda* right to counsel.[127] The court also relied

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121. *Id.* (citing *Smith*, 496 U.S. at 95). The second part requires that once the first part is answered, statements are only admissible if "the defendant initiated further discussion, and . . . knowingly and intelligently waived the right to have an attorney present." *Id.* (citing *Smith*, 496 U.S. at 95).

122. *Id.* at 576-77. If a court must first determine if a suspect actually invoked the right to counsel, clarifying an ambiguous request seems to be the obvious standard to use.

123. *See supra* note 101.

124. *See, e.g.*, People v. Krueger, 412 N.E.2d 537 (Ill. 1980), *cert. denied*, 451 U.S. 1019 (1981); State v. Johnson, 318 N.W.2d 417 (Iowa) (en banc), *cert. denied*, 459 U.S. 848 (1982); State v. Phillips, 563 S.W.2d 47 (Mo. 1978), *cert. denied*, 443 U.S. 904 (1979); Lee v. State, 560 P.2d 226 (Okla. Ct. App. 1977).

125. 412 N.E.2d 537 (Ill. 1980), *cert. denied*, 451 U.S. 1019 (1981). Police arrested Krueger and advised him of his *Miranda* rights. *Id.* at 538. After he signed a waiver-of-rights form, three officers began their interrogation. *Id.* At some point in the interview, Krueger said that he might need a lawyer, but continued talking to the officers. *Id.* at 538-39. Shortly thereafter, Krueger signed a confession. *Id.* at 539. Krueger sought to suppress the confession, claiming that he had adequately invoked his right to counsel so that the police violated his *Miranda* rights when they continued the interrogation. *Id.* at 538.

126. *Id.* at 539. The record indicated some confusion as to what Krueger said exactly, but the statements testified to by the three officers were essentially identical. *Id.* at 538. Krueger said either, "'[m]aybe I ought to have an attorney,'" "'[m]aybe I need a lawyer'" or "'[m]aybe I ought to talk to an attorney.'" *Id.* These are all clearly ambiguous requests for counsel.

127. *Id.* at 539-40. The court expressed that not "every reference to an attorney, no matter how vague, indecisive or ambiguous, should constitute an invocation of the right to counsel." *Id.* The court did look at other factors, including the fact that the defendant had normal intelligence, understood and waived his Miranda rights, voluntarily talked to the police without evidence of coercion or duress, and was only interrogated for a short time. *Id.*

on *Miranda* to allow the individual officers to use their subjective judgment in determining whether a suspect has invoked his right to counsel.[128] Therefore, the court adopted the position that ambiguous requests do not invoke the right to counsel, but does *allow* police officers to determine the suspect's ambiguous intent.[129] In its holding, the court distinctly and expressly rejected the per se bar rule.[130]

Other courts adopting this approach have looked at the "totality of circumstances" to determine whether a suspect intended to request an attorney when the request was ambiguous. In *Kapocsi v. State*,[131] the Oklahoma Court of Criminal Appeals held that the suspect's ambiguous request did not indicate a present desire for an attorney based on the surrounding circumstances.[132] Similarly, the Texas Court of Appeals found that a suspect who stated that he "was trying to contact an attorney" did not invoke his right to counsel in *Clausen v. State*.[133] In relying on a "totality of the circumstances" test to rebut the presumption of invocation, the court essentially allowed the officers to ignore the suspect's ambiguous request if they determined that the suspect did not intend to invoke his right to counsel.[134]

Since the lower courts have adopted these various standards to handle an ambiguous request for counsel, the judicial community looked eagerly toward the Supreme Court's decision in *Davis v. United*

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128. *Id.* (citing Miranda v. Arizona, 384 U.S. 436, 486 n.55 (1966)). Even though a police officer's belief of a suspect's intent is not dispositive, "the officers *must* be allowed to exercise their judgment in determining whether a suspect has requested counsel." *Id.* (emphasis added).

129. *Id.* This differs from the clarification approach in that there is no requirement that police clarify.

130. *Id.* The court stated, "We hold that the officers did not violate defendant's *Miranda* rights, for . . . a more positive indication or manifestation of a desire for an attorney was required than was made here." *Id.*

131. 668 P.2d 1157 (Okla. Crim. App. 1983), *cert. denied*, 464 U.S. 1070 (1984). After police arrested and advised him of his *Miranda* rights, Kapocsi said, "'I'm thinking I will need a lawyer.'" *Id.* at 1159 n.1. When police continued their interrogation, Kapocsi made incriminating statements. *Id.* at 1159-60.

132. *Id.* In looking at the "totality of the circumstances," the court found that Kapocsi voluntarily continued talking to the officers and that he actually requested an attorney for trial, not for the interrogation. *Id.* at 1159 n.3.

133. 682 S.W.2d 328, 331 (Tex. Ct. App. 1984), *cert. denied*, 475 U.S. 1021 (1986). After police arrested Clausen, an officer advised him of his *Miranda* rights. *Id.* at 331. Clausen told the officer that he "was trying to contact an attorney." *Id.* After the officer asked Clausen several times if he understood his rights, Clausen voluntarily gave incriminating statements. *Id.*

134. *Id.* "The court should not presume that any effort to contact an attorney represents the invocation of the right to counsel if the totality of circumstances rebuts the presumption." *Id.* (citing Gorel v. United States, 531 F. Supp. 368, 372 (S.D. Tex. 1981)). The court found that "[a]ll of the circumstances surrounding appellant's questioning indicate that he . . . did not want counsel at that time." *Id.*

States.[135] *Davis* finally provided the Court the opportunity to settle the issue of ambiguous requests for counsel.

III. FACTS OF THE CASE

On November 4, 1988, the Naval Investigative Service (NIS) interrogated petitioner Davis as a suspect in the killing of a fellow enlisted sailor on October 2, 1988.[136] NIS agents brought petitioner, who had spent over a week in isolation in a psychiatric ward, to the NIS office, where the agents handcuffed him to a chair.[137] Before questioning began, the agents read Davis his *Miranda* rights.[138] After Davis waived the right to remain silent and the right to have an attorney present, both orally and in writing, the agents initiated the interrogation.[139]

After about an hour and a half of questioning, Davis stated, "'Maybe I should talk to a lawyer.'"[140] The agents stopped their questioning about the killing and proceeded to ascertain the meaning of Davis's statement.[141] The agents told Davis that they would stop all questioning if they could clarify that Davis's statement was actually a request for counsel and not just a comment.[142] Davis replied that he was not asking for a lawyer and continued by stating that he did not want a lawyer.[143] The agents resumed questioning about the murder.[144] After another hour of interrogation, Davis said, "'I think I want a lawyer before

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135. 114 S. Ct. 2350 (1994).

136. *Id.* at 2353.

137. Reply Brief at 4-5, Davis v. United States, 114 S. Ct. 2350 (1994) (No. 92-1949).

138. *Davis*, 114 S. Ct. at 2353. The agents told petitioner that he was a suspect in the killing and that he had the right to remain silent, that anything he said could be used against him in a court-martial trial, that he had a right to talk to an attorney, and that he had a right to have an attorney present during the interrogation. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* One of the agents testified that:

> We made 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.

United States v. Davis, 36 M.J. 337, 340 (1993) (brackets omitted), *aff'd*, 114 S. Ct. 2350 (1994).

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

144. *Id.*

I say anything else.'"[145] Immediately, the agents ceased all questioning.[146]

At his trial, a general court-martial, Davis moved to suppress the statements made during the last hour of interrogation, claiming that his mention of a lawyer should have invoked his right to counsel.[147] The military judge denied the motion and convicted Davis of murder.[148] The Navy-Marine Corps Court of Military Review granted review.[149] The court held that because Davis's statement was not an unequivocal request for counsel, the agents were justified in asking clarifying questions.[150] After commenting that the Supreme Court has not settled the issue of ambiguous requests for counsel, the court adopted the approach that an ambiguous statement must be clarified before questioning can continue.[151]

Recognizing the opportunity to finally resolve this issue on the merits, the Court granted certiorari on November 1, 1993.[152]

IV. ANALYSIS OF THE COURT'S OPINION

A. *Justice O'Connor's Majority Opinion*[153]

In holding that police can ignore an ambiguous request for counsel, the Court relied primarily on the need for effective law enforcement.[154] The Court began its analysis by stating that the Constitution protects a person's right to counsel during custodial interrogation.[155] The Court in *Miranda* established this right as a safeguard to protect a person's Fifth Amendment right against self-incrimination.[156] In recognizing that

145. *Davis*, 36 M.J. at 340.

146. *Id.*

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

148. *Id.*

149. *Id.*; *see Davis*, 36 M.J. at 337.

150. *Davis*, 36 M.J. at 341. The court recognized the three approaches to ambiguous requests for counsel followed by various jurisdictions. *Id.* at 341-42; *see supra* notes 82-135 and accompanying text.

151. *Davis*, 36 M.J. at 341-42.

152. *Davis*, 114 S. Ct. at 2354, *cert. granted*, 114 S. Ct. 379 (1993).

153. Justice O'Connor delivered the opinion of the Court, joined by Chief Justice Rehnquist, and Justices Scalia, Kennedy, and Thomas. *Id.* at 2352.

154. *Davis*, 114 S. Ct. at 2356. The Court unanimously held that police are not required to stop all questioning when a suspect makes an equivocal request for counsel. *Id.*

155. *Id.* at 2354. The Sixth Amendment guarantees a person the right to counsel at the start of an adversary criminal proceeding. *Id.* (citing U.S. Const. amend. VI).

156. *Id.* The Court stated that "[t]he right to counsel established in *Miranda* was one of a series of recommended procedural safeguards . . . [that] were not themselves rights protected by the Constitution but were instead measures to insure that

the right to counsel is "sufficiently important to suspects in criminal investigations," the Court reaffirmed the *Edwards* rule that police must stop questioning whenever a suspect requests an attorney even if the suspect had earlier waived his *Miranda* rights.[157] The rule is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights."[158] However, after explaining the importance of the *Edwards* rule, the Court qualified the rationale by reiterating that the rule is not a Constitutional right,[159] but rather one that is "justified only by reference to its prophylactic purpose."[160]

In applying the *Edwards* rule, the Court required an objective standard in determining if a suspect has requested the right for counsel.[161] The Court relied on *McNeil v. Wisconsin*,[162] stating that the request "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney."[163] However, the Court seemed to make a liberal conclusion based on the *McNeil* holding when it said that, "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning."[164] From this assertion, the Court concluded that a suspect must make an unambiguous request for an attorney to invoke the *Miranda* right to counsel.[165] Fur-

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the right against compulsory self-incrimination was protected." *Id.* (internal quotation marks omitted) (quoting Michigan v. Tucker, 417 U.S. 433, 443-44 (1974)).

157. *Id.* at 2354-55. The Court referred to this rule as the "second layer of prophylaxis for the *Miranda* right to counsel." *Id.* at 2355 (quoting McNeil v. Wisconsin, 501 U.S. 171, 176 (1991)) (internal quotation marks omitted).

158. *Id.* (quoting Michigan v. Harvey, 494 U.S. 344, 350 (1990)) (internal quotation marks omitted).

159. *Id.* The right does not attach to the Fifth Amendment's right against self-incrimination. *See* U.S. CONST. amend. V.

160. *Davis*, 114 S. Ct. at 2355 (quoting Connecticut v. Barrett, 479 U.S. 523, 528 (1987)).

161. *Id.* (citing *Barrett*, 479 U.S. at 52).

162. 501 U.S. 171 (1991).

163. *Davis*, 114 S. Ct. at 2355 (quoting McNeil v. Wisconsin, 501 U.S. 171, 178 (1991)).

164. *Id.* (citing *McNeil*, 501 U.S. at 178; Edwards v. Arizona, 451 U.S. 477, 485 (1981)).

165. *Id.* The Court supported this statement by stating that "a statement either is such an assertion of the right to counsel or it is not." *Id.* (quoting Smith v. Illinois, 469 U.S. 91, 97-98 (1984)).

thermore, based on its cited precedents, the Court concluded that a 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. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect."[166] With this language, the Court expressly adopted the position that officers are not required to stop the interrogation when the suspect ambiguously requests counsel.[167]

In dismissing Davis's contention that police must stop questioning a suspect when the suspect makes an ambiguous request for counsel, the Court relied on the rationale behind the *Edwards* rule that police must stop the interrogation when a suspect requests an attorney.[168] As the Court noted, however, a rule that police must stop the interrogation when they cannot determine if a suspect has even requested his right to an attorney "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity"[169] by preventing police from continuing their interrogation even when a suspect does not want an attorney present.[170] To support its holding, the Court noted that it has previously stated that police officers are not required to stop questioning when a suspect makes an ambiguous request for counsel.[171]

After relying on past Court rulings to support its holding, the Court fortified its argument by making its own observations in favor of the rule.[172] The focal point of the argument is the "need for effective law enforcement," which the Court stated is the "other side of the *Miranda* equation."[173] If police are required to stop and determine whether a suspect requested counsel, the Court asserted that police will have to make "difficult judgment calls" that could affect the suppression of evidence.[174] Consequently, this would hinder the police investigative

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166. *Id.* The Court quoted Moran v. Burbine: "[T]he interrogation must cease until an attorney is present only [i]f the individual states that he wants an attorney." 475 U.S. 412, 433 n.4 (1986). The Court seemed to be stating that this mandates an unequivocal request, which may be reading more into the statement than was intended.

167. *Davis*, 114 S. Ct. at 2355.

168. *Id.* at 2355-56.

169. *Id.* (quoting Michigan v. Mosley, 423 U.S. 96, 102 (1975)).

170. *Id.* at 2356. The Court noted that *Edwards* does not require that a lawyer be present when a suspect agrees to answer questions without a lawyer. *Id.*

171. *Id.* The Court quoted *Miranda*'s language that "if a suspect is 'indecisive in his request for counsel,' the officers need not always cease questioning." *Id.* (quoting Miranda v. Arizona, 384 U.S. 436, 485 (1966)).

172. *Id.*

173. *Id.*

174. *Id.*

process since the police would no longer have an easily applied bright-line test.[175] The Court was also unwilling to add a "third layer of prophylaxis" to the *Miranda* rights, stating that giving a suspect the right to have an attorney present during custodial interrogations *and* requiring police to immediately stop questioning when a suspect requested counsel was enough to protect a suspect's *Miranda* rights.[176]

The Court concluded by addressing the concern that its holding fails to protect the rights of suspects who are not able to clearly assert their right to counsel, but who still desire an attorney.[177] This group includes persons who are afraid or intimidated by the police, those who lack adequate communication skills, or those affected by any other means to the extent that they cannot clearly assert their intentions.[178] The Court quickly dismissed this important issue by stating that the principal policy behind *Miranda* rights—protection against coercion and self-incrimination—is protected when the suspect is initially made fully aware of his right to remain silent and right to counsel.[179] Furthermore, *Edwards* provides an additional layer of protection by allowing the suspect to immediately cease the interrogation, even after he initially waives his right to counsel.[180] These two layers are sufficient to protect a suspect's rights since they meet *Miranda*'s primary policy goal.[181]

The Court did recognize that requiring police to clarify ambiguous requests for counsel is "good police practice" because it minimizes the chances that evidence obtained after the request would be suppressed

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175. *Id.*

176. *Id.* at 2356-57. The Court reasoned the two layers are enough to protect the suspect. The issue in this case, however, involved the second layer, i.e., how do police know when a suspect requests counsel. Therefore, determining whether a request has occurred is inherent in this second layer and is not really a third layer.

177. *Id.* at 2356.

178. *Id.*

179. *Id.* The Court relied on a previous holding in stating: "'[F]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process.'" *Id.* (quoting Moran v. Burbine, 475 U.S. 412, 427 (1986)).

180. *Id.* This added layer of protection is only obtained when the request for counsel is "affirmatively invoked by the suspect." *Id.*

181. *Id.* In this brief paragraph of the Court's opinion, the Court implied that if a suspect understands and waives his initial *Miranda* rights, that removes the danger of coercion or self-incrimination, even for a suspect who may not assert an unambiguous request for counsel because he has "indicated his willingness to deal with the police unassisted." *Id.*

if the request does not turn out to be ambiguous.[182] However, the Court declined to adopt a rule requiring police to ask clarifying questions and reiterated its holding that police can continue questioning when a suspect makes an ambiguous request for counsel.[183]

The Court also addressed the issue of whether 18 U.S.C. § 3501 should apply to this case, but relegated the discussion to a footnote.[184] The statute appeared to apply since it "govern[s] the admissibility of confessions in federal prosecutions."[185] The statute provides that "a confession . . . shall be admissible in evidence if it is *voluntarily* given.[186] Relying on two principal arguments, the Court quickly dismissed this issue.[187] First, since the parties did not dispute the Court of Military Appeals holdings that previous Court cases regarding the Fifth Amendment apply to the admissibility of evidence obtained in military interrogations for court-martial trials,[188] the Court presumed that its holdings apply equally to military court-martial trials.[189] Second, since the Government did not rely on the statute, the Court did not require itself to interpret the statute.[190]

B. Justice Scalia's Concurring Opinion

While agreeing with the Court's opinion, Justice Scalia found that the Court should not have brushed aside the issue of applying 18 U.S.C. § 3501 to this case by stating that "[l]egal analysis of the admissibility of a confession without reference to these provisions [18 U.S.C. § 3501] is equivalent to legal analysis of the admissibility of hearsay without consulting the Rules of Evidence; it is an unreal exercise."[191]

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182. *Id.*

183. *Id.* The Court clearly acknowledged the approach advocated by the dissent, but it seemed confident that the *Edward*'s rule sufficiently protects the suspect's rights.

184. *Id.* at 2354 n.*.

185. *Id.* (quoting United States v. Alvarez-Sanchez, 114 S. Ct. 1599, 1600 (1994)) (inner quotation marks omitted).

186. 18 U.S.C. § 3501(a) (1988) (emphasis added). The trial judge determines voluntariness by looking at all the circumstances surrounding the confession. 18 U.S.C. § 3501(b) (1988).

187. *Davis*, 114 S. Ct. at 2354 n.*.

188. *Id.* (citing United States v. McLaren, 38 M.J. 112, 115 (1993), *cert. denied*, 114 S. Ct. 1056 (1994); United States v. Applewhite, 23 M.J. 196, 198 (1987)).

189. *Id.*

190. *Id.*

191. *Id.* at 2357 (Scalia, J., concurring). Justice Scalia addressed the logic of the Court's reason for refusing to consider the statutes applicability to the case at bar as follows: "The Court today bases its refusal to consider § 3501 not upon the fact that the provision is inapplicable, but upon the fact that the Government failed to argue it." *Id.* n.* (Scalia, J., concurring).

Justice Scalia noted that dismissing issues not raised is not a statutory or constitutional requirement, but rather just a "sound prudential practice."[192] Justice Scalia, however, argued that the Court should consider this issue because the Court would be neglecting its duty if it did not.[193] Justice Scalia acknowledged the Executive's power to avoid applying the statute by not introducing evidence that would be allowed under the statute, but Justice Scalia found that the Executive has neither the right nor power to determine what objections are allowed once the evidence is introduced.[194] At this point in the proceeding, the statute is a "provision of law directed to the courts," and thus, courts should determine its applicability in admitting the evidence.[195]

Justice Scalia expressed two concerns about the Court's continual refusal to apply the statute to federal prosecutions.[196] First, the Court may be wasting its time in reviewing these cases because they might not even involve *Miranda* issues.[197] Second, and the bigger concern of the two, is the danger of allowing many dangerous criminals to go free and harm the people.[198] Since the statute requires a lower standard for admissibility of confessions than *Miranda*, many admissible confessions in federal prosecutions may be excluded when applied to the higher *Miranda* standards.[199] As a result, criminals who would be convicted

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192. *Id.* at 2358 (Scalia, J., concurring).

193. *Id.* (Scalia, J., concurring). "We shirk our duty if we systematically disregard that statutory command simply because the Justice Department systematically declines to remind us of it." *Id.* (Scalia, J., concurring). Justice Scalia asserted that the voluntariness requirement for the admissibility of confessions provided in *Miranda* has its equivalence in 18 U.S.C. § 3501 for federal criminal prosecutions, and therefore, the Court should not ignore this statute just because the Government continually refuses to raise it before the Court. *Id.* (Scalia, J., concurring).

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

195. *Id.* (Scalia, J., concurring). The statute "reflect[s] the people's assessment of the proper balance to be struck between concern for persons interrogated in custody and the needs of effective law enforcement." *Id.* (Scalia, J., concurring).

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

197. *Id.* (Scalia, J., concurring). 18 U.S.C. § 3501 would apply instead of *Miranda* holdings. *See id.* (Scalia, J., concurring).

198. *Id.* (Scalia, J., concurring). Justice Scalia warned that refusing to apply the federal statute would allow "many *dangerous* felons . . . to continue their *depredations* upon our citizens." *Id.* (Scalia, J., concurring) (emphasis added).

199. *Id.* (Scalia, J., concurring). The statute only requires that the confession be voluntarily given, looking at all the circumstances including *Miranda* warnings. *See supra* note 178 and accompanying text. However, *Miranda* is not controlling; therefore, a confession is admissible even if there is a *Miranda* violation so long as the confession is voluntarily given. *Id.* For cases falling under *Miranda* requirements,

under 18 U.S.C. § 3501 may be freed if the court applied the unnecessary and higher *Miranda* standard.[200] The public will not accept this result if it can be reasonably avoided.[201] Justice Scalia, therefore, stated that the Court has an obligation to consider the applicability of the statute, which "is consistent with the Third Branch's obligation to decide according to the law."[202]

C. *Justice Souter's Opinion Concurring in the Judgment*[203]

Justice Souter, along with three other Justices, agreed with the majority's view that police need not cease all questioning when confronted with an ambiguous request for counsel, but disagreed that police can continue their interrogation when a suspect has made an ambiguous request.[204] Instead, the four Justices advocated requiring police to ask only clarifying questions in response to ambiguous requests for counsel.[205] In supporting the policy of requiring police to clarify a suspect's ambiguous request for counsel before the interrogation may continue, Justice Souter began his argument by relying on previous lower court decisions and law enforcement briefs.[206] Justice Souter indicated that most of the lower courts and many police opinions reject the majority's holding.[207] Requiring police to stop the interrogation and

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however, any confession is inadmissible if it was obtained in violation of the suspect's *Miranda* rights. *See supra* text accompanying note 19.

200. *Davis*, 114 S. Ct. at 2358 (Scalia, J., concurring).

201. *See id.* (Scalia, J., concurring). Justice Scalia stressed his point by reminding the Court of the current "intense national concern about the problem of run-away crime." *Id.* (Scalia, J., concurring). Justice Scalia contended that applying 18 U.S.C. § 3501 may alleviate this problem, while ignoring the relevance of the statute would compound the problem. *Id.* (Scalia, J., concurring).

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

203. Justice Souter delivered the opinion, concurring only in the judgment, joined by Justices Blackmun, Stevens, and Ginsburg. *Id.* (Souter, J., concurring).

204. *Id.* at 2359 (Souter, J., concurring).

205. *Id.* (Souter, J., concurring). This is the clarification approach, as opposed to the majority's approach of ignoring ambiguous requests.

206. *Id.* & nn.1-2 (Souter, J., concurring).

207. *Id.* (Souter, J., concurring). A "majority of the many courts" and "a considerable body of law enforcement officials" that addressed the issue of ambiguous requests for counsel all argued contrary to the majority's holding. *Id.* (Souter, J., concurring). In a footnote, Justice Souter listed several federal district court cases, including United States v. Gotay, 844 F.2d 971, 975 (2d Cir. 1988); United States v. Fouche, 833 F.2d 1284, 1287 (9th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988); United States v. Porter, 776 F.2d 370 (1st Cir. 1985) (en banc), *cert. denied*, 481 U.S. 1048 (1987); Thompson v. Wainwright, 601 F.2d 768, 771-72 (5th Cir. 1979) (en banc). *Id.* at 2359 n.1. (Souter, J., concurring). Additionally, Justice Souter listed some state court cases, which he asserted are "similarly lopsided" against the majority's approach: People v. Benjamin, 732 P.2d 1167, 1171 (Colo. 1987), Crawford v. State, 580

clarify a suspect's intent would conform to "concerns of fairness and practicality," because this approach protects suspects who have not made an unequivocal request for counsel from "fend[ing] for themselves."[208]

Justice Souter then expanded on the "fairness and practicality" concerns supporting the minority's approach.[209] Justice Souter contended that the Court should adopt an approach consistent with previous precedent because these two concepts have been well-settled for nearly three decades.[210] The Court previously settled the fairness concern by "assur[ing] that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process"[211] and the practicality concern settled such that "*Miranda* rules, intended to operate in the real world, 'must be consistent with . . . practical realities.'"[212] Justice Souter advocated the minority approach because it "fulfills both ambitions" by (1) assuring a suspect will be granted his right to an attorney if he wants one even if he does not communicate it clearly, and (2) alleviating the practical problems involved during communications between suspect and police.[213]

After supporting the minority's approach, Justice Souter attacked the majority's decision by arguing that it "does not fare so well" when measured against the two principles of fairness and practicality.[214] In terms

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A.2d 571, 576-77 (Del. 1990), Martinez v. State, 564 So. 2d 1071, 1074 (Fla. 1990), and State v. Robinson, 427 N.W.2d 217, 223 (Minn. 1988). *Id.* at 2359 n.1.

Justice Souter cited two law enforcement sources, one supporting the minority's approach and the other refuting the majority's approach. *Id.* at 2359 n.2 (Souter, J., concurring).

208. *Id.* (Souter, J., concurring). Suspects who have made unambiguous requests for counsel cannot be further interrogated without an attorney, while suspects who have not made unambiguous requests are subject to continued interrogation, even when they may have desired an attorney. *Id.* (Souter, J., concurring).

209. *Id.* at 2360 (Souter, J., concurring).

210. *Id.* (Souter, J., concurring).

211. *Id.* (citing Connecticut v. Barrett, 479 U.S. 513, 528 (1987) (Souter, J., concurring) (quoting Miranda v. Arizona, 384 U.S. 436, 469 (1966)).

212. *Id.* (Souter, J., concurring) (quoting Arizona v. Roberson, 486 U.S. 675, 688 (1988) (Kennedy, J., dissenting)).

213. *Id.* (Souter, J., concurring). By requiring police to immediately stop the interrogation and clarify the suspect's intent behind an ambiguous request for counsel, the suspect's rights will be guaranteed because of "real-world reasons why misunderstandings arise . . . and real-world limitations on the capacity of police and trial courts to apply fine distinctions and intricate rules." *Id.* (Souter, J., concurring).

214. *Id.* (Souter, J., concurring).

of fairness, Justice Souter noted that the majority recognized it has "single[d] out an odd group . . . for the Court's demand of heightened linguistic care."[215] Many of these suspects "lack . . . a confident command of the English language;"[216] "many are 'woefully ignorant,'"[217] "and many more will be sufficiently intimidated by the interrogation process" that they will be unable to assertively communicate their intentions.[218] In light of these realities, the Court has not required a requisite level of clarity to invoke the right to counsel in order to protect these individual rights.[219] As such, the Court has "'give[n] a broad, rather than a narrow interpretation'" for requests for counsel[220] and "'indulge[d] every reasonable presumption'" that a suspect has not waived his right to counsel.[221]

Justice Souter next attacked the majority's contention that there is a distinction between a suspect's initial waiver of counsel and his later attempts to reinvoke the right.[222] The majority asserted that since a suspect has shown his willingness to speak once he has waived his initial rights, the risk of coercion is not as great; therefore, the suspect must later make a clear request to reinvoke that right.[223] Justice Souter relied on *Miranda*'s language "describ[ing] the object of the warning as being to assure 'a continuous opportunity to exercise [the right of silence]'"[224] and requiring questioning to stop "'at any stage of the process that [the suspect] wishes to consult with an attorney.'"[225] Justice

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215. *Id.* (Souter, J., concurring). This group consists of "suspects who may be 'thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures.'" *Id.* (Souter, J., concurring) (quoting *Miranda*, 384 U.S. at 457).

216. *Id.* (Souter, J., concurring) (citing United States v. De la Jara, 973 F.2d 746, 750 (9th Cir. 1992)).

217. *Id.* at 2361 (Souter, J., concurring) (quoting *Miranda*, 384 U.S. at 468).

218. *Id.* (Souter, J., concurring). In a footnote, Justice Souter supported this last category by adding that "[s]ocial science confirms . . . that individuals who feel intimidated or powerless are more likely to speak in equivocal or nonstandard terms when no ambiguity or equivocation is meant." *Id.* n.4. (Souter, J., concurring) (citing WILLIAM M. O'BARR, LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM 61-71 (1982)).

219. *Id.* at 2361 (Souter, J., concurring).

220. *Id.* (Souter, J., concurring) (quoting Michigan v. Jackson, 475 U.S. 625, 633 (1986); Connecticut v. Barrett, 479 U.S. 523, 529 (1987)).

221. *Id.* (Souter, J., concurring) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). Justice Souter cited Oregon v. Bradshaw, 462 U.S. 1039, 1051 (1983) (Powell, J., concurring), which required a "knowing and intelligent waiver" to give up the right to counsel. *Id.* (Souter, J., concurring).

222. *Id.* (Souter, J., concurring).

223. *Id.* at 2356.

224. *Id.* at 2361 (Souter, J., concurring) (quoting Miranda v. Arizona, 384 U.S. 436, 444 (1966)).

225. *Id.* (Souter, J., concurring) (quoting *Miranda*, 384 U.S. at 444-45).

Souter suggested that "continuous opportunity" implies an unwavering standard to invoke the right, and "at any stage" indicates that the standard should apply equally to initial, as well as later, stages of the interrogation process.[226]

Justice Souter next attacked the Court's argument that it is acceptable to continue questioning when an "indecisive" suspect requests an attorneys because the initial *Miranda* warnings reduce the risk of coercion.[227] Again, Justice Souter relied on *Miranda*, which expressly warned that a single advisement of a suspect's rights is not enough to safeguard against coercive effects.[228] Continuing with the fairness concept, Justice Souter suggested that the majority's approach does not protect the suspect under the intentions of the Fifth Amendment.[229] Justice Souter worried that when the police ignore a suspect's requests, the suspect may believe it is useless to try and invoke the right again, and thus will confess in order to end the interrogation.[230]

Justice Souter also disagreed that "a statement either is . . . an assertion of the right to counsel or it is not."[231] Referring to *Smith*, Justice Souter noted that the Court previously acknowledged that a suspect could effectively invoke request for counsel even if the request was ambiguous.[232] Consequently, Justice Souter advocated the minority's

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226. *Id.* (Souter, J., concurring).

227. *Id.* (Souter, J., concurring).

228. *Id.* at 2361-62 (Souter, J., concurring) (citing *Miranda*, 384 U.S. at 469). "'[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.'" *Id.* (Souter, J., concurring) (quoting *Miranda*, 384 U.S. 469).

229. *Id.* at 2362 (Souter, J., concurring). The "real risk in the majority's approach, go[es] close to the core of what the . . . Fifth Amendment provides." *Id.* (Souter, J., concurring). The Fifth Amendment's purpose is to protect suspects against self-incrimination. *See* U.S. CONST. amend. V.

230. *Davis*, 114 S. Ct. at 2362 (Souter, J., concurring). The danger is that "[w]hen a suspect understands his (expressed) wishes to have been ignored . . . , in contravention of the 'rights' just read to him by his interrogator, he may well see further objection as futile and confession (true or not) as the only way to end his interrogation." *Id.* (Souter, J., concurring). Justice Souter made a strong argument. If his statement were true, as common sense might suggest, a suspect, whether innocent or not, could incriminate himself in contravention of his Fifth Amendment rights, even when he desired the presence of counsel. At a minimum, Justice Souter's statement seems to bear some truthfulness.

231. *Id.* (Souter, J., concurring) (internal quotation marks and brackets omitted) (quoting Smith v. Illinois, 469 U.S. 91, 97-98 (1984)).

232. *Id.* (Souter, J., concurring) (citing *Smith*, 469 U.S. at 98). In *Smith*, the Court

approach by suggesting that "clarification is the intuitively sensible course."[233]

In addressing the majority's final fairness concern, Justice Souter used only a few sentences.[234] While the majority emphasized the need for "effective law enforcement," Justice Souter pointed out that the only situation favoring the majority's rule is when a suspect who makes an ambiguous request clearly asserts his right to counsel after clarification of his request.[235] In this situation, questioning must stop and the police would lose the confession if required to follow the majority's rule.[236] Justice Souter stated that "*Miranda* itself determined" that society should bear this price of lost confessions.[237]

Additionally, Justice Souter disagreed with the majority's argument concerning the practicality factor, advocating that the minority rule is more practical.[238] Acknowledging that many requests will place law enforcement personnel in difficult situations, Justice Souter asserted that the minority's rule will "relieve the officer of any responsibility for guessing" the suspect's intentions.[239] Furthermore, the minority's ap-

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stressed that it has "neither denied the possibility that a reference to counsel could be ambiguous . . . nor suggested that particular statements should be considered in isolation." *Id.* (Souter, J., concurring) (quoting *Smith*, 469 U.S. at 98). Justice Souter referred to *Smith* in order to indicate that, because the Court has not explicitly required an unequivocal request, nor required an ambiguous statement to be determined by itself, the minority approach is more in line with this aspect of previous Court precedents. *See id.*

233. *Id.* at 2363 (Souter, J., concurring). In a footnote, Justice Souter added some support to his suggestion by stating that the *Smith* decision was quoted from the same sentence in the Illinois Supreme Court opinion, which prescribed "'strictly' limited questioning" for ambiguous requests for counsel. *Id.* at 2362 n.6. (Souter, J., concurring) (citing People v. Smith, 102 Ill. 2d 365, 375 (Simon, J., dissenting), *rev'd*, 469 U.S. 91 (1984)).

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

235. *Id.* (Souter, J., concurring).

236. *Id.* (Souter, J., concurring).

237. *Id.* (Souter, J., concurring). This argument seems to go to the core of rebutting the majority's rationale. The majority says that the need for effective law enforcement to save "lost confessions" is addressed by their approach. *See id.* (Souter, J., concurring). However, as Justice Souter counters, the very purpose of *Miranda* is to protect suspects from making self-incriminating statements if they request counsel to be present. *See supra* note 229 and accompanying text. Therefore, a suspect who truly desires counsel should not be deprived of his *Miranda* rights simply because he ambiguously requests counsel.

238. *Davis*, 114 S. Ct. at 2363 (Souter, J., concurring).

239. *Id.* (Souter, J., concurring). Justice Souter cited several cases where Justices disagree as to the ambiguity of a request for counsel. *Id.* at 2363 n.7 (Souter, J., concurring). Therefore, if Justices cannot agree on certain ambiguous requests, why should the Court place that burden on the individual law enforcement officers, who, presumably, have less knowledge about the requisite clarity than judges? *See id.*

proach allowed the individual suspect to determine his own intent, since he is the proper person to make the determination.[240]

After rejecting the majority's approach and advocating the minority rule, Justice Souter addressed the approach the petitioner advocated: Police must stop *all* questioning when a suspect makes a request for counsel, whether ambiguous or not.[241] While acknowledging the danger of the minority's approach that clarifying questions may amount to "badgering a suspect who wants counsel," Justice Souter countered with the policy argument for respecting an individual's right of choice.[242] If the Court requires police to stop questioning even though a suspect had intended to speak freely to the police without the presence of counsel, it would "disserve[]" this choice.[243] This is also the case where "[t]he costs to society of losing confessions would . . . be especially hard to bear" because police must now stop the interrogation even when further questioning would clarify the suspect's desire to waive his right to counsel.[244]

In a fairly extensive footnote, Justice Souter also suggested the majority had either misread or misinterpreted previous Court precedents.[245] Beginning with the Court's reliance on *McNeil v. Wisconsin*,[246] Justice Souter argued that *McNeil* did not even address the clarity required to invoke the right to counsel, but only required

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(Souter, J., concurring).

240. *Id.* (Souter, J., concurring). This seems the most logical approach, because if an officer is not sure of a suspect's intent, the best way to ascertain the intent is to directly ask the suspect through clarifying questions.

241. *Id.* (Souter, J., concurring). Petitioner's approach was the third of the three different state and federal approaches. In terms of completeness, the minority opinion was more thorough because it addressed all the approaches which courts have adopted. The majority opinion did not address this last view.

242. *Id.* at 2363-64. (Souter, J., concurring). Justice Souter expressed the policy as a "strong bias in favor of individual choice." *Id.* at 2364 (Souter, J., concurring).

243. *Id.* (Souter, J., concurring).

244. *Id.* (Souter, J., concurring).

245. *Id.* at 2359-60 (Souter, J., concurring). This footnote appeared near the beginning of Justice Souter's opinion. In it, Justice Souter first pointed out that the majority said that the Court has not decided the issue of ambiguous request, but then argued that its approach was "foreshadowed" by past Court precedents. *Id.* (Souter, J., concurring). This point does not seem particularly relevant since these statements did not conflict with each other. The majority was simply stating that the issue was never fully addressed, but that past precedent has indicated support for the majority's approach. Justice Souter could have simply discussed why the majority's cited cases do *not* foreshadow the majority's approach.

246. 501 U.S. 171 (1991).

that the statement "*can* reasonably be construed" to be a request for counsel.[247] From only this, Justice Souter did not believe that *McNeil* "foreshadowed" the majority's approach, as Justice O'Connor claimed.[248] Justice Souter next attacked the majority's interpretation of *Edwards v. Arizona*,[249] specifically the statement that police cannot continue their interrogation when a suspect has "clearly asserted" his right to counsel.[250] Simply emphasizing "clearly asserted" does not decide the issue of how clear a request must be to invoke the right to counsel.[251] All the *Edwards* rule stated was that police must immediately stop the interrogation once a suspect clearly asserts his desire for counsel.[252]

In the final argument of the footnote, Justice Souter rejected the majority's contention that *Miranda* itself was a precursor to its approach as not "plausible."[253] Foremost in his argument was the fact that the quoted passage was not even part of the Court's opinion, but rather from an FBI response, read to the Court, inquiring about its then-existing policies.[254] Additionally, Justice Souter stated that the statement in *Miranda*, suggesting that the interrogation can continue if a request for counsel was "indecisive," is more in line with the minority's approach than the majority's.[255] Requiring police to ask clarifying questions follows more logically from the statement that a suspect who makes an "indecisive" request may be "question[ed] on whether he did or did not waive counsel" than does the approach of allowing police to ignore the ambiguous request.[256]

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247. *Davis*, 114 S. Ct. at 2360 n.2 (Souter, J., concurring) (quoting *McNeil*, 501 U.S. at 178) (emphasis added). Justice Souter argued that since the issue of clarity was not even addressed, the majority was mistaken in its reading that *McNeil* foreshadowed its approach. *Id.* (Souter, J., concurring). *McNeil* simply prohibited courts from inferring from a suspect's silence that he intended to invoke his right to counsel. *Id.* (Souter, J., concurring).

248. *Id.* (Souter, J., concurring).

249. 451 U.S. 477 (1981).

250. *Davis*, 114 S. Ct. at 2360 n.2 (Souter, J., concurring) (citing *Edwards*, 451 U.S. at 485).

251. *Id.* (Souter, J., concurring).

252. *Id.* (Souter, J., concurring). The statement might be construed to say that interrogation must stop *only* when a suspect clearly asserts the request. Nothing in *Edwards*, however, seems to warrant this construction.

253. *Id.* (Souter, J., concurring).

254. *Id.* (Souter, J., concurring). The letter was in response to a request by the Solicitor General inquiring about procedures followed by the FBI in advising suspects their rights and questioning after the rights are waived. *See* Miranda v. Arizona, 384 U.S. 436, 483-84 (1966).

255. *Davis*, 114 S. Ct. at 2360-61 n.3 (Souter, J., concurring) (quoting *Miranda*, 384 U.S. at 485).

256. *Id.* (Souter, J., concurring) (quoting *Miranda*, 384 U.S. at 485). The statement

Relying on past precedent, Justice Souter concluded by declaring that "[o]ur cases are best respected by a rule that" requires police officers to clarify any ambiguous requests for counsel before the interrogation can continue.[257]

V. IMPACT OF THE COURT'S DECISION

The Court's decision in *Davis* surprised most observers. Based solely on the weight of judicial precedent,[258] most people probably expected the Court to adopt the clarification approach. In addition to judicial precedent, numerous law review articles have advocated the clarification approach.[259] Even experts in criminal law fully expected *Davis* to

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is fairly vague. The passage in question is: "If [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." *Miranda*, 384 U.S. at 485 (emphasis added). There appear to be two possible meanings. One is that an indecisive request raises *questions* on whether the suspect intended to waive counsel, that individual law enforcement personnel must determine on a case-by-case basis. The other is that police may *question* to determine whether a suspect did or did not waive counsel. The first interpretation, which the majority accepts, seems more logical. The second interpretation seems less plausible since it interprets the word "question" to be a verb rather than a noun in the context of the passage.

257. *Davis*, 114 S. Ct. at 2364 (Souter, J., concurring).

258. *See supra* note 101 and accompanying text. A significant majority of state and federal courts had adopted the clarification approach, while only a few had accepted the standard adopted by *Davis*, allowing police to ignore ambiguous requests.

259. *See, e.g.*, James J. Tomkovicz, *Standards For Invocation And Waiver Of Counsel In Confession Contexts*, 71 IOWA L. REV. 975 (1986); Matthew W. D. Bowman, Note, *The Right To Counsel During Custodial Interrogation: Equivocal References To An Attorney —Determining What Statements Or Conduct Should Constitute An Accused's Invocation Of The Right To Counsel*, 39 VAND. L. REV. 1159 (1986); Rhonda Y. Cline, Comment, *Equivocal Requests For Counsel: A Balance Of Competing Police Considerations*, 55 U. CIN. L. REV. 767 (1987); David Lavey, Comment, United States v. Porter: *A New Solution To The Old Problem Of* Miranda *And Ambiguous Requests For Counsel*, 20 GA. L. REV. 221 (1985); Charles R. Shreffler, Jr., Note, *Judicial Approaches To The Ambiguous Request For Counsel Since* Miranda v. Arizona, 62 NOTRE DAME L. REV. 460 (1987); Charles J. Williams, Comment, Connecticut v. Barrett *And The Limited Invocation Of The Right To Counsel: A New Limitation Of Fifth Amendment* Miranda *Protections*, 73 IOWA L. REV. 743 (1988). No law review articles advocated the *Davis* Court's standard. Only one article did not advocate the clarification approach; it suggested that the per se bar rule was the best standard for protecting a suspect's Fifth Amendment rights. *See* Ada Clapp, *The Second Circuit Adopts A Clarification Approach To Ambiguous Requests For Counsel:* United States v. Gotay, 56 BROOK. L. REV. 511 (1990).

adopt the clarifying approach.[260] Even though the result was unexpected, the lower courts had no choice but to follow the Court's precedent. Therefore, when the *Davis* decision was announced, the lower courts fell in line with the Court's mandated standard for federal law.[261]

A. *Effect on Police*

Both law enforcement officials and those individuals under custodial interrogation will feel the effects of *Davis*. The Court based its holding on the "need for effective law enforcement."[262] The *Davis* approach will help the police function, but it may also hinder them as well.

Under *Davis*, police can operate under a bright line test and will no longer be required to determine if an ambiguous request was actually a request for counsel.[263] With the previous majority approach requiring clarification and the per se bar rule, any ambiguous request must be classified as being either an ambiguous request for counsel or not an ambiguous request for counsel. If the officers misclassify, subsequent incriminating statements could be suppressed, leading to an acquittal.[264] However, with the *Davis* approach, police do not need to classify: they can ignore any ambiguous statement and continue their interrogation without fear that future statements will be suppressed.[265]

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260. *See* George E. Dix, Miranda's *Time Is Up*, TEXAS LAWYER, February 7, 1994, at 18 (stating that the Court "will almost certainly adopt" the clarification approach and "*Davis* should be a relatively easy case for the court"). Dix is a noted criminal law expert, the A. W. Walker Centennial Chair in Law at the University of Texas School of Law, and a member of the Texas Lawyer Board of Contributors. *Id.*

261. *See, e.g.*, United States v. Buckley, 36 F.3d 1106 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1154 (1995); Coleman v. Singletary, 30 F.3d 1420 (11th Cir. 1994), *cert. denied*, 1995 WL 125839; United States v. Sanchez, 866 F. Supp. 1542 (D. Kan. 1994); Gentry v. State, 1994 WL 529410 (Ala. Crim. App. Sept. 30, 1994); Deck v. State, 1995 WL 124353 (Fla. Dist. Ct. App. 5th. Dist. Feb. 10, 1995); State v. Bailey, 1995 WL 29823 (Kan. Jan. 27, 1995); State v. Panetti, 1994 WL 622116 (Tex. Ct. App. Nov. 9, 1994).

262. *Davis*, 114 S. Ct. at 2356. The Court's approach would create a "bright line [test] than can be applied by officers in the real world of investigation without unduly hampering the gathering of information." *Id.*

263. *See supra* text accompanying notes 167, 175.

264. With the clarifying approach, if the officer thinks the request is not an ambiguous request for counsel, he is under no obligation to clarify. *See supra* text accompanying note 101. However, if he is wrong, then the rule is violated and the suspect's statements would be suppressed. *Id.* Similarly, with the per se bar rule, if the officer misclassifies an ambiguous request for counsel as just an ambiguous request and continues the interrogation, the suspect's statements will again be inadmissible. *See supra* text accompanying note 85.

265. *See supra* text accompanying notes 174-75.

On its face, *Davis* would not appear to provide any significant improvement because classification would not seem to be much of a problem, i.e., either the request is clear or it contains some ambiguities. Ambiguities can usually be classified into one of four categories: statements that contain conflicting desires, indecisive statements, actions that could indicate a desire for counsel, and confusing or unclear references to an attorney.[266] The courts generally have no problem finding that statements containing conflicting desires[267] and confusing or unclear statements referring to an attorney[268] are ambiguous requests for counsel. Courts have more difficulty, however, with indecisive statements[269] and actions that may indicate a desire for counsel.[270] Different courts have reached different conclusions with similar statements.[271] Therefore, if the courts have trouble classifying ambiguous statements, how can we expect the police to make correct determinations? Under *Davis*, this concern becomes irrelevant.

On the other hand, when a suspect makes a statement that may or may not be a request for counsel, the interrogating officer must subjec-

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266. *See, e.g., infra* notes 267-70 and accompanying text.

267. *See, e.g.*, Nash v. Estelle, 597 F.2d 513 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 981 (1979). "I would like to have a lawyer, but I'd rather talk to you" shows both a desire to have an attorney and a desire to continue the questioning. *See id.* at 516. The court held that this constituted an equivocal request for counsel. *See supra* text accompanying note 105.

268. *See, e.g.*, McCree v. Housewright, 689 F.2d 797, 799-800 (8th Cir. 1982), *cert. denied*, 460 U.S. 1088 (1983) (finding "Well, yes because my brother did say he was thinking of hiring one himself. I don't know . . . I don't know what it is, really and truly" was an equivocal response to a question of whether he wanted counsel); United States v. Grullon, 496 F. Supp. 991, 1000 (E.D. Pa. 1979) (finding that when suspect refused to sign a *Miranda* waiver form because "I don't feel up to signing it. I don't feel up to signing a paper without having a lawyer," was an equivocal request since it appears he was only requesting an attorney for the signing, not further questioning).

269. *Compare* Maglio v. Jago, 580 F.2d 202 (6th Cir. 1978) (holding that "maybe I should have an attorney" is an equivocal request for counsel) *with* People v. Krueger, 412 N.E.2d 537 (Ill. 1980), *cert. denied*, 451 U.S. 1019 (1981) (holding that "[m]aybe I ought to have an attorney" is not an equivocal request for counsel).

270. *Compare* United States v. Porter, 764 F.2d 1 (1st Cir. 1985), *cert. denied*, 481 U.S. 1048 (1987) (holding that a suspect's unsuccessful call to his attorney was an equivocal request for counsel) *with* Gorel v. United States, 531 F. Supp. 368, 370 (S.D. Tex. 1981) (finding that an attempt by the suspect's wife to contact an attorney while her husband was being interrogated in their home did not amount to an equivocal request for counsel).

271. *See supra* notes 269-70.

tively decide whether this is an ambiguous or unambiguous request.[272] If the officer believes a statement is an equivocal request, he can ignore it and continue the interrogation.[273] However, if the trial court finds the request unequivocal, any statements made after the request are inadmissible and a guilty defendant may go free.[274] Since the officer is not required to clarify any ambiguities under the Court's approach, even though he is free to do so, valid confessions may be lost simply because the officer misinterpreted a suspect's statement.[275] There is also the danger that an unscrupulous police officer will use a sliding scale to classify some statements as ambiguous requests so that he can continue the interrogation, even though in other situations, the officer may treat the statement as unambiguous. *Davis's* approach gives police more subjective latitude, which may in turn lead to more unscrupulous police practices.[276]

The majority also claims that its approach will not "unduly hamper[] the gathering of information," which is a primary police function.[277] The majority's approach increases the efficiency of the investigative function because police would no longer be required to stop the interrogation when confronted with an ambiguous request.[278] Under the other two approaches, if a suspect who was just ready to voluntarily confess makes an ambiguous request, police would have to interrupt the interrogation.[279] This could lead to a possible confession being lost, even though the suspect did not intend his statement to invoke the right to counsel.[280] In these terms, *Davis* promotes police efficiency, but what if the suspect did actually desire counsel? *Davis* may be sacrificing an individual's rights to promote the police function.

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272. This differs from the above problem. The above problem involved determining whether ambiguous statements were requests for counsel, whereas this problem involves determining whether a statement is ambiguous or unambiguous.

273. *See supra* note 154 and accompanying text.

274. *See supra* note 264 and accompanying text.

275. *Id.* This approach leaves too much discretion to the individual officers. Different officers may have different standards as to the standard of clarity required for an unambiguous request. An officer may make a judgment call and decide an otherwise unambiguous statement is ambiguous and continue the interrogation. The officer may not have thought about clarifying the request, which *Davis* allows but does not require.

276. If police were required to clarify, they may be more conscious that their clarification questions will be subject to greater review. Generally, anything that is required is looked at more meticulously, and anything that is optional is not as strictly reviewed. Therefore, with a clarification approach, officers may think twice about using "clarifying" questions to intimidate or coerce individuals.

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

278. *See id.*

279. *See id.*

280. *See id.*

B. Effect on the Individual

The much greater effect of *Davis* will be on the rights of the individual in custody. Pro-*Davis* commentators might argue that *Davis* protects these individuals' rights. Since *Davis* does not require clarification, the police will not be tempted to coerce or harass suspects with "clarifying" questions to elicit confessions.[281] The Court's standard would still allow the suspect to unequivocally assert his right to counsel, but without the threat of the police using clarifying questions for coercive purposes.[282]

In reality, *Davis* will probably not have a measurable effect on this problem. Even though police are not required to clarify, they are not prohibited from doing so.[283] In fact, many standard police practices still involve some form of coercive tactics.[284] Thus, compared to the clarification approach, *Davis* will probably not significantly reduce the risk of coercive police tactics.

On the other hand, *Davis* has the potential of substantially hindering the individual's custodial rights. *Davis* would mainly affect the rights of two main groups of individuals: those that do not have the communication skills to adequately make an unambiguous request for counsel and those who are so intimidated by the police that they do not or cannot make an unambiguous request.[285] Even the majority, in reaching its opinion, recognized that these groups might be "disadvantage[d]."[286] The irony in this is that these are precisely the groups of individuals that *Miranda* intended to protect.[287]

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281. *See id.*

282. *See id.* at 2355-56. *But see id.* at 2362 (Scalia, J., concurring).

283. *See id.* at 2356.

284. *See generally* F. INBAU, ET. AL., CRIMINAL INTERROGATION AND CONFESSIONS (3d ed. 1986); C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (4th ed. 1978); F. ROYAL & S. SCHUTT, THE GENTLE ART OF INTERVIEWING AND INTERROGATION (1976); C. VAN METER, PRINCIPLES OF POLICE INTERROGATION (1973).

285. *See Davis*, 114 S. Ct. at 2356, 2360 n.4 (Scalia, J., concurring); O'BARR, *supra* note 218, at 61-76.

286. *Davis*, 114 S. Ct. at 2356. "We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present." *Id.*

287. *See* Miranda v. Arizona, 384 U.S. 436, 445-46 (1966). These groups of individuals are more likely to incriminate themselves than people who can speak well or are not intimidated by the police.

In an attempt to convey their desire to have counsel, individuals lacking adequate communication skills may make an equivocal request, which may be the best that an individual can do. If the police ignore this request, as allowed by *Davis*, the suspect may feel that further requests will likewise be ignored and are useless.[288] As a result, even though the suspect desired to invoke his right to an attorney, police will deny him that right simply because he could not articulate his request with the proper clarity.[289] Consequently, the police violate the suspect's *Miranda* right to counsel.

The other group affected by *Davis* are the individuals who are so intimidated by the police that it affects their ability to assert an unequivocal request for counsel.[290] Intimated people are less likely to assert their rights and more likely to speak in vague or ambiguous terms.[291] If a suspect ambiguously requests the right to counsel and the police ignore him, the police presence and inaction may intimidate the individual so much that he will be afraid to try and invoke his right again.[292] Since the suspect may think there is no other way to end the interrogation, he may just confess in order to end his ordeal.[293] This is one of the exact situations *Miranda* sought to protect against: self-incrimination. Once again, the government will violate the suspect's rights.

C. *Effect on the* Miranda *Rights*

Beyond the immediate effect of increasing police efficiency at the expense of denying suspects the protection intended by *Miranda*, *Davis* may have some potentially disastrous far-reaching effects. *Miranda* has essentially gone unchallenged since the Court enumerated its *Miranda* rights in 1966.[294] However, by narrowing the scope of protection accorded by the right to counsel,[295] *Davis* appears to take a sizable chunk out of *Miranda*. The result is that *Miranda* is not as hal-

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288. Davis, 114 S. Ct. at 2362 (Souter, J., concurring).

289. The clarification approach eliminates this possibility because the officer is required to determine the suspect's intent. *See supra* text accompanying note 101. The per se bar also eliminates this because any ambiguous request requires all questioning to end. *See supra* text accompanying note 124.

290. Davis, 114 S. Ct. at 2362 (Souter, J., concurring).

291. *See* O'Barr, *supra* note 218, at 61-71.

292. *See Davis*, 114 S. Ct. at 2360-61 n.4 (Scalia, J., concurring).

293. *Id.*

294. *See supra* notes 29-80 and accompanying text. Supreme Court cases since *Miranda* have generally expanded the scope of protection. *Id.*

295. By requiring suspects to make unambiguous requests for counsel, the Court made reinvoking the right more difficult. This goes against the Court's trends throughout the post-*Miranda* cases. *See supra* notes 29-80 and accompanying text.

lowed as it once seemed to be. Consequently, anti-*Miranda* factions may start chipping away at *Miranda*, believing that it is now vulnerable.

The *Davis* Court relied on the "need for effective law enforcement" to support its holding.[296] One could construe the Court's decision to mean that the police function and the investigative process can outweigh certain aspects of an individual's rights. Future attacks may focus on this argument to challenge other areas of the *Miranda* rights. Therefore, the possibility exists that *Davis* may signal an end to the *Miranda* rights. In fact, a distinguished criminal law expert has commented that the Court should abolish *Miranda* rights and that voluntariness should determine the admissibility of confessions.[297]

D. Possible Future Reversal of Davis

Given the great weight of authority advocating the clarifying approach and the fact that the majority approach only passed by a five to four vote, the possibility exists that *Davis* will be overturned in the future.

1. Advantages of the Clarification Approach

If *Davis* is overturned, the Court would almost certainly adopt the current minority approach of requiring officers to clarify ambiguous requests. The advantages of this approach appear obvious when analyzed in terms of satisfying the intent of *Miranda*, promoting the police function, and protecting the individual's rights.

Miranda stated that a request for an attorney can be invoked "in any manner."[298] The majority's approach does not provide the individual with the protection contemplated by the "in any manner" language because numerous groups of individuals would be denied the right to counsel if unable to unambiguously communicate their desire for counsel.[299] In barring all interrogations after an ambiguous request, the per se bar rule would comply with the "in any manner" language. However, this approach would be contrary to the other intent of *Miranda*: admit-

296. *Davis*, 114 S. Ct. at 2356.

297. Dix, *supra* note 260, at 25. Dix contends that "[t]he court should return to voluntariness as the ultimate question of constitutional admissibility of confessions." *Id.*

298. *Miranda*, 384 U.S. at 444-45.

299. *See supra* notes 285-93 and accompanying text.

ting "freely and voluntarily" given statements.[300] A voluntary confession would be suppressed because a suspect inadvertently makes an ambiguous request for counsel.[301]

The clarification approach best satisfies *Miranda*'s intent. Requiring the police to stop and clarify a suspect's intent, the clarification approach provides the broad protection consistent with *Miranda*'s "in any manner" language.[302] This approach also ensures that courts will admit voluntary statements because police can continue the questioning if they determine that the suspect desires to continue.[303]

The majority relies on the "need for effective law enforcement" to support its position.[304] However, its approach may actually hinder the investigative process by eliciting inadmissible statements or opening up possibilities for police misconduct.[305] Instead of promoting police efficiency, the per se bar rule would deter the investigative process simply because the police would have to stop the questioning even when a suspect wants to give a statement.[306] Again, the clarification approach, which provides the police with clear guidelines during interrogations, best meets the needs of efficient police practice. Whenever confronted with an ambiguous request, police must stop and clarify, and if the suspect desires to continue, the police can be sure that their continued interrogation will not result in inadmissible statements.[307] Therefore, this approach minimizes the amount of lost and inadmissible confessions and increases investigative efficiency.

The most important factor in adopting a proper standard is the protection of the individual's rights. The majority's approach clearly provides the *least* protection. Even when a suspect desires counsel, the police may legally deny the right if the suspect does not clearly assert the request.[308] Even though the per se bar rule best protects the custodial suspect from self-incrimination, it does so at the cost of denying

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300. *Miranda*, 384 U.S. at 478. The Court stated, "[c]onfessions remain a proper element in law enforcement. Any statement given freely and voluntarily without compelling influences is, of course, admissible in evidence . . . . There is no requirement that police stop a person who . . . wishes to confess to a crime . . . or [offer] any other statement he desires to make." *Id.*

301. *See id.*

302. *See supra* text accompanying note 101. If a suspect truly desires an attorney, the police must respect those wishes since officers are required to stop and determine the intent. Therefore, the suspect's right to an attorney will be honored even if ambiguously communicated.

303. *See supra* text accompanying note 101.

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

305. *See supra* notes 266-71 and accompanying text.

306. *See supra* text accompanying note 85.

307. *See supra* text accompanying note 101.

308. *See supra* notes 263-65 and accompanying text.

the suspect his right to choose.[309] However, under the clarification approach, all the individual's rights are protected, i.e. the police must end the interrogation if the police find the suspect wants an attorney and the suspect is free to continue talking if the police determine that is the suspect's wishes.[310]

2. Tenuous Holding in *Davis*

Considering the political make-up of the Court, the *Davis* decision is probably not as surprising as it initially seems. The *Davis* Court is generally conservative, with Justice Scalia being the most conservative and Justice Blackmun the most liberal.[311] The rest of the Court, from conservative to liberal, consists of Justice Thomas, Chief Justice Rehnquist, Justices O'Connor, Kennedy, Ginsburg, Souter and Stevens.[312]

Throughout the term that the Court decided *Davis*, Justices Scalia, Thomas, O'Connor and Chief Justice Rehnquist usually voted together, while Justices Ginsburg, Souter, Stevens and Blackmun joined together.[313] This generally left Justice Kennedy, who usually sides with the conservatives, to decide the issues.[314]

When the Court voted along ideological lines in *Davis*,[315] Justice Kennedy was left to cast the deciding vote. Following his generally conservative thinking, Justice Kennedy voted with the conservative group to provide the 5-4 majority.[316] However, Justice Kennedy has voted with the liberal group several times.[317] The addition of Justice Breyer, who replaces Justice Blackmun, along with more seniority for Justices Souter and Ginsburg, could be enough to sway the Court, especially Justice Kennedy, to reverse *Davis*. Even though the liberal group loses their most liberal member, the generally centrist Justice Breyer could bring more agreement to the Court because he is known for

309. The rule prohibits a suspect from making further statements even if he wished to continue. *See supra* text accompanying note 85.

310. *See supra* text accompanying note 101.

311. *See* Joan Biskupic, *Justices Follow a Mostly Conservative Course: Kennedy Assuming Pivotal Role on a Supreme Court That Continues to Redefine Itself*, WASH. POST, July 4, 1994, at A12.

312. *Id.*

313. *Id.* at A1, A12.

314. *Id.* at A12.

315. *See supra* notes 153, 203.

316. *See supra* note 153.

317. *See* Biskupic, *supra* note 311, at A12.

bringing together people at the extremes.[318] Additionally, since Justice Breyer's opinions emphasize balancing tests rather than ideology,[319] he may be able to convince the pivotal Justice Kennedy or the other more conservative Justices that the clarification approach best balances the interests of the police and the custodial suspect.

Notwithstanding the advantages of the clarification approach, the Court suggested in its own opinion that *Davis* may be tenuous.[320] The Court praised the clarification approach as "good police practice," but fails to adopt it without stating a reason.[321] Therefore, due to the majority's apparent favorable recognition of the clarification approach and Justice Breyer's ability to unite ideological factions, the Court may and should overturn *Davis*.

E. Effect on Current Law

Since a Supreme Court ruling is the law of the land for federal law, the federal courts have no choice but to adopt the *Davis* approach.[322] Supreme Court rulings, however, do not necessarily bind state courts, even though the states usually follow the Court. State constitutions allow the individual states to provide their citizens with greater protection than provided for by the United States Constitution.[323] Even though *Davis* is only several months old, two states have already rejected its holding.[324] The two state opinions evidence disfavor with *Davis* by giving criminal suspects greater protection.

In *State v. Hoey*,[325] police arrested and advised Hoey of his *Miranda* rights.[326] After a detective asked Hoey whether he thought he would need an attorney, Hoey replied, "I don't have the money to buy one."[327]

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318. *Id.*

319. *Id.*

320. Davis v. United States, 114 S. Ct. 2350, 2356 (1994). Referring to the clarification approach, the majority stated that "it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney." *Id.* The Court does not say, however, why it does not adopt this approach, but simply that it "decline[s] to adopt [the] rule." *Id.*

321. *Id.* The Court recognized that the clarification rule would "minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel." *Id.*

322. *See supra* note 261.

323. *See, e.g., infra* note 331.

324. *See* State v. Hoey, 881 P.2d 504 (Haw. 1994) (rejecting *Davis* after only three months); State v. Farley, 452 S.E.2d 50, 59 (W. Va. 1994) (rejecting *Davis* after five months).

325. *Hoey*, 881 P.2d 504 (Haw. 1994).

326. *Id.* at 508-09.

327. *Id.* at 509. The response was ambiguous because Hoey apparently did not know he could have a lawyer appointed at no charge, and because if Hoey knew

Instead of attempting to clarify the response, the detective continued the interrogation and subsequently obtained a confession.[328] Based on the confession, the trial court convicted Hoey.[329] The Hawai'i Supreme Court vacated and remanded, holding that because Hoey ambiguously responded and the detective did not clarify, the subsequent confession was inadmissible.[330] The court rejected the *Davis* standard and adopted the minority approach mainly because the court chose to provide its citizens with "broader protection" than *Davis* allowed.[331] The court "adopt[s] the reasoning of Justice Souter" as the rationale behind its holding.[332]

Similarly, the West Virginia Supreme Court of Appeals in *State v. Farley*[333] expressly rejected *Davis* and adopted the clarification approach.[334] Like *Hoey*, the court in *Farley* relied on the need to protect the suspect's rights by "level[ing] the playing field . . . for the criminal defendant faced with custodial interrogation."[335] The custodial suspect needs protection because of the "coercive atmosphere" of an interrogation.[336] The court also "note[d] with interest" that Hawaii rejected *Davis* after only three months.[337] If more states follow the lead of Hawaii and West Virginia in rejecting *Davis*, the effect could snowball into most states rejecting *Davis* and following their originally adopted clarification approach. Therefore, Hawaii and West Virginia may be a precursor to the eventual reversal of *Davis*.

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this, the response did not indicate if he would have wanted the free lawyer.

328. *Id.*

329. *Id.* at 515.

330. *Id.* at 524.

331. *Id.* at 523. The court notes that they are "free to give broader protection under the Hawai'i Constitution than that given by the federal constitution." *Id.* In refusing to adopt *Davis*, "we choose to afford our citizens broader protection under . . . the Hawai'i Constitution than that recognized by the *Davis* majority . . . by aligning ourselves with the jurisdictions" following the clarification approach. *Id.*

332. *Id.*; *see supra* notes 204-57 and accompanying text for Justice Souter's reasoning.

333. 452 S.E.2d 50 (W. Va. 1994).

334. *Id.* at 59 n.12.

335. *Id.* The court asserted that the "*primary* purpose of our interrogation rules is to level the playing field, to some extent, for the criminal defendant faced with custodial interrogation." *Id.* (emphasis added).

336. *Id.* This coercive atmosphere includes "police pressure, secrecy, and the lack of sophistication of many criminal defendants." *Id.*

337. *Id.*

VI. CONCLUSION

Ever since *Miranda v. Arizona* set forth the right to counsel in 1966, the Court had not defined the requisite level of clarity required to invoke the right to counsel. The lower courts have all adopted one of three approaches: the clarification approach, the per se bar, and one allowing police to ignore ambiguous requests,[338] with a clear majority adopting the clarification approach.[339] Therefore, when the Court finally addressed the issue in *Davis v. United States*, most judicial observers thought the Court would formally adopt the majority clarification approach.[340] When the Court chose the approach allowing police to ignore an ambiguous request for counsel and continue their interrogation, the result was clearly unexpected.

In attempting to address the "need for effective law enforcement," the Court may have initiated the unraveling of the *Miranda* rights. By seemingly focusing on the "need for effective law enforcement" rather than on the need to protect the intended rights accorded in *Miranda*, the Court may have opened up the door for future attacks on the *Miranda* rights by providing a basis for such an attack. The clarification approach, which most expected the Court to adopt, best balances the intent of *Miranda* and the need to promote the police function. Requiring police to stop the interrogation and clarify a suspect's ambiguous request protects the individual's rights as well as prevents possible acquittals due to lost confessions.

Although the Court did not adopt this approach, the possibility exists for a future reversal of *Davis*. Since the *Davis* Court failed to adopt the clarification approach by one vote, and because the Court's make-up is changing, a future Court may reverse *Davis* and adopt the clarification approach. *Davis* is already showing signs of weakness, as Hawaii has expressly rejected the holding after only three months, followed by West Virginia two months later.[341] However, if *Davis* survives, *Miranda* rights may begin to weaken or eventually even become nonexistent. Therefore, the much anticipated and surprising decision in *Davis* may signal the end of the *Miranda* rights if it remains good law.

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338. *See supra* notes 82-84 and accompanying text.
339. *See supra* notes 101-22 and accompanying text.
340. *See supra* notes 258-60 and accompanying text.
341. *See supra* notes 324-37 and accompanying text.