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An Ambiguous Request for Counsel Before, and Not After a Miranda Waiver: *United States v. Rodriguez*, *United States v. Fry* and *State v. Blackburn*

By Harvey Gee[1]

Fifteen years ago, in *Davis v. United States*,[2] the Supreme Court considered the degree of clarity necessary for a custodial suspect to invoke the *Miranda* right to counsel after a waiver.[3] *Davis* decided the issue of how clearly a criminal suspect must assert his Fifth Amendment right to counsel.[4] The Court held that *after* a suspect knowingly and voluntarily waives his rights, law enforcement officers may continue their questioning unless the suspect clearly requests an attorney.[5] The Court reasoned that although agents continued questioning *Davis* after he stated, "I think I want a lawyer before I say anything else,"[6] the continued questioning did not violate the suspect's Fifth Amendment privilege against compulsory self-incrimination.[7] Under *Davis*, unless a suspect unambiguously requests counsel, law enforcement officers need not stop questioning him.[8] *Davis* marked a departure from the Fifth Amendment's requirement that the government bear the entire burden of protecting an individual's privilege against self-incrimination. *Miranda v. Arizona*[9] held that "[i]f the individual desires to exercise his privilege, he has the right to do so."[10] The *Davis* decision, however, allows the lower courts, as a constitutional as well as a practical matter, broad latitude to interpret or ignore ambiguous requests.[11]

Because the Court never expressly stated that its ruling and rationale applied to pre-*Miranda* waiver situations as well as post-waiver requests, *Davis* left open the question of whether its objective test applies in pre-waiver situations.[12] Since *Davis*, there have been several instructive cases in which an ambiguous request for counsel was made before *Miranda* warnings. To begin, in *United States v. Rodriguez*[13] the United States Court of Appeals for the Ninth Circuit held that *Nelson v. McCarthy*,[14] a case decided before *Davis* that required police officers to clarify any ambiguous requests for counsel made during an interrogation, was not abrogated by *Davis*.[15] Relying on *Nelson*'s requirement that pre-waiver clarification of a suspect's request concerning his *Miranda* rights must be made, Judge Milan D. Smith, Jr., wrote, "a duty rests with the interrogating officer to clarify any ambiguity before beginning general interrogation."[16] The Ninth Circuit found that the interrogator should have clarified Rodriguez's ambiguous statement, and it reversed the district court's decision to admit Rodriguez's subsequent incriminating statements.[17] Following *Rodriguez*, the U.S. District Court for the District of Idaho held in *United States v. Fry*[18] that an ambiguous request concerning the right to counsel requires the interviewing officer to stop any questioning, and to clarify and determine whether the statement was a request for counsel.[19] Last spring, in *State v. Blackburn*,[20] the South Dakota Supreme Court similarly held that in a pre-waiver situation where the accused has not yet expressly waived his *Miranda* rights, the officers must clarify the waiver before proceeding with the interview.[21]

This Recent Development analyzes the holdings of *Rodriguez, Fry,* and *Blackburn*, each of which follow the trend of a number of state and federal courts in declining to extend the *Davis* rule to pre-waiver situations. These courts have largely rested their reasoning on what *Davis* did not say. This Recent Development examines the emerging judicial trends regarding ambiguous requests for counsel. It focuses on the reasoning and conclusions of the state and federal courts which have interpreted the case since *Davis*. The jurisprudence that has developed during this intervening period shows that until the Supreme Court revisits the issue of ambiguous request for counsel, lower courts will continue to refer to decisions made by other state courts and federal circuits for guidance or to build on their own precedent as

the Ninth Circuit and the North Dakota Supreme Court have done.

This discussion and examination is divided into five sections. Part II reviews the basic tenets of *Miranda v. Arizona*, and argues that having questioning cease if a criminal suspect says that they want an attorney, regardless of whether it is pre or post-waiver, is faithful to the sprit and ruling of *Miranda*. Part III examines some of the holdings in different *fora* that have limited the reach of *Davis*. Part IV advocates that courts should adopt the "clarification approach" espoused by Justice David Souter in his concurrence in *Davis*, an argument that I believe is grounded in reality and is consistent with notions of judicial restraint and *stare decisis*. Part V discusses the lower courts' treatment of pre-waiver ambiguous requests for counsel in cases subsequent to *Davis*. Part VI summarizes the legal reasoning in the *Rodriguez, Fry,* and *Blackburn* decisions and discusses how these cases support the argument that the burden to clarify ambiguous requests for counsel *before* a waiver should be shouldered by police interrogators and not by suspects.

II. *Miranda v. Arizona*

A. The Landmark Decision

Chief Justice Earl Warren, writing for five of the nine members of the Court, stated that "if the individual indicates in any manner, at any time prior to or during questioning . . . that he wants an attorney, the interrogation must cease until an attorney is present."[22] Central to the *Miranda* decision was the strong interest in protecting suspects from coercion during interrogation.[23] Based on the Fifth Amendment privilege against self-incrimination, *Miranda* created a prophylactic rule to aid in judicial review of custodial interrogations.[24] If adequate warnings are not provided, then a confession is considered tainted.[25] Although the confession may not be voluntary, courts will at least have greater confidence in any confession that is obtained.[26]

There are three key principles that should be noted in *Miranda*. First, the Supreme Court in *Miranda* created rights for suspects during a custodial interrogation.[27] *Miranda* and its progeny have served as well-settled legal protections afforded to suspects. Professor Laurence Tribe remarks,

> In *Miranda* . . . the Supreme Court was consciously constructing a prophylactic set of rules whose enforcement was believed to be one reasonable way—not necessarily the *only* reasonable way—of implementing the core constitutional value at stake . . . .[28]

Second, the language contained within the *Miranda* decision is evidence of the Supreme Court's broad interpretation of a suspect's invocation of his right to counsel.[29] In *Miranda*, the Supreme Court held that "'[i]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request.' This proposition applies with equal force in the context of providing counsel to protect an accused's Fifth Amendment privilege in the face of interrogation."[30] The Court concluded that "if the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."[31] *Miranda*'s "in any manner" language is indicative of the Supreme Court's broad allowance for exercise of the right to counsel.[32]

Third, the *Miranda* Court was concerned with the inherently coercive atmosphere of custodial interrogations. The *Miranda* Court suggested that the suspect should be given the benefit of the doubt in the interpretation of ambiguous requests for counsel.[33] *Miranda* was an opportunity for the Supreme Court to express its dissatisfaction with the due process "totality of the circumstances" test as an exclusive means of regulating confessions.[34]

Competing interests forced the Warren Court to balance the needs of law enforcement against the suspect's right against self-incrimination.[35] While the Court recognized the importance of effective law enforcement, it warned against coercive police conduct.[36] Throughout its opinion, the Court repeatedly referred to the Fifth Amendment of the United States Constitution, which guarantees to all people the privilege to be free from compulsory self-incrimination, and it subsequently emphasized that "[t]he right to counsel established in *Miranda* [is not itself] . . . protected by the Constitution but [was established] to insure that the right against compulsory self-incrimination was protected."[37] In emphasizing that an individual is afforded his privilege under the Fifth Amendment of the Constitution not to be compelled to incriminate himself, Chief Justice Earl Warren eloquently wrote,

> The Fifth Amendment privilege is so fundamental to our system of constitu-

> tional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given . . . . [W]hatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.[38]

Miranda addressed the practical considerations and the constitutional issues implicated by unrestricted custodial interrogation. A primary motivation behind *Miranda* was the Court's view that a police interrogation is an inherently intimidating and coercive procedure.[39] The Court observed,

> [T]he ease with which the questions put to [the accused] may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions . . . made the [criminal justice] system so odious as to give rise to a demand for its total abolition.[40]

Miranda implemented procedural safeguards to protect a suspect's Fifth Amendment privilege against self-incrimination while being subjected to custodial interrogation.[41] In practical terms, prior to any questioning, the person taken into custody or otherwise deprived of his freedom of action in any significant way 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.[42] The language from *Miranda* states that if a suspect "indicates in any manner and at any stage of the process that he wished to consult with an attorney before speaking there can be no questioning."[43]

Was *Miranda* as significant a barrier to obtaining confessions as law enforcement would like the public to believe? Measuring the efficacy of *Miranda* has never been an easy task. According to Professor George Thomas, the studies have offered different results in measure of whether the reading of *Miranda* warnings leads to more or less confessions.[44] He explains that the local police administering the warnings have varying attitudes in conducting interrogation and measuring their compliance with Supreme Court doctrine.[45] Nevertheless, Professor Thomas argues that even within the judicial system there is no consensus about a direct *Miranda* effect on confessions, and concludes that there are no significant statistical differences found.[46]

There are also the constant variables that should be considered. Professor Thomas acknowledges that some people are discouraged from making admissions when they are provided a *Miranda* warning while others see the warning as encouragement to speak to the police.[47] Correspondingly, Professor Steven Duke suggests there are many factors influencing confession rates that have no relevance within the context of a pre-interrogation warning, including: (1) interrogation expertise of the police; (2) time available for the interrogation; and (3) the urgency of the interrogation.[48]

B. The Weakening and Narrowing of *Miranda*

A survey of Supreme Court cases from 1966 to 1994 reveals that *Miranda* has been weakened over time.[49] The Court continued narrowing down the scope of *Miranda* guarantees by limiting the application of the exclusionary rule to *Miranda* violations.[50] More specifically, the Court allowed the admission of statements obtained in violation of *Miranda* for the purpose of impeachment at trial [51] and has limited the application of the exclusionary rule by creating a "public safety exception" to *Miranda*'s warning requirements.[52] In these cases, the Court offered a narrow reading of the *Miranda* protections with respect to interrogation, waiver, and invocation.[53] Further, *Miranda*'s scope in the context of waiver was limited in *Oregon v. Bradshaw*[54] when the Court examined the waiver of counsel rights subsequent to invocation and required a court to first determine whether the accused initiated further conversations with the interrogators, and if so, ascertain whether this constituted a knowing and intelligent waiver of *Miranda* rights.[55]

These decisions have since blurred the bright–line rule originally established in *Miranda* and perhaps implicitly created a way to circumvent that rule.[56] As a result, it has become more difficult for both police officers and lower courts to know when a confession has been lawfully obtained.[57] However, in *Edwards v. Arizona*[58] the strength and resilience of *Miranda* returned.[59]

In *Edwards*, the Court fine-tuned the application of *Miranda* and created "a second layer of prophylaxis for the *Miranda* right to counsel."[60] The *Edwards* Court held that when an accused invokes the right to counsel, all questioning must cease until counsel arrives or until the accused initiates further conversation.[61]

The applicability of the *Edwards* bright–line rule was further clarified by a wave of four cases: *Smith v. Illinois*,[62] *Connecticut v. Barrett*,[63] *Arizona v. Roberson*,[64] and *Minnick v. Mississippi*.[65] While recognizing the diverse handling of the issue among the various lower courts, the Supreme Court chose not to address the issue directly.[66] The defendant in *Smith*, after being informed of his counsel rights, replied, "Uh yeah. I'd like to do that."[67] The Court found no ambiguity in this request.[68] Despite the bright–line rule set forth by *Edwards*, the Court had to later determine when the *Edwards* protections would be triggered.[69]

The *Smith* Court found the defendant's statement to be a clear and unequivocal request for counsel and consequently found no need to address the level of clarity such a request requires.[70] The Court's language in *Smith* supports a narrow approach to invocation.[71] Nonetheless, the *Smith* Court concluded 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."[72]

Under the threshold-of-clarity rule, some jurisdictions required invocations of the right to counsel to be direct and unambiguous before they were given any legal effect. Conversely, other courts embraced a *per se* standard and treated any invocation as legally sufficient to bar any further police interrogation.

III. The Limits of *Davis v. United States*: A Suspect Has to be Clear After Waiving *Miranda* Rights

In *Davis*, the Supreme Court considered the degree of clarity necessary for a custodial suspect to invoke the *Miranda* right to counsel after a waiver.[73] Until *Davis*, the Supreme Court had yet to resolve the question of what legal effect, if any, should be afforded to an accused's use of equivocal or ambiguous language when invoking *Miranda* rights during a police interrogation.[74] Without a clear rule from the high Court, three diverse approaches emerged in the state and lower federal courts: (1) the "threshold-of clarity" standard, (2) the "per se invocation" standard, and (3) the "clarification" standard.[75] Under the threshold-of-clarity rule, some jurisdictions required invocations of the right to counsel to be direct and unambiguous before they were given any legal effect.[76] Conversely, other courts embraced a *per se* standard and treated any invocation as legally sufficient to bar any further police interrogation.[77]

In *Davis*, the Court decided that law enforcement officers are not required to cease questioning immediately upon the making of an ambiguous or equivocal reference for an attorney.[78] The *Davis* Court held that after a suspect knowingly and voluntarily waives his *Miranda* rights, law enforcement officers may continue their questioning until and unless the suspect clearly requests an attorney.[79] The Court reasoned that although agents continued to question Davis after he stated, "I think I want a lawyer before I say anything else,"[80] the continued questioning did not violate the suspect's Fifth Amendment privilege against compulsory self-incrimination.[81]

In *Davis*, a sailor in the United States Navy was beaten to death with a pool cue, and his body was discovered the next morning on a loading dock behind the Charleston Naval Base commissary.[82] The Naval Investigative Service ("NIS") interviewed Davis on the USS MAHAN, his assigned military duty station.[83] Prior to the interrogation, the accused was advised of his right to speak with an attorney and to have an attorney present during questioning under *Miranda* and Article 31 of the Uniform Code of Military Justice.[84] Davis subsequently gave an oral and written waiver of these rights.[85] Approximately an hour and a half into the interrogation, Davis stated, "Maybe I should talk to a lawyer."[86] Discussions continued with Davis in an attempt to clarify if he was asserting his right to counsel.[87] Davis was asked if he was asking for a lawyer or just making a comment about a lawyer.[88] According to the agent, Davis responded, "No, I'm not asking for a lawyer—[n]o, I don't want a lawyer."[89]

After a short break, the NIS agents briefly reminded Davis of his Article 31 and *Miranda* rights and continued the interrogation.[90] An hour later, Davis exclaimed, "I think I want a lawyer before I say anything else."[91] The interrogation was then terminated.[92]

At trial, the military judge denied Davis' motion to suppress the statements he made during the interrogation, and determined that the initial phraseology used by Davis was not a request for counsel.[93] The Court of Military Appeals affirmed, holding that Davis' ambiguous request did not serve to invoke his right to counsel and that the NIS agents responded properly in seeking to clarify the remark.[94]

In an attempt to establish a clear legal precedent, the Court established a test in *Davis* that focused equally on the factual and legal analysis of the ambiguous request for counsel. Justice Sandra Day O'Connor, joined by Chief Justice William Rehnquist, Justices Antonin Scalia, Anthony Kennedy, and Clarence Thomas, wrote the majority opinion.[95] The majority addressed (1) whether an ambiguous request for counsel is sufficient to invoke a suspect's right to counsel under *Miranda* and (2) whether, per *Edwards*, police officers are obligated to ask clarifying questions after an ambiguous request for counsel.[96] The Court decisively answered these questions by holding that, after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until the suspect clearly requests an attorney and that *Edwards* does not limit such questioning, by any means, to clarifying questions.[97]

In coming to its narrowly-focused conclusion, the Court rationalized that the mere act of informing suspects of their *Miranda* rights would be sufficient to overcome deficiencies and to protect against the coerced relinquishment of the right against self-incrimination.[98] The Court viewed the more lenient approaches taken by other jurisdictions as unnecessarily burdensome on law enforcement.[99] In adopting a more rigid rule, it reasoned that police officers should not be "forced to make difficult judgment calls about whether the suspect in fact wants a lawyer. . ."[100]

The Court utilized an objective test to determine if a suspect's statement can be reasonably construed as a request for counsel but was reluctant to apply a bright–line rule to ease questioning based and ambiguous requests.

> Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will 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.[101]

The Court acknowledged that a requirement for a clear assertion of the right to counsel may disadvantage some suspects if they are unable to articulate this right "because of fear, intimidation, or lack of linguistic skill."[102] But in this decision, the interests of law enforcement won out. The Court further mentioned that it would be "good police practice" for officers to clarify an ambiguous request.[103] In the Court's view, if suspects were not required to be clear in asserting their right to counsel, there would be an unreasonable burden placed on officers to decide whether they can question suspects.[104] Furthermore, this burden would unduly hamper information-gathering on the part of police.[105]

Under the *Davis* mandate, a suspect must clearly articulate his desire to have counsel present such that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.[106] Otherwise, a post-waiver reference to an attorney creates neither an obligation for questioning to cease nor an obligation for officers to clarify the ambiguous statement.[107] The officers may continue their interrogation without fear that future statements will be suppressed.[108] *Davis* effectively means that this police function, specifically the investigative process, outweighs the individual's rights in these circumstances. The *Davis* decision allows lower courts, as both a constitutional and a practical matter, to ignore ambiguous requests. As such, jurisdictions would be free to develop their own standard for clarity, thereby creating even more uncertainty than before the *Davis* decision. Also, lower courts would be confronted with cases that require the second-guessing of police judgments that a request for counsel was sufficiently ambiguous to alleviate the need for clarification. Judges would be compelled to perform objective inquiries into the facts surrounding the interrogation. Statements that may be perceived as somewhat equivocal can be ignored regardless of whether they are a suspect's earnest request for counsel, and as a result, the suspect may believe that any other requests for counsel or further objections to questioning may be futile.

These infirmities highlight the problems inherent in *Davis* and *Davis*' inconsistency with Supreme Court Fifth Amendment jurisprudence. Under *Davis*, an ambiguous invocation of the *Miranda* rights after an

initial valid waiver is ineffective (for example where there is a warning and waiver, questioning, and then an ambiguous statement).[109] The question remains, however, whether the *Davis* rationale applies to an initial ambiguous response (for example where there is a warning followed by an ambiguous response). As discussed in the next section, courts have divergent opinions with regard to this question. Some jurisdictions have determined that it does apply, whereas other jurisdictions have concluded that it does not.

IV. Justice Souter and the Clarification Approach: Just Ask - Was it a Request or Not?

The invocation of *Miranda* rights should not be so difficult. *Miranda* rights are in place to prevent custodial interrogations that are inherently coercive. Unfortunately, as illustrated by some lower courts' decisions after *Davis*, these protections are sometimes removed.[110] Accordingly, because the Fifth Amendment prohibits compelled self-incrimination, all responses to questioning not accompanied by a valid waiver are considered compelled.[111]

Although the *Davis* Court did not mention when a suspect must make a clear request for counsel, I have previously argued that because the facts in *Davis* involved a post-waiver invocation, the clarification rule does not apply before a suspect waives his right to counsel.[112] Professor Marcy Strauss recently argued that *Davis* should be seen as a limited rule, applicable only to post-waiver invocations.[113] Professor Strauss also suggests that court decisions after *Davis* have made it extremely difficult for suspects who wish to assert their rights to do so, as many judges classify even seemingly clear invocations as ambiguous invocations.[114] Professor Strauss further urges that courts should require that any ambiguous or equivocal request be clarified prior to continued questioning of a suspect.[115] Though in my earlier piece I did not advocate for the adoption of a clarification approach to address this issue in future cases, the court decisions since have made clear that a clarification approach should be applied to address ambiguous requests for counsel in pre-wavier situations. Just like Professor Strauss, I would also argue that future ambiguous request cases should follow this reasoning and place the burden on interrogators, not suspects, to show that that the suspect waived his *Miranda* rights. A clarification approach would be consistent with the precedent set by *Miranda* and *Edwards*, guaranteeing the right to counsel and protecting suspects' constitutional rights. This was the majority rule before *Davis*. This approach allows the police to continue questioning an arrestee whose invocation was ambiguous, but only to determine the suspect's intent to exercise his right to counsel.

As previously mentioned in the introduction, a majority of federal courts have utilized the clarification standard, which allows police officers to continue questioning an arrestee whose invocation was ambiguous or equivocal solely for the purpose of determining the suspect's intent to exercise his right to counsel. But under *Davis*, depending on the interpretation of the lower court, the burden is on defendants to clearly articulate their request for counsel after they have already initially declined such assistance. A caveat is in order.

The obligation for defendants to clearly ask for an attorney before an initial waiver allows the speaker's expressed intent to be ignored.[116] From my perspective, and based on my criminal defense experience, I suggest that the better approach is to require the police officer to seek clarification from the suspect if he is unsure whether the defendant is requesting an attorney. Just ask. While *Miranda* requires all questioning to cease, a question to clarify should be allowed and should not be interpreted as an effort to elicit an incriminating statement. Under a clarification approach aimed towards efficient police practice, the police would follow established guidelines during interrogations: when confronted with an ambiguous request, the police must stop and clarify. At the same time, the individual's constitutional rights would be protected as that individual can choose to either seek counsel or continue with questioning. Notably, this clarification approach was advocated by Justice Souter in his *Davis* concurrence.

Justice Souter, joined by Justices Harry Blackmun, John Paul Stevens, and Ruth Bader Ginsburg, concurred with the majority.[117] Although Justice Souter believed the majority's decision was correct, the standard adopted by the majority was not. Justice Souter agreed that Davis' statements should not have been excluded from trial because he had not clearly requested an attorney.[118] Justice Souter, however, disagreed with the majority's standard with regard to a police officer's obligation to clarify an ambiguous request for counsel.[119] In particular, he concluded that interrogators have the legal obligation to clarify a custodial subject's ambiguous statement if the statement could be interpreted as a desire to consult with an attorney.[120]

Justice Souter made three crucial points. First,

he believed that the clarification standard adopted by the majority of the lower courts was a better alternative.[121] Rather than allowing the police to continue interrogating a suspect after an equivocal request for counsel, Justice Souter would require police officers, following an ambiguous statement, to ascertain whether the suspect actually wants an attorney.[122] This standard would not only ensure that a suspect's choice of whether to have counsel during an interrogation will be "scrupulously honored," but would also provide a workable solution to the misunderstandings that often arise between suspect and interrogator.[123] Justice Souter made the robust claim that "the *Miranda* safeguards exist 'to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process,' and that the justification for *Miranda* rules, intended to operate in the real world, 'must be consistent with . . . practical realities.'"[124]

Second, Justice Souter suggested that the majority disregarded judicial restraint. According to Justice Souter, the majority's holding was not mandated by any of the Court's prior decisions, and for the majority to assert otherwise was an erroneous application of precedent.[125] Finally, Justice Souter pointed out that the majority did not define when an assertion is clear and when it is not.[126] He argued that "every approach, including the majority's, will involve some 'difficult judgment calls,'" and police judgment calls, according to the majority, would actually erode the bright–line test of *Edwards*.[127]

In Souter's view, officers have a non-assignable legal obligation to ask necessary questions in order to clarify any ambiguous statements made by a suspect.[128] In addition, Justice Souter noted that a large percentage of criminal suspects lack a strong command of the English language, and many others are either so intimidated by the interrogation process or so overwhelmed by the uncertainty of their situation that they are unable to speak assertively.[129] With this in mind, Justice Souter insisted that, because of these realities, the Court has traditionally required a broad interpretation of requests for counsel.[130]

In her article, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under Miranda*, Professor Strauss asserts that,

> [E]ven if *Davis* renders an ambiguous statement insufficient to invoke a suspect's rights, that statement should influence whether there occurred a valid waiver…Even if not deemed an invocation *per se*, the statement can and should be considered in deciding the validity of any waiver. Pre-waiver, ignoring such a statement (or making a derogatory statement about how not talking would hurt the defendant's cause) should render any subsequent waiver invalid. At a minimum, the officers need to clarify the suspect's desire in order to satisfy the waiver requirements.[131]

[T]he police may continue questioning unless the suspect unambiguously invokes his rights, regardless of whether law enforcement officials have endeavored to clarify any ambiguity.

As an alternative, Professor Strauss argues that the courts should adopt a strict "stop-and-clarify" method, which requires officers to follow specific rules in asking questions from a prepared script about whether the suspect wants counsel or not.[132] The officer would not be allowed to add any editorial comments onto these rigid rules.[133] As applied to the cases in this Recent Development, both Justice Souter's clarification approach and Strauss' approach would ensure that a suspect's request for counsel would be honored, and as a result, litigation and challenges to the statements would be reduced or eliminated.

After *Davis*, some courts utilized the *Davis* rationale and applied the so-called clarification approach in a pre-waiver situation. They have held that upon any clear or equivocal request for counsel, the police must cease all questioning and seek clarification of the suspect's request. Accordingly, the police may continue questioning unless the suspect unambiguously invokes his rights, regardless of whether law enforcement officials have endeavored to clarify any ambiguity.[134] As discussed below, the courts that follow the clarification rule will probably develop individualized standards and associated definitions of "ambiguity," which will depend upon the facts and circumstances of each case that arises during the development of these standards.

V. From *Leyva* to *Robinson*: Pre-Waiver Ambigous Requests for Counsel Jurisprudence After *Davis*

A. *Davis* is Applicable Even When a Suspect Makes an Ambiguous Request for Counsel *Before* Waiving *Miranda* Rights

Several courts have applied the *Davis* doctrine regardless of its timing. The Massachusetts Court of Appeals acknowledged that the *Davis* rationale is limited to post-waiver ambiguity, not an ambiguous request for counsel in the context of the initial advisement of rights. The court found no difference, however, between applying the *Davis* rule to any waiver situation, either before *Miranda* warnings or after, stating that "[c]ourts have held that unless a suspect 'clearly and unambiguously' invokes his right to remain silent, either before or after a waiver of that right, the police are not required to cease questioning."[135]

The Sixth Circuit Court of Appeals also applied *Davis* to a pre-waiver situation in *Abela v. Martin*,[136] a case involving a stabbing death at a party.[137] The suspect was also injured and taken to a hospital emergency room for treatment.[138] At the hospital, the police officer was interrogating Abela about the events when Abela stated, "[m]aybe I should talk to an attorney by the name of William Evans," showing the officer Mr. Evans' business card.[139] The officer then left the room, presumably to contact Abela's attorney.[140] The officer came back to the room and proceeded to *Mirandize* Abela, but never made any mention of Mr. Evans.[141] Nevertheless, Abela signed the waiver form given to him and made a statement.[142] After being transported to the police station, Abela made another statement to the police.[143] The Sixth Circuit distinguished the facts of *Abela* from those of *Davis* and found Abela's request for his attorney to be unequivocal in nature, stating that "[a]fter Abela requested counsel, the police were required to cease questioning him until he had a lawyer present."[144]

In *In re Christopher K,*[145] the Illinois Supreme Court applied *Davis*' objective test to a pre-waiver setting and addressed whether the suspect's articulation of his request for counsel was sufficiently clear for a reasonable officer in the circumstances to have understood the statement as such a request.[146] The court concluded that respondent's statement was not sufficiently clear to invoke his right to counsel and based its reasoning on the following:

> The fact waiver has not yet occurred can simply be subsumed into the objective test. That is, a trial court may consider the proximity between the *Miranda* warnings and the purported invocation of the right to counsel in determining how a reasonable officer in the circumstances would have understood the suspect's statement.[147]

Notably, the Texas Supreme Court issued a rare suppression ruling in a juvenile case. The court in *In the Matter of H.V.*[148] found that a juvenile who told a magistrate that he "wanted his mother to ask for an attorney" invoked his right to counsel before police interrogated him about a murder.[149] H.V. was a sixteen-year-old Bosnian native who was seen leaving his high school with the victim two days after buying a gun.[150] A police detective met with H.V. at his high school the day after the victim's body was discovered at a construction site with gunshot wounds to his head.[151] H.V. voluntarily accompanied the detective to a juvenile processing center where the magistrate asked H.V. whether he wanted to waive his rights and speak to the police.[152] When H.V. said he wanted to speak to his mother, he was informed that he could not speak to his mother to ask for an attorney.[153] Despite H.V.'s reminder to the magistrate that he was sixteen years old, the magistrate told him that H.V. was the only person who can request an attorney.[154] H.V. later provided a written statement in which he claimed that the victim accidentally shot himself with H.V.'s gun.[155]

The majority opinion referred to *Davis* and provided examples of what constituted a valid request for counsel.[156] The court recognized that, "[t]here appear to be no cases answering whether a juvenile's age is among the 'variety of other reasons' courts cannot consider when deciding whether an accused has requested counsel."[157] The court later determined that, "[t]his is not a case in which H.V. simply wanted to see his mother; the only reason he said he wanted her was for the purpose of getting him an attorney."[158]

Seemingly, not only are these courts reading *Davis* as saying that it applies in pre-waiver situations, but also that any request for counsel, either before or after waiver, must be made clear by the suspect. The burden of clarification rests squarely on the shoulders of the suspect.

B. Potential Abuses of *Davis* and Police Interrogation Tactics

Davis allows a great deal of leeway for police interrogators because it says nothing about the manner in which interrogators are permitted to respond to an ambiguous request for an attorney. As a result, interrogators may feel latitude in employing tactics to deflect suspects from invoking their right to an attorney.[159]

In my previous work as a public defender, I listened to the many narratives from my clients about how the police would not provide *Miranda* rights when they should have. In these situations, officers frequently claimed that they were asking only routine investigation questions of my clients who were or were not supposedly under arrest. Sometimes that was true. Other times, it appeared to be a pre-text to elicit incriminating statements. Regardless of the motive of the police, this gives a great deal of leeway in their information gathering. Professor Paul Butler, a former federal prosecutor, observes,

> The police are very good at getting suspects to talk, even after they give suspects *Miranda* warnings. . . Officers get people to talk by methods that include lying about the evidence in the case, lying about witnesses, and lying about the likelihood of prosecution.[160]

Because the police are trained in interrogation tactics, they are significantly advantaged over even the most cunning of criminal suspects. According to Professor Charles Weisselberg, in California police recruits in basic academy training are instructed that after suspects receive and acknowledge that they understand their rights, suspects must either waive or invoke that right; continuing training materials are provided to police officers as well.[161] The police can use various tactics when suspects consider a request for counsel including: (1) leading suspects to believe that, by invoking their right to have an attorney present, it may make it difficult to tell their story to the police; and (2) giving the impression that they would not be able to take advantage of the benefits of cooperating with the police.[162] Essentially, even when officers work within the boundaries created by *Miranda* and *Davis*, they can still employ whatever trickery or psychological coercion that the *Miranda* Court considered.

Ten years after *Davis*, in *Missouri v. Seibert*,[163] a particularly egregious abuse case came before the Court. Seibert was convicted in state court of second-degree murder.[164] Seibert feared facing charges of neglect when her son, afflicted with cerebral palsy, died in his sleep.[165] Instead, she helped arrange for her son's body to be incinerated in the family's mobile home.[166] After her arrest, Seibert was not given *Miranda* warnings and was questioned for thirty to forty minutes until a confession was obtained.[167] At one point the officer squeezed Seibert's arm.[168] After a twenty minute break, the officer returned, provided her with *Miranda* warnings, and obtained a signed waiver from her.[169] The interrogation resumed and, when confronted with her pre-warning confession, Seibert repeated the information.[170] At trial, the interrogating officer revealed that he employed questioning techniques that required him to withhold *Miranda* warnings, to question Seibert, to then give *Miranda* warnings, and to repeat his question until he received the answer previously given.[171]

At issue was the police practice of providing no warnings of the right to silence and counsel until a confession is obtained through interrogation.[172] The Court was to determine the admissibility of the repeated statement.[173] Justice Souter wrote for the Court, joined by Justices Stevens, Ginsburg, and Breyer, holding that *Miranda* warnings given mid-interrogation where an unwarned confession was produced were ineffective and therefore the confession was inadmissible at trial.[174] According to majority opinion, the repeated statement was inadmissible "[b]ecause this midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with *Miranda*'s constitutional requirement . . . ."[175]

The objective of the question–first tactic utilized by the police was to render *Miranda* warnings ineffective by waiting for an opportune time to give the warnings after the suspect confesses.[176] The majority recognized that "the question-first tactic effectively threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted."[177] Further, "[t]he unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive and managed with psychological skill. When the police were finished there was little, if anything, . . . left unsaid."[178]

Justice Steven Breyer's concurrence was equally critical in his criticisms of the police interrogation techniques employed in Seibert's interrogation.

> Reference to the prewarning statement

> was an implicit suggestion that the mere repetition of the earlier statement was not independently incriminating. The implicitly suggestion was false . . . The technique simply creates too high a risk that postwarning statements will be obtained when a suspect was deprived of "knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."[179]

Subsequently, as a remedial measure, Justice Breyer proposed a Fourth Amendment type rule that "[c]ourts should exclude the 'fruits' of the initial unwarned questioning unless the failure to warn was in good faith."[180]

Academics were also critical of the conduct of the interrogation tactics in *Seibert*, as Professor Yale Kamisar observed,

> [I]f the police really believed (as they expect the rest of us to believe) that a fresh set of *Miranda* warnings, plus an additional warning explaining the likely inadmissibility of the earlier unwarned statement, would completely "cure" everything and restore the suspect to exactly the same position he would have been in had he never made the earlier unwarned statement, what do the police gain by deliberately withholding the warnings in the first place and giving the *Miranda* warnings and the supplementary warning later? Wouldn't it be a good deal simpler just to give the appropriate warnings in the first place?[181]

When *Davis* and *Seibert* are considered together a relationship may be drawn between ambiguous requests for counsel and improper interrogation tactics. Take a hypothetical case using the same facts as in *Seibert* with only slight changes: the suspect remarked, "'Maybe I should talk to a lawyer" before they were *Mirandized*. A court may rely on the rationale offered in *Davis* and find that there would be no obligation by the officer to clarify the statement (a pre-waiver situation). If the same requests were made by a suspect after they were *Mirandized*, then under *Davis*, a court may find that there is no duty on behalf of police officers to clarify such a statement and any incriminating statement would be potentially admissible. Such interrogation tactics will not invalidate the suspect's waiver of her right to an attorney. Unlike *Seibert,* most cases lack strong evidence of the interrogator's wrongful intent.

The notion that the police should not be allowed to employ interrogation tactics that will undermine a suspect's understanding of the warnings was reiterated by the Florida Court of Appeals in *Dooley v. State.*[182] Dooley, who was accused of sexual battery and lewd acts against a minor said, "Um, I don't wish to waive my rights," after he was given his *Miranda* warning.[183] Dooley later said during the interrogation, "Um, I'm going to talk to you," and a confession resulted.[184] Later citing *Miranda*, the Florida court held that Dooley's statement was not a waiver, and the interrogation should have ceased at that point."[185] The court also found the interrogator's indication that Dooley could speak to the officer without the risk of his statements being used in court was improper, stating that "The police may not use misinformation about *Miranda* rights to nudge a hesitant suspect into initially waiving those rights and speaking with the police."[186]

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C. *Davis* is Not Applicable: A Clear Request is Necessary Only *After* Waiving *Miranda* Rights

Several lower courts, unwilling to confront th-*Davis* majority opinion, have held that *Davis* is limited to post-waiver situations. In *State v. Leyva*,[187] the Utah Supreme Court held that *Davis* did not intend to extend to pre-waiver situations.[188] In *Leyva*, the Utah Highway Patrol noticed Leyva's car leaning to one side on the freeway when a State Trooper noticed that the car's license plate had been issued to another car.[189] A high speed pursuit began when the trooper attempted to pull Leyva over.[190] The trooper read Leyva his *Miranda* rights, and asked Leyva if he wanted to talk. Leyva responded, "I don't know."[191] Fifteen minutes later, while

being transported to jail, Leyva asked the trooper about the charge against him.[192] The trooper told Leyva that he was being charged with "Evading, improper registration, no driver's license, no insurance, and possession of cocaine."[193] Leyva said, "'Hey, man, I'll admit to everything else, but the cocaine isn't mine.' [The trooper] asked, 'So you admit you saw my lights and were trying to run from me?' Leyva replied, 'Yeah, I was, but the cocaine isn't mine.'"[194]

The Utah Supreme Court rejected the state's broad reading of *Davis* which purportedly supported their argument that officers are not required to limit their inquiry to clarifying the intent of the suspect, but could continue questioning.[195] The majority reasoned that "[t]he Court in Davis made clear that its holding applied only to a suspect's attempt to *reinvoke* his *Miranda* rights '*after* a knowing and voluntary waiver' . . . . Plainly the court in *Davis* did not intend its holding to extend to prewaiver scenarios . . . ."[196]

The *Leyva* analytical framework was adopted by the South Dakota Supreme Court in *State v. Tuttle*,[197] which held that *Davis* does not apply to pre-waiver situations, and where the accused has not yet validly waived *Miranda* rights, the officers must clarify the waiver before.[198] In that case, officers arrived to the scene of a verbal argument between Tuttle and another gentleman.[199] Officers then discovered another man who was stabbed eleven times.[200] Under interrogation, Tuttle admitted to stabbing the victim three times.[201] After a lengthy colloquy, Tuttle stated he did not want to waive his rights but still wanted to talk with the interrogator.[202] The court found that Tuttle's responses during the interview indicated he knew that any admission would be incriminating and upheld the lower court's finding that he knowingly, intelligently, and voluntarily waived his *Miranda* rights.[203] The court also noted that the detective sufficiently clarified Tuttle's intent and that based on the totality of the circumstances Tuttle waived his *Miranda* rights.[204]

The viewpoint that the *Davis* rationale should not be extended to pre-wavier situations gained traction at the intermediate court of appeals level. The Maryland Court of Appeals relied on *Leyva*, and declined to extend *Davis* in *Freeman v. State*.[205] Freeman was convicted of shooting to death her boyfriend.[206] Freeman walked into a police station and announced, "I just shot someone."[207] Freeman responded to the Sergeant's question about which hand she used to shoot the victim.[208] The Sergeant then advised Freeman of her *Miranda* rights.[209] She indicated that she understood her rights, but said nothing about waiving them.[210]

Later Freeman waived her rights by initialing each question on the waiver form.[211] In response to questioning, Freeman explained where and when she purchased the gun, that the gun is normally kept underneath the front seat of her car, and that she did not have a permit for it even thought she knew it was against the law.[212] The court stated,

> While there may well be sound reason to apply the logic of *Davis* to the matter of an ambiguous invocation of the right to silence that follows a valid waiver of *Miranda* rights, that logic does not extend to an ambiguous invocation that occurs prior to the initial waiver of rights.[213]

The court *sua sponte* presented the issue of whether the rationale of *Davis* applies to an ambiguous invocation made prior to wavier of rights, but it was persuaded by the Utah Supreme Court's reasoning in *Leyva* and declined to apply *Davis* to a prewaiver context analysis.[214]

The next year, the Alabama Criminal Court of Appeals was persuaded by *Freeman v. State* when it addressed the issue of whether pre-waiver *Davis* applied and essentially adopted the *Freeman* analysis in *State v. Collins*.[215] There, Collins gave a videotaped statement to the Montgomery Police Department Officer, in which she admitted that she was involved in a fatal hit-and-run accident.[216] The Court determined that she was not paying attention to the road, and was looking for something in her purse on the backseat.[217] Collins said that she hit something that caused her car to swerve, noticed that her windshield was broken, and saw a girl lying on the road.[218] Collins further said she did not stop but returned to work and did not contact the police despite seeing the news coverage about the girl being killed.[219] Collins gave the statement without counsel present and claimed that (1) she did not understand the right to counsel and therefore she could not have waived it and (2) neither officer present answered her question about how long it would take to get an attorney.[220]

In finding that there was no knowing or voluntary waiver of her *Miranda* rights, the majority wrote, "*Davis* does not apply to this case. Collins's questions were directed to the delay involved in obtaining a lawyer, and she asked them before she signed the waiver-of-rights form."[221] The court concluded that the ambiguity of Collins' questions required the interrogat-

ing officer to ask follow-up questions to clarify the ambiguity.[222]

> In *Robinson v. Arkansas*,[223] after a jury trial, Robinson was convicted of first-degree murder.[224] Robinson ran from the crime scene, was caught after a pursuit, and was taken into custody.[225] After Robinson was read his *Miranda* rights from a preprinted card, the Sheriff asked him, "why are you running from the police?" Robinson answered, "I don't want to say anything right now."[226] The questioning continued, and Robinson made several incriminating statements.[227]

In the court's opinion, written by Judge Jim Gunter, Robinson's response was construed as an invocation of his right to remain silent under *Miranda*, and the court determined that "[u]nder these circumstances . . . the officer should have ceased his interrogation after Robinson's statement, 'I don't want to say anything right now.'"[228]

While the court does not explicitly mention *Davis* in its opinion, an analysis of *Davis* as applied to *Robinson* is provided in Judge Annabelle Clinton Imber's concurring opinion, and in the dissent by Judge Tom Glaze. Judge Imber referred to the Arkansas Rules of Criminal Procedure[229] and the *Davis* decision, and recalled that *Davis* allows a suspect to invoke his right to counsel in any manner if he does so before waiving his *Miranda* rights.[230] The Imber concurrence averred that "Robinson never waived his rights…his statement 'I don't want to say anything right now' was not required by *Davis* to be unequivocal. Rather, it was sufficient because it was made in 'any manner.'"[231]

However, Judge Tom Glaze disagreed with this interpretation of *Davis* and explained in his dissent that the invocation of a right to counsel need not be equivocal or tentative during questioning.[232] With this in mind, he concluded that "Robinson's attempted invocation of his right to remain silent was equivocal because he merely said that he did not want to say anything 'right now.' Robinson's response could reasonably be interpreted to mean that he might (or would) talk later, and he did."[233]

V. Analysis of *United States v. Rodriguez*, *United States v. Fry*, and *State v. Blackburn*: The Right Idea

This section closely examines *Rodriguez, Fry,* and *Blackburn* and discusses their similar rationales. These three recent cases represent the view that in a pre-waiver situation where the accused has not waived their *Miranda* rights, the officers must clarify the waiver before proceeding with the interview (the burden is placed on the officer, not on the suspect). These courts required that all questioning must stop, even when the most ambiguous references to counsel is made.

A. *United States v. Rodriguez*

As briefly discussed in my introduction, in *Rodriguez*, the Ninth Circuit Court of
Appeals held that its precedent before *Davis*, which required police officers to clarify any ambiguous requests for counsel at any time during an interrogation, survives *Davis*. The facts are straightforward. Rodriguez was driving erratically and was pulled over in a National Recreation Area in Las Vegas based on suspicion of intoxication.[234] Before roadside sobriety tests could be performed, the Ranger learned that Rodriguez was a registered felon and saw a pistol handle protruding from an open bag in the bed of the Rodriguez's truck.[235] Rodriquez informed the Ranger that there was another firearm under the driver's seat.[236] After providing Rodriguez with a *Miranda* warning, the Ranger asked him if he wanted to speak.[237] Rodriguez responded, "I'm good for tonight."[238] At trial, the Ranger testified that he understood this as being Rodriguez's willingness to speak to him later, but not immediately.[239] Rodriguez responded to the Ranger's questions and admitted that the bag, the gun, and the silencer belonged to him.[240]

The court noted that in the context of a *Miranda* waiver, the phrase "I'm good" may be interpreted in a myriad of ways and reasoned that the statement could have been an ambiguous invocation of the right to silence.[241] As such, the court then considered the need for the Ranger to have clarified Rodriguez's response.[242] The court referred to the narrow holding of *Davis*, which involved a post-waiver situation, and acknowledged the decision's limitations, which held that "'*after a knowing and voluntary waiver of the* Miranda *rights*, law enforcement officers may *continue* questioning until and unless the suspect clearly requests an attorney.'"[243] The court noted that "[t]he text of the [*Davis*] opinion is . . . narrowly drawn: it asks whether '*further* questioning' is permitted upon an equivocal or ambiguous invocation of the right to counsel, or, rather, whether questioning must 'cease.'"[244] The court further proclaimed that "to

the extent *Nelson* requires pre-waiver clarification of a suspect's wishes… it has not been superseded by *Davis*… Prior to obtaining an unambiguous and unequivocal waiver, a duty rests with the interrogating officers to clarify any ambiguity before beginning general interrogation."[245]

In concluding its decision, the court held that the burden rests on the government and not on the suspect to clarify any ambiguous statement, and as such, because the interrogator did not clarify *Rodriguez*'s wishes, the district court erred in admitting his subsequent incriminating statement into evidence.[246] The court also noted, "if it is not unreasonable to ask a police officer to administer the warning, it is also not unreasonable to ask him to get an unequivocal waiver before commencing general interrogation."[247]

B. *United States v. Fry*

The District Court for the District of Idaho in *United States v. Fry* relied on *Rodriguez* for analytical support and joined other courts in restricting *Davis*' holding to facts arising in a post-waiver context.[248] The court suppressed Fry's statements because his request for counsel was intentionally ignored; Fry did not have to make a specific clear request in a pre-waiver context.[249]

In this case, Fry was driving his pickup with two passengers and was pulled over by police officers during a traffic stop.[250] The officers found a pipe and syringe and placed Fry under arrest for unlawful use of drug paraphernalia.[251] The officers then initiated conversation with Fry without providing any *Miranda* warnings.[252] They informed Fry that he was the subject of a methamphetamine distribution investigation.[253] Fry asked, depending on the differing accounts, either "Do I get to have a lawyer to sit in?" or "Do I need an attorney?"[254] One of the interrogators attempted to "soften-up" Fry by telling him of the potential charges he faced and of the advantages of cooperating with the investigation.[255] The dialogue continued despite the fact that Fry was neither provided any *Miranda* warnings nor given a response to his "lawyer" question.[256] The officers never clarified Fry's statement regarding a lawyer.[257] Fry was further informed about potential charges stemming from the evidence of his alleged criminal activity and how they would stand in the federal system, and was given further encouragement to cooperate with police.[258] Only then was Fry given his *Miranda* rights.[259]

According to Judge Quackenbush, writing for the court, the facts support a finding that Fry wanted a lawyer and that the interrogator should have clarified any ambiguity that may have existed.[260] The court noted that Fry's statement regarding the need for an attorney was made "*prior* to the reading of his *Miranda* rights, *prior* to the subsequent waiver, and *prior* to the interviewing agents' 'softening up' and questioning."[261] The decision was especially critical of the interrogator, Agent Smith, and devoted a lengthy passage to his failure to address Fry's request for a lawyer and to Smith's persistent questioning in an effort to elicit incriminating statements.[262] The court wrote, "[t]he question was clear enough that a reasonable officer in light of the circumstances would have understood that the suspect *might* be invoking the right to counsel. As such, Agent Smith had a duty to clarify the ambiguity before proceeding with an interview and interrogation."[263]

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The prophylactic rules established in *Miranda* and *Edwards*, which were intended to preclude the type of questioning tactics employed against Fry, were especially helpful to the court. It concluded that the *Miranda* and *Edwards* rules were violated, and as such, Fry's statements should be suppressed.[264] The court then proceeded to distinguish *Edwards*' facts from Fry's circumstances:

> Though the court acknowledges that the *Edwards* facts involved a "clearly asserted" invocation of the right to counsel, the court finds that the unclarified, pre-waiver, ambiguous reference to counsel is most analogous to and must be treated and analyzed as though it were a clear request for counsel (thus

> triggering the protection of *Edwards*) until and unless the suspect's intent is clarified otherwise. This is consistent with the Supreme Court's "settled approach" that a defendant's request for counsel is to be given a broad rather than a narrow interpretation.[265]

Perhaps echoing the Supreme Court in *Seibert*, the *Fry* court concluded that Agent Smith's failure to clarify Fry's statement and his "subsequent coercive dialogue and interrogation of the Defendant violated the doctrines established in *Miranda* and *Edwards*," rendering Fry's subsequent confession tainted. [266]

C. *State v. Blackburn*

Last spring, the South Dakota Supreme Court in *Blackburn* reiterated what it previously held in *Tuttle*: in a pre-waiver situation where the accused has not yet validly waived the *Miranda* rights, the officers must clarify the waiver before proceeding with the interview.[267] As with *Rodriguez* and *Fry*, the *Blackburn* court determined that the burden is on law enforcement and not on the suspect to clarify an ambiguous statement.[268]

Blackburn was charged with the murder of his girlfriend.[269] He was initially stopped by the police while driving the victim's car.[270] Blackburn was interviewed twice.[271] The trial court determined that any statements by Blackburn during the first interview were not admissible because Blackburn repeatedly said he was drunk and would not answer questions until he was sober.[272] Blackburn's requests for an attorney were ignored.[273] According to the court, "Blackburn requested an attorney more than twenty-five times and also repeatedly refused to talk to anyone. The interrogating officers did not heed Blackburn's requests during the first interview. Blackburn was not permitted to call an attorney at any time."[274]

After being advised of his *Miranda* rights during the second interview, which was videotaped,[275] Blackburn said,

> I mean I'd like, I'd like there to be a lawyer present just so I don't fuckin' step myself over the deep end or nothing else, but I mean at this point I really don't see why there needs to be one because I, I really I want to know that you guys know.[276]

The interrogating officer did not clarify Blackburn's ambiguous and equivocal answers, and continued the interrogation.[277] Blackburn then made the following admissions: (1) he was drunk and high on cocaine when he was at the victim's house when an argument ensued and escalated into a physical altercation; (2) he punched and stabbed the victim several times with a knife; and (3) that he struck the victim's head with a rock.[278] Only after these statements were made did the interrogating officer attempt to clarify Blackburn's earlier statement about wanting a lawyer.[279]

On appeal, the State argued that (1) Blackburn's statement was not a request equivocal or otherwise, for an attorney or to stop the interrogation and (2) even if Blackburn's request was considered an equivocal request for an attorney, his request was made after waiving his *Miranda* rights, and the officer could therefore continue questioning absent a clear request.[280]

Justice Judith Meierhenry wrote the court's opinion and noted that several courts, including the Supreme Court in *Rodriguez*, have held that police officers must clarify an ambiguous waiver before proceeding with the interview.[281] The court explained that the trial court properly applied *Davis*' objective "reasonable person standard" and determined that Blackburn's statement was ambiguous or equivocal.[282] The "trial court was not in error in finding Blackburn's statement ambiguous and in need of clarification before continuing with the interrogation."[283] The State bore the heavy burden to demonstrate that Blackburn knowingly and intelligently waived his *Miranda* rights. The court announced that "[t]he ambiguity of his answer leaves the waiver of his *Miranda* rights in question. As such, the officer had a duty to clarify Blackburn's statement to determine if he wanted an attorney."[284]

VII. Conclusion

From my vantage point, *Rodriguez*, *Fry*, *Blackburn*, and the other cases discussed reached their proper conclusions because they did not extend *Davis*, were based on sound reasoning, and were consistent with prior Supreme Court holdings. This trend may evolve into the majority rule in most jurisdictions. Hopefully, other courts will similarly find that in situations where a suspect makes an ambiguous statement after being *Mirandized*, the police have an obligation to seek clarifi-

cation of that statement. This clarification approach, which places the burden on law enforcement, would be consistent with *Miranda*.

If nothing else, *Davis* and the subsequent cases interpreting it invite judges, lawyers, and academics to build on the arguments presented to create practical moderate solutions to the issue of ambiguous requests for counsel. The limitations placed on ambiguous requests for counsel under *Davis* seem destined to remain in place. Attorneys will likely continue to litigate over this issue, just as the courts will continue to grapple with this issue of when a suspect must be clear in requesting a lawyer.

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[2] 512 U.S. 452 (1994). Prior to *Davis v. United States*, the courts were divided on their requirements for invoking *Miranda*. Some courts have treated a suspect's ambiguous remarks regarding their *Miranda* rights as a clear invocation under *Miranda v. Arizona*. For example, in the past, it was the rule in California that an invocation need not be clear or obvious. These courts have consistently ruled that officers must terminate an interview if the suspect makes an ambiguous remark that merely indicates that he might be invoking his Miranda rights. *See, e.g.*, People v. Porter, 270 Cal. Rptr. 773, 775–76 (Ct. App. 1990) (reasoning that defendant's statements, while ambiguous as to whether he was invoking his *Miranda* rights, suggested that he did not wish to further discuss the case and police officers therefore should have ceased interrogation).

[3] *See Davis*, 512 U.S. at 461–62.

[4] *Id.*; U.S. Const. amend. V.

[5] *Davis*, 512 U.S. at 461–62.

[6] *Id.* at 455.

[7] *See id.* at 459 (explaining that the suspect must express his desire to have a counsel present with sufficient clarity as to be understood by a reasonable police officer).

[8] *See id.* at 459–60 (suggesting that a bright–line rule would provide constitutional protection without burdening police investigation).

[9] 384 U.S. 436 (1966).

[10] *Id.* at 480.

[11] *See* David Aram Kaiser & Paul Lufkin, *Deconstructing Davis v. United States: Intention and Meaning in Ambiguous Requests for Counsel*, 32 Hastings Const. L.Q. 737, 760 (2005) (arguing that *Davis*' requirement of a clear invocation of *Miranda* allows police and the courts to ignore circumstantial evidence that may indicate a suspect's unexpressed intentions).

[12] *See Davis*, 512 U.S. at 470–71 (Souter, J., concurring) (discussing the difficulty in distinguishing between initial waiver situations and post-waiver requests).

[13] 518 F.3d 1072 (9th Cir. 2008).

[14] 637 F.2d 1291 (9th Cir. 1981).

[15] *See Rodriguez*, 518 F.3d at 1080 (explaining that *Davis* abrogated the clarification rule only to the extent that the rule required clarifications of invocations made post-waiver).

[16] *Id.*

[17] *Id.* at 1081.

[18] No. CR-09-44-N-JLQ, 2009 WL 1687958 (D. Idaho June 16, 2009).

[19] *See id.* at *8 (referring to *Miranda*'s assertion that if an individual indicates at any time prior to or during custodial interrogation that they want an attorney, the interrogation must cease).

[20] 766 N.W.2d 177 (S.D. 2009).

[21] *Id.* at 182.

[22] *Miranda*, 384 U.S. at 473–74. *Miranda* goes on to state that "[a]t that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." *Id.* at 474.

[23] *See* Floralynn Einesman, *Confessions and Culture: The Interaction of Miranda and Diversity*, 90 J. Crim. L. & Criminology 1, 3 (1999) (arguing that *Miranda* recognized the "inherent coercion of incommunicado police interrogation" and acknowledged that police officers use "sophisticated psychological ploys" and trickery to induce a suspect's confession).

[24] *See id.* (stating that previously, the Court protected against self-incrimination by applying the Fifth and Fourteen Amendment right to due process and the Sixth Amendment right to a counsel).

[25] *Id.* at 2–3.

[26] *See id.* (noting that required *Miranda* warnings provide an additional safeguard against potentially coerced confessions).

[27] *See Miranda v. Arizona*, 384 U.S. 436, 498 (1966) (concluding that defendant must be apprised of his rights in order to ensure that he made a knowing and voluntary waiver of those rights when he confessed).

[28] Laurence H. Tribe, The Invisible Constitution 174 (2008).

[29] *See Miranda*, 384 U.S. at 469–71 (explaining the importance of apprising a suspect of his rights regardless of the suspect's personal characteristics or the circumstances surrounding the interrogation).

[30] *Id.* at 471 (quoting Carnley v. Cochran, 369 U.S. 506, 513 (1962)).

[31] *Id.* at 473–74 (emphasis added) (footnote omitted).

[32] *See* Davis v. United States, 512 U.S. 452, 471 (1994) (Souter, J., concurring) (discrediting the distinction between initial waivers and subsequent decisions to reinvoke *Miranda* rights); *see also* United States v. Gotay, 844 F.2d 971, 974 (2d Cir. 1988) (indicating that a suspect's stated desire for counsel despite inability to afford counsel was an unambiguous request that precluded further interrogation).

[33] *See Miranda*, 384 U.S. at 471–72 (stating that only a suspect's express waiver after an unambiguous warning would constitute a knowing waiver of right to counsel).

[34] *See* Brooke B. Grona, Note, United States v. Dickerson: *Leaving Miranda and Finding a Deserted Statute*, 26 Am. J. Crim. L. 367, 367–68 (1999) (evaluating the practice of the Court to ignore the procedural safeguards established in Miranda).

[35] *See Davis*, 512 U.S. at 457–58 (recognizing the judicially created "knowing and intelligent" waiver standard is justified by the importance of a suspect's right against self-incrimination); Einesman, *supra* note 21, at 45 (suggesting that despite *Miranda*'s declaration that a heavy burden rests on the government to prove the defendant's valid waiver of his privilege against self-incrimination, the court often finds that the Government has sustained its burden of proof).

[36] *Miranda*, 384 U.S. at 481.

[37] *Davis*, 512 U.S. at 457 (citing Michigan v. Tucker, 417 U.S. 433, 443–44 (1974)); *see also* U.S. Const. amend. V.

[38] *Miranda*, 384 U.S. at 468–69.

[39] *See id.* at 445 (noting the importance of understanding the circumstances under which the interrogations at issue had occurred and discussing several physically coercive methods that police officers utilize to elicit confessions).

[40] *Id.* at 442–43 (quoting Brown v. Walker, 161 U.S. 591, 595–96 (1896)).

[41] *Id.* at 444–45; *see also* Donald A. Dripps, *Supreme Court Review: Forward: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. Crim. L. & Criminology 699, 701 (1988) (asserting that an outright repeal of the privilege against self-incrimination is impractical, and subversive interpretation is inconsistent with principled

constitutionalism).
[42] *Id.*
[43] *Id*.
[44] *See* George C. Thomas III, *Dialogue on* Miranda*: Is* Miranda *a Real-World Failure? A Plea for More (And Better) Empirical Evidence*, 43 UCLA L. Rev. 821, 827 (1996) (suggesting that the bias of researchers may have impacted findings on the consequences of the reading of *Miranda* rights).
[45] *See id.* at 832 (positing that police are more likely to obtain a confession during an interrogation when they are more serious about the investigation, regardless of whether warnings are given).
[46] *Id.* at 831–32. *See also* Yale Kamisar, *On the Fortieth Anniversary of the Miranda Case: Why We Needed It, How We Got It—And What Happened to It*, 5 Ohio St. J. Crim. L. 163, 177 (2007) (indicating that negligible impact of *Miranda* has prompted some to argue that the *Miranda* ruling should be extended).
[47] *See* Thomas*, supra* note 44, at 833 (proposing that there is a correlation between the seriousness of a crime and a suspect's psychological need to confess).
[48] *See* Steven B. Duke, *Does Miranda Protect the Innocent or the Guilty?*, 10 Chap. L. Rev. 551, 556 (2007).
[49] *See* Harvey Gee, *Essay: When do you have to be clear? Reconsidering* Davis v. United States, 30 Sw. U. L. Rev. 381, 403 (2001) (citing Bill Kisliuk, *Maintaining Miranda*, S.F. Recorder, Nov. 5, 1999, at 4).
[50] *Id.* at 403 n. 128 (noting that "[t]he protections for individuals against government power during the 1960's diminished during the 1970's. This curbing was caused by the appointment of a conservative majority to the U.S. Supreme Court and the appointment of Warren E. Burger as Chief Justice to succeed Earl Warren.")
[51] *Id.* at 403 n.129 (citing Harris v. New York, 401 U.S. 222, 223 (1971) (permitting the use of defendant's contradictory statements made to the police during interrogation to impeach credibility of his direct testimony at trial)).
[52] *Id.* at 403 n. 130 (citing New York v. Quarles, 467 U.S. 649, 655–56 (1984) (permitting a waiverless confession by a suspect that led a police officer to a loaded gun in a crowded supermarket)).
[53] *Id.* at 404 n. 131 (citing Anders v. California, 386 U.S. 738, 745 (1967) (stating that counsel is not required to brief the case against their client); *Harris*, 401 U.S. at 224 (stating that evidence barred *Miranda* in a prosecutor's case-in-chief is not barred for all purposes); Michigan v. Tucker, 417 U.S. 433, 445–46 (1974) (stating that police did not abridge suspect's privilege against self-incrimination by departing from the proplylactic standards of *Miranda*); Michigan v. Mosely, 423 U.S. 96, 102–03 (1975) (stating that *Miranda* does not require police to refrain from questioning a suspect for an indefinite duration once a suspect invokes their right to remain silent); *Quarles*, 467 U.S. at 654 (stating that *Miranda* warnings are not themselves rights protected by the Constitution); *see also* Laurie Levenson, Back to the Future, S.F. Daily J., Dec. 30, 1999, at 5 (discussing the narrowing of the scope of *Miranda* protections since its decision)). In so doing, the Court has substantially reduced the prophylactic protections of a suspect's assertion of Fifth Amendment rights during interrogation. The Court has interpreted *Miranda* to permit the resumption of questioning after a suspect has exercised his right to remain silent. Questioning may resume as long as (1) the suspect's right has been scrupulously honored and questioning ceased, (2) a significant amount of time has passed since the suspect invoked his right, (3) the suspect is again informed of his rights, and (4) the second interrogation is restricted to a crime that is not a subject of an earlier interrogation. *Mosely*, 423 U.S. at 104–07.
[54] 462 U.S. 1039 (1983).
[55] Gee, *supra* note 49, at 404 n. 132 (citing *Bradshaw*, 462 U.S. at 1045–46 (holding that initiation of a conversation by the accused after invoking his right to counsel does not a constitute waiver of that right but rather the police must engage in a two-step process to determine whether the accused (1) initiated further conversation by asking, "[W]ell, what is going to happen to me now?" and (2) made a knowing and intelligent waiver of the right to counsel)). In this case, Justice O'Connor demonstrated her willingness to accept a police officer's interpretation of a suspect's statement for effective interrogation and investigation. *Id.* at 1046. Justice O'Connor sided consistently with conservative opinions that gave police officers the benefit of the doubt, and interpreted a suspect's mention of counsel in an increasingly restrictive manner. *Id.*).
[56] Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions* in The Miranda Debate: Law, Justice, and Policing 142, 144 (Richard A. Leo & George C. Thomas III eds., 1998).
[57] *See id.* (suggesting that *Miranda*'s original bright–line rule was easy for police to administer and that other than in situations of outright coercion, officers cannot know the limits in securing confessions).
[58] 451 U.S. 477 (1981).
[59] Gee, *supra* note 49, at 404 n. 134 (citing 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, 239 (1985) (explaining that the steady erosion of *Miranda* came to an abrupt halt two years later in *Edwards v. Arizona*, where the Court vigorously reaffirmed and strengthened *Miranda*'s bright–line philosophy)).
[60] *Id.* at 404 n. 136 (citing *Davis*, 512 U.S. at 458 (quoting McNeil v. Wisconsin, 501 U.S. 171, 176–77 (1991)).
[61] *Id.* at 404-05 n. 137 (citing *Edwards*, 451 U.S. at 484 (explaining that a valid waiver cannot be established by showing that suspect responded to further police-custodial interrogation after being advised of rights)).
[62] 469 U.S. 91, 91 (1984) (concluding that questioning must cease where nothing about the request for counsel or the circumstances leading up to the request is ambiguous).
[63] 479 U.S. 523, 529 (1987) (holding that a suspect may give a limited or conditional waiver of *Miranda* rights).
[64] 486 U.S. 675, 677–78 (1988) (holding that an invocation of counsel under *Edwards* was not offense specific).
[65] 498 U.S. 146, 153 (1990) (holding that the protection of *Edwards* continues even after the suspect has consulted with an attorney).
[66] Gee, *supra* note 49, at 405 n. 146 (citing *Smith*, 469 U.S. at 96 (stating that its holding is a limited one that does not address the effect of ambiguities that precede an accused's request for counsel)).
[67] *Id.* at 405-06 n. 147 (quoting *Smith*, 469 U.S. at 93).
[68] *Id.* at 405-06 n. 148 (citing *Smith,* 469 U.S. at 96–97 (explaining that the courts below improperly found defendant's request for counsel to be ambiguous in the context of his subsequent statements)).
[69] *See, e.g.*, Oregon v. Bradshaw, 462 U.S. 1039, 1045–46 (1983) (holding that defendant's question, "[W]ell, what is going to happen to me now?" evinced defendant's willingness and desire for a generalized discussion about the investigation and consequently did not trigger *Edwards* protections); Arizona v. Roberson, 486 U.S. 675, 685, 688 (1988) (holding that questioning a suspect who had invoked his right to counsel, but had not received counsel, about a separate investigation triggered *Edwards* protections); Minnick v. Mississippi, 498 U.S. 146, 154, 156 (1990) (holding that police-initiated questioning of a defendant who had isolated consultations with counsel, but whose counsel was absent when the interrogation resumed, triggered *Edwards* protections).
[70] Gee, *supra* note 49, at 406 n. 150 (citing *Smith*, 469 U.S. at 96).
[71] *Id.* at 406.
[72] *Id.* at 406 (citing *Smith,* 469 U.S. at 98).
[73] *See Davis v. United States*, 512 U.S. 452, 461–62 (1994) (suggesting the need to establish a balance that will protect an individual's right to counsel while facilitating effective police enforcement).
[74] Gee, *supra* note 49, at 388.
[75] *See id.* (quoting United States v. Davis, 36 M.J. 337, 341 (C.M.A. 1993)).
[76] Gee, *supra* note 49, at 388 n. 49 (citing *Davis*, 512 U.S. at 456).
[77] *Id.* at 388 n. 50 (citing *Davis,* 512 U.S. at 456).
[78] *See Davis*, 512 U.S. at 461–62 (arguing that the clarity of the *Edwards* rule would be diminished if police were required to cease questioning if a suspect makes a statement that might be a request for an attorney).

[79] *See id.* (proposing that it would nonetheless be good police practice for interviewing officers to clarify whether or not an individual would want an attorney after an equivocal statement).
[80] *Id.* at 455.
[81] Gee, *supra* note 49, at 381-82 n. 8 (citing *Davis,* 512 U.S. at 458).
[82] *Davis*, 512 U.S. at 454.
[83] *Id.*
[84] *Id.*
[85] *Id.* at 455.
[86] *Id.*
[87] *Davis*, 512 U.S. at 455.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Davis*, 512 U.S. at 455.
[93] *Id.*
[94] *Id.* at 455–56.
[95] *Id.* at 453.
[96] *Id.* at 454.
[97] *Davis*, 512 U.S. at 461.
[98] *Id.* at 460–61.
[99] *Id.* at 458–59.
[100] *Id.* at 461.
[101] *Davis*, 512 U.S. at 461.
[102] *Id.* at 460.
[103] *Id.* at 461.
[104] *Id.*
[105] *Id.*
[106] *Davis*, 512 U.S. at 459.
[107] *Id.* at 461–62.
[108] *Id.*
[109] *Id.* at 461.
[110] *See infra*, Part VI (discussing the *Rodriguez*, *Blackburn* and *Fry* cases where officers did not receive a valid waiver but moved forward with questioning).
[111] *See supra*, Part II.A. (summarizing the *Miranda* Court's decision and the Court's analysis of Fifth Amendment protections).
[112] *See generally* Gee, *supra* note 49, at 384.
[113] *See* Marcy Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under* Miranda, 17 Wm. & Mary Bill Rts. J. 773, 819–21 (2009).
[114] *Id.* at 775.
[115] *Id.*
[116] *See* Kaiser & Lufkin, *supra* note 11, at 762.
[117] *See Davis*, 512 U.S. at 466 (Souter, J., concurring).
[118] *Id.*
[119] *Id.* at 467.
[120] *Id.*
[121] *See id.* at 466. *See also* Charles R. Shreffler, Jr., Note, *Judicial Approaches to the Ambiguous Request for Counsel Since* Miranda v. Arizona, 62 Notre Dame L. Rev. 460, 472 (1987) (arguing that the clarification approach represents a reasonable balancing of interests between the individual defendant and society). "The clarification approach shifts some of the pressure of custodial interrogation from the suspect to law enforcement officials. Given the pressure inherent in such interrogations, it is reasonable to expect the state to carry some of the burden placed on the suspect to clearly invoke the right to counsel." *Id.* at 473.
[122] *Davis*, 512 U.S. at 473–74 (Souter, J., concurring).
[123] *Id.* at 469.
[124] *Id.* (citations omitted). At his Senate confirmation hearing, Justice Souter characterized *Miranda* as "a very pragmatic procedure that would cut down on the degree of possibility that confessions would turn out to be involuntary" and excluded from the court. *See* Tinsley E. Yarbrough, David Hackett Souter: Traditional Republican on the Rehnquist Court 132 (Oxford University Press, Inc. 2005).
[125] *Davis*, 512 U.S. at 466–67 (Souter, J., concurring).
[126] *Id.*
[127] *Id.* at 474–75.
[128] *Id.* at 475.
[129] *Id.* at 469–70.
[130] *Davis*, 512 U.S. at 470. According to Justice Souter, "the awareness of just these realities has, in the past, dissuaded the Court from placing any burden of clarity upon individuals in custody, but has led it instead to require that requests for counsel be 'given a broad, rather than a narrow, interpretation,' and that courts 'indulge every reasonable presumption' that a suspect has not waived his right to counsel under *Miranda* . . . ." *Id.* (citations omitted).
[131] Strauss, *supra* note 113, at 820.
[132] *Id.* at 823.
[133] *Id.*
[134] *Davis*, 512 U.S. at 461–62.
[135] Commonwealth v. Sicari, 752 N.E.2d 684, 697 n.13 (Mass. 2001).
[136] 380 F. 3d 915, 926 (6th Cir. 2004).
[137] *Id.* at 918.
[138] *Id.* at 919.
[139] *Id.*
[140] *Id.*
[141] *Abela,* 380 F. 3d 915 at 919.
[142] *Id.*
[143] *Id.*
[144] *Id.* at 926–27.
[145] 841 N.E.2d 945 (Ill. 2005).
[146] *Id.* at 965.
[147] *Id.*
[148] 252 S.W.3d 319 (Tex. 2008).
[149] *Id.* at 326–27.
[150] *Id.* at 321.
[151] *Id.*
[152] *Id.*
[153] *In the matter of H.V.* 252 S.W.3d at 321.
[154] *Id.*
[155] *Id.*
[156] *Id.* at 325–26.
[157] *Id.* at 326.
[158] *In the matter of H.V.* 252 S.W.3d. at 327.
[159] *See* Charles D. Weisselberg, *Mourning* Miranda, 96 Cal. L. Rev. 1519, 1585 (2008).
[160] Paul Butler, Let's Get Free: A Hip-Hop Theory of Justice 158 (The New Press 2009).
[161] *See* Weisselberg, *supra* note 159, at 1583.
[162] Welsh S. White, *Deflecting a Suspect From Requesting an Attorney*, 68 U. Pitt. L. Rev. 29, 40 (2006).
[163] 542 U.S. 600 (2004).
[164] *Id.* at 606.
[165] *Id.* at 604.
[166] *Id.*
[167] *Id.* at 604–05.
[168] *Seibert*, 542 U.S. at 605.
[169] *Id.*
[170] *Id.*
[171] *Id.* at 605–06.
[172] *Id.* at 604.
[173] *Seibert*, 542 U.S. at 604.
[174] *Id.*
[175] *Id.*
[176] *Id.* at 611.
[177] *Id.* at 617.
[178] *Seibert*, 542 U.S. at 616.
[179] *Id.* at 621 (Breyer, J., concurring) (citing Moran v. Burbine, 475 U.S. 412, 423–424 (1986)).
[180] *Id.* at 617.

[181] Yale Kamisar, Tribute, *Postscript: Another Look at* Patane *and* Seibert*, the 2004* Miranda *"Poisoned Fruit" Cases*, 2 Ohio St. J. Crim. L. 97, 110 (2004).
[182] 743 So. 2d 65 (Fla. Dist. Ct. App. 1999).
[183] *Id.* at 67.
[184] *Id.*
[185] *Id.* at 68.
[186] *Id.* at 69.
[187] 951 P.2d 738 (Utah 1997).
[188] *Id.* at 743.
[189] *Id.* at 740.
[190] *Id.*
[191] *Id.*
[192] *Leyva*, 951 P.2d at 740.
[193] *Id.*
[194] *Id.*
[195] *Id.* at 741, 743.
[196] *Id.* at 743 (citations omitted) (emphasis in original).
[197] 650 N.W.2d 20 (S.D. 2002).
[198] *Id.* at 28.
[199] *Id.* at 24.
[200] *Id.* at 24–25.
[201] *Id.* at 25.
[202] *Tuttle,* 650 N.W.2d at 30.
[203] *Id.*
[204] *Id.*
[205] 857 A.2d 557, 572 (Md. Ct. Spec. App. 2004).
[206] *Id.* at 559.
[207] *Id.* at 560.
[208] *Id.* at 561.
[209] *Id.*
[210] *Freeman*, 857 A.2d at 561.
[211] *Id.* at 562.
[212] *Id.* at 563.
[213] *Id.* at 570.
[214] *Id.* at 573.
[215] 937 So. 2d 86, 92 (Ala. Crim. App. 2005).
[216] *Id.* at 87–88.
[217] *Id.* at 87.
[218] *Id.* at 87–88.
[219] *Id.* at 88.
[220] *Collins*, 937 So. 2d 86 at 88.
[221] *Id.* at 93.
[222] *Id.*
[223] 283 S.W.3d 558 (Ark. 2008).
[224] *Id.* at 558.
[225] *Id.* at 559.
[226] *Id.* (emphasis omitted).
[227] *Id.*
[228] *Robinson*, 283 S.W.3d at 561.
[229] Ark. R. Crim. P. 4.5 (2007).
[230] *Robinson*, 283 S.W.3d at 563 (Imber, J., concurring).
[231] *Id.* (citations omitted).
[232] *Id.* at 564 (Glaze, J., dissenting).
[233] *Id.* at 565.
[234] United States v. Rodriguez, 518 F.3d 1072, 1074 (9th Cir. 2008).
[235] *Id.* at 1075.
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *Rodriguez*, 518 F.3d at 1075.
[240] *Id.*
[241] *Id.* at 1077.
[242] *Id.*
[243] *Id.* at 1078 (emphasis in original) (citations omitted).
[244] *Rodriguez*, 518 F.3d at 1078 (emphasis in original) (citations omitted).
[245] *Id.* at 1080.
[246] *Id*. at 1081.
[247] *Id.* at 1079 n.7.
[248] United States v. Fry, No. CR-09-44-N-JLQ, 2009 WL 1687958 (D. Idaho June 16, 2009).
[249] *Id.* at *18.
[250] *Id.* at *1.
[251] *Id.*
[252] *Id.* at *2.
[253] *Fry*, 2009 WL 1687958 at *2.
[254] *Id.*
[255] *Id.*
[256] *Id.*
[257] *Id.* at *3.
[258] *Fry*, 2009 WL 1687958 at *3.
[259] *Id.*
[260] *Id.* at *11.
[261] *Id.* at *10 (emphasis in original).
[262] *Id.* at *12.
[263] *Fry,* 2009 WL 1687958 at *11 (emphasis in original).
[264] *Id.* at *13.
[265] *Id.* (citation omitted).
[266] *Id.*
[267] State v. Blackburn, 766 N.W.2d 177, 182 (S.D. 2009).
[268] *Id.*
[269] *Id.* at 178.
[270] *Id*. at 179.
[271] *Id.*
[272] *Blackburn,* 766 N.W.2d at 179.
[273] *Id.* at 184.
[274] *Id.*
[275] Videotaping is considered an additional procedural safeguard against coerced confessions. Professor Duke suggests that the interrogation process be improved with the use of video recording. He also advocates for relaxing rules concerning the admissibility of expert confession testimony and having judges provide jury instruction guiding jurors evaluation of the credibility of confessions and incriminating statements. *See* Duke, *supra* note 45, at 570.
[276] *Blackburn*, 766 N.W.2d at 179.
[277] *Id.* at 180.
[278] *Id.*
[279] *Id.*
[280] *Id*. at 183.
[281] *Blackburn*, 766 N.W.2d at 182.
[282] *Id.* at 184.
[283] *Id.*
[284] *Id.* (citations omitted).

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