The Supreme Court Limits the Fifth Amendment Right to Counsel by Requiring Clear Requests--Davis v. United States

Gregory J. Griffith
University of Kentucky

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The Supreme Court Limits the Fifth Amendment Right to Counsel by Requiring Clear Requests — *Davis v. United States*

**INTRODUCTION**

In *Miranda v. Arizona,* the Supreme Court established that criminal suspects have a right, under the Fifth Amendment, to have counsel present during any custodial interrogation. However, *Miranda* and later Supreme Court cases did not determine whether an ambiguous or equivocal statement constitutes an invocation of this right. State and lower federal courts developed three major approaches to the problem. The first approach declared that any ambiguous reference to an attorney invoked the right to counsel. Courts adopting the second approach held that only clear requests for counsel would suffice. The third approach, adopted by most federal circuits, required police faced with an ambiguous or equivocal statement to ask strictly limited questions to clarify the suspect's intention before proceeding further.

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2. Maglio v. Jago, 580 F.2d 202, 205 (6th Cir. 1978) ("[Q]uestioning 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.' " (quoting *Miranda*, 384 U.S. at 445) (emphasis in *Maglio*)); People v. Superior Court, 542 P.2d 1390, 1394 (Cal. 1975) (relying on *Miranda* for the phrase "in any manner and at any stage of the process" (emphasis in Superior Court)), *cert. denied*, 429 U.S. 816 (1976); Ochoa v. State, 573 S.W.2d 796, 800 (Tex. Crim. App. 1978) (refusing to require a "'formal request' or absolute demand for a lawyer").
4. Poyner v. Murray, 964 F.2d 1404, 1411-12 (4th Cir.) (allowing police to resume questioning when the suspect initiated the conversation), *cert. denied*, 113 S. Ct. 419 (1992); United States v. Eaton, 890 F.2d 511, 514 (1st Cir. 1989) (finding that defendant never even equivocally asserted his right to an attorney), *cert. denied*, 495 U.S. 906.
The Supreme Court finally addressed the issue of police conduct in the face of ambiguous statements in *Davis v. United States*, and adopted the second, "clear request," approach by a five to four decision.

The five justices in the majority applied the narrowest reading of *Miranda* and *Edwards v. Arizona*, holding that only absolutely clear requests constitute an invocation of the right to counsel. Four concurring justices advanced the position that when a reference to an attorney is ambiguous, police should clarify the suspect's intentions before proceeding.

The *Davis* decision, while probably serving the efficient administration of justice, is of doubtful assistance to the effective administration of justice, and threatens to overrun the rights of accused citizens. The concurring opinion of Justice Souter in *Davis* represents the best approach to the problem, properly balancing the rights of the accused and the interests of justice.

Part I of this Note discusses the suspect's right to counsel as established in *Miranda* and *Edwards*. Part II examines the three approaches taken by lower courts to the problem of ambiguous statements. Part III discusses Supreme Court development of the right to

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(1990); *United States v. Gotay*, 844 F.2d 971, 975 (2d Cir. 1988) (holding that continuation of questioning was proper because the defendant's statement could "[b]y no stretch... be construed as a request for counsel..."); *United States v. Fouche*, 776 F.2d 1398, 1404-05 (9th Cir. 1985) (holding that police may clarify any ambiguities); *United States v. Cherry*, 733 F.2d 1124, 1131 (5th Cir. 1984) ("[N]o statement taken after an equivocal request is made and before it is clarified as an effective waiver of the present assistance of counsel can clear the Miranda bar." (quoting *Thompson v. Wainwright*, 601 F.2d 768, 771-72 (5th Cir. 1979)) (emphasis omitted) (alterations in *Cherry*); *Nash v. Estelle*, 597 F.2d 513, 517-18 (5th Cir.) (allowing clarification questions but warning that an officer may not "utilize the guise of clarification as a subterfuge for coercion or intimidation"), cert. denied, 444 U.S. 981 (1979). For several examples of what has constituted an ambiguous statement, see Rhonda Y. Cline, *Equivocal Requests for Counsel: A Balance of Competing Policy Considerations*, 55 U. Cin. L. Rev. 767, 770-74 (1987).

5 114 S. Ct. 2350 (1994).
6 Id. at 2352. Justice O'Connor delivered the opinion of the court. Id.
7 451 U.S. 477, 484-85 (1981) (holding that, once invoked, the right to have counsel present during interrogation may only be waived when the suspect "initiates further communication, exchanges, or conversations" with authorities). See infra notes 39-48 and accompanying text.
8 *Davis*, 114 S. Ct. at 2356.
9 Id. at 2359 (Souter, J., concurring in judgment).
10 See id. at 2358-64 (Souter, J., concurring in judgment).
11 See infra notes 17-52 and accompanying text.
12 See infra notes 53-117 and accompanying text.
counsel after *Edwards* but before *Davis*. Part IV discusses the *Davis* decision. Part V evaluates the benefits and dangers of each theory. This Note concludes that the "clarification" approach represents the best standard for handling ambiguous statements.

I. THE RIGHT TO COUNSEL

The United States Supreme Court declared in *Miranda v. Arizona* that all suspects have, and must be informed of, the right to have counsel present during any custodial interrogation. Fifteen years later, in *Edwards v. Arizona*, the Court further developed the right to counsel by placing suspects who have invoked the right off-limits to further questioning.

A "custodial interrogation" for purposes of *Miranda* is "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." Under *Miranda*, police must, prior to any custodial questioning, inform a suspect of the right to have counsel present during questioning. However, this right may be "voluntarily, knowingly, and intelligently" waived. If the suspect's *Miranda* rights are waived, police may then question the suspect until the suspect invokes the right by requesting an attorney. Questioning must then cease until an attorney is present. Any statements obtained from questioning after a suspect invokes his *Miranda* right to counsel may not be used against the suspect in later court proceedings. Such statements are considered to have been obtained in violation of the Fifth Amendment privilege against self-incrimination.

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13 See infra notes 118-35 and accompanying text.
14 See infra notes 136-63 and accompanying text.
15 See infra notes 164-76 and accompanying text.
16 See infra notes 177-91 and accompanying text.
19 Miranda, 384 U.S. at 444.
20 Id.
21 Id.
22 Id. at 474.
24 Miranda, 384 U.S. at 444.
25 Id. at 479. The *Miranda* line of cases focuses all but exclusively on the Fifth Amendment. The Sixth Amendment is applicable only after formal proceedings have been initiated, as in an arraignment or indictment. *Edwards*, 451 U.S. at 480 n.7.
The requirements imposed by *Miranda* were not held to be part of the Fifth Amendment itself. Rather, they were deemed "procedural safeguards effective to secure the privilege against self-incrimination."26

A primary motivation behind *Miranda* was the Court's view that a police interrogation is an inherently intimidating and coercive procedure.27 The Court noted that

the ease with which the questions put to [the suspect] 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 system [of justice] so odious as to give rise to a demand for its total abolition.28

The Court recounted numerous examples of abusive and coercive police behavior in incommunicado interrogations.29 The majority believed that, in this compelling setting, significant procedural safeguards were necessary to preserve a criminal suspect's constitutional right against self-incrimination.30 They cited several manuals and speeches on interrogation tactics, all of which emphasized prolonged isolation and various

The Fifth Amendment reads as follows:
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

U.S. CONST. amend. V.

The Sixth Amendment reads as follows:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

26 *Miranda*, 384 U.S. at 444.
27 Id. at 445.
28 Id. at 442-43 (quoting Brown v. Walker, 161 U.S. 591, 595-96 (1896)).
29 Id. at 446 n.6. The Court cited beating, hanging, whipping and protracted interrogations as examples. Id.
30 Id. at 469.
forms of trickery, such as persuading, cajoling, and deceiving the suspect\textsuperscript{31} to produce a confession.\textsuperscript{32} The materials dealt specifically with how to encourage a suspect who has asked to consult with an attorney to speak before the attorney's arrival.\textsuperscript{33}

The Miranda Court praised the Constitution's drafters for including the protections of the Fifth Amendment. These protections, when guaranteed by the requisite procedural devices, the Court said, were designed to remedy the problem of improperly obtained incriminating statements:

So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.\textsuperscript{34}

\textit{Miranda} was not solely concerned with fairness to criminal suspects. Another basic aim of the decision was "to give concrete constitutional guidelines for law enforcement agencies and courts to follow"\textsuperscript{35} so that the judicial system could function consistently and effectively. Such was the reason for the precise enumeration of the now-famous "Miranda warnings."\textsuperscript{36}

\textsuperscript{31} The Court stated that "The manuals quoted in the text following are the most recent and representative of the texts currently available." \textit{Id.} at 447-56, 448 n.8. Examples of suggested interrogation techniques included isolation of the suspect; unfamiliar or uncomfortable surroundings to unnerve the suspect; perseverance to wear the suspect down; offer of legal excuses to rationalize the suspect's confession as not legally binding; the "Mutt and Jeff" routine where one "good cop" protects and defends the suspect from another "bad cop," thereby gaining the suspect's trust for "good cop," who coerces him to confess; false line-ups to scare the suspect into thinking he has been positively identified; and down-playing the assistance of counsel to gain a quicker statement. \textit{Id.} at 452.

\textsuperscript{32} \textit{Id.} at 449-51.

\textsuperscript{33} \textit{Id.} at 454 n.22.

\textsuperscript{34} \textit{Id.} at 443 (quoting Brown v. Walker, 161 U.S. 591, 595-96 (1896)).

\textsuperscript{35} \textit{Id.} at 441-42.

\textsuperscript{36} \textit{Id.} at 471.

Standard police procedure now outlines the rights that must be read to a suspect upon arrest as follows:

\textbf{DEFENDANT'S RIGHTS}

1. You have the right to remain silent.
Miranda held that questioning must cease when a suspect “indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking . . . .” The phrase “in any manner,” while suggesting a liberal interpretation of a suspect’s statement, did not settle the question of what exactly constitutes an invocation of the right to counsel. Many suspects fail to say anything so precise as “I decline to answer any more questions until I have consulted with an attorney,” “I want an attorney now,” or any other unequivocal statement. The Miranda court believed that the inability of suspects to formulate clear statements was yet another by-product of the custodial interrogation atmosphere.

In Edwards v. Arizona, the Supreme Court addressed the issue of waiver of the right to counsel once it has been invoked. Police arrested Edwards and informed him of his rights pursuant to Miranda, but he agreed to submit to questioning without an attorney. Officers also allowed Edwards to contact a county prosecutor in an attempt to negotiate a deal. After deciding not to call the prosecutor, Edwards asked for an attorney and the questioning ceased. The next day, however, detectives came to interview Edwards in jail, without the presence of counsel, and again advised him of his Miranda rights. Edwards agreed to talk, and eventually gave self-incriminating information, which was admitted into evidence at his trial.

2. Anything you say can and will be used against you in court.
3. You have the right to have an attorney before making any statement and may have your attorney with you during questioning.
4. If you cannot afford an attorney and desire one, the court will appoint one for you.
5. You may stop the questioning at any time by refusing to answer further or by requesting to consult with your attorney.

**WAIVER**

In order to secure a waiver, the following questions should be asked and an affirmative answer secured to each.

1. Do you understand each of these rights I have explained to you?
2. With these rights in mind, do you wish to talk to us now?

Kentucky State Police uniform notation of defendant’s rights (taken from a laminated card distributed to all officers by the Kentucky State Police).

37 Id. at 444-45 (emphasis added).
38 See id. at 469-71.
40 Id. at 478.
41 Id.
42 Id. at 479. Edwards started to make the call, but then hung up. Id.
43 Id. Edwards said: “I want an attorney before making a deal.” Id.
44 Id.
45 Id. When detectives went to see Edwards, he initially told his guard “that he did
The Court reversed Edwards' conviction, holding that once invoked, the right to counsel can be waived only if "the accused himself initiates further communication, exchanges, or conversations with the police." This standard allows suspects to talk if they so desire, but sharply curtails the danger of police badgering suspects into consenting to the reopening of interrogation.

The language of the Edwards holding, however, created further uncertainty concerning the question of just what constitutes invocation of the right in the first place. The Court held that "it is inconsistent with Miranda and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." Thus, Edwards does not address the issue of ambiguous assertions of the Miranda right to counsel.

Likewise, additional Supreme Court examination failed to resolve the treatment of ambiguous statements that might or might not be construed as invocations of the right to counsel. The wide range of attorney-related references made by suspects led to a number of standards among the lower courts for evaluating ambiguous statements. Three major standards for handling ambiguous statements developed independently in state and lower federal courts until the Supreme Court handed down its decision in Davis v. United States in June, 1994.

II. AMBIGUOUS REQUESTS

The approaches developed by federal and state courts fell into three general categories, as described in Smith v. Illinois. The first, the "per se bar" approach, asked whether the suspect's statement was in any way susceptible to interpretation as a request for counsel. If so, the right

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46 Id. at 485.
47 Id.
48 Id. (emphasis added).
49 See infra notes 118-35 and accompanying text.
50 See infra notes 53-117 and accompanying text.
51 See infra notes 53-60 and accompanying text.
52 114 S. Ct. 2350 (1994).
53 469 U.S. 91 (1984) (per curiam). The Court in Smith determined that the suspect's statement was unquestionably a request for counsel and thus, avoided choosing a standard for ambiguous statements. The suspect was asked if he understood that he could have an attorney present, and he responded: "Uh, yeah. I'd like to do that." The officers continued questioning the suspect despite this statement. Id. at 93, 96.
54 Maglio v. Jago, 580 F.2d 202, 205 (6th Cir. 1978); Ada Clapp, The Second Circuit
was deemed to have been invoked, and all further questioning was prohibited.\textsuperscript{55} The second group of courts developed a "threshold of clarity" approach.\textsuperscript{56} These courts held that the right to counsel was invoked only by a clear request for an attorney.\textsuperscript{57} Under this approach, police could effectively ignore any ambiguous remarks,\textsuperscript{58} and continue questioning. The third approach, the "clarification" standard, like the per-se bar approach, asked if the statement would suggest to police officers that the suspect might be invoking the right to counsel.\textsuperscript{59} However, it offered a somewhat more flexible response. Instead of breaking off all questioning, police could ask specific, non-evidentiary questions tailored to determine whether the suspect was indeed requesting counsel. Each approach is examined in more detail in the discussion that follows.\textsuperscript{60}

\textbf{A. Per Se Bar}

The courts adopting the per se bar approach took the "in any manner" language of \textit{Miranda}\textsuperscript{61} literally, holding that any reference to

\begin{footnotesize}

\textsuperscript{56} This approach is derived from interpreting \textit{Edwards v. Arizona}, 451 U.S. 477 (1981).


\textsuperscript{58} \textit{See Davis v. United States}, 114 S. Ct. 2350, 2355 (1994).


\textsuperscript{60} \textit{See also Fouche}, 776 F.2d at 1404-05 (examining the per se bar approach in \textit{Maglio v. Jago}, 580 F.2d 202 (6th Cir. 1978) and the clarification standard of \textit{United States v. Cherry}, 733 F.2d 1124 (5th Cir. 1984)).

\textsuperscript{61} \textit{Miranda v. Arizona}, 384 U.S. 436, 445 (1966) (holding that Fifth Amendment rights are invoked when the suspect "indicates in any manner and at any stage of the process that he wishes to consult an attorney before speaking ").
\end{footnotesize}
an attorney sufficed to invoke the suspect's right to counsel.\(^6\) In *Maglio v. Jago*,\(^6\) the defendant Maglio was arrested on suspicion of murder. A police officer read Maglio the *Miranda* warnings, then asked: "Having these rights in mind, do you wish to talk to us now without an attorney?\(^5\)" Maglio answered, "Maybe I should have an attorney."\(^5\) Maglio was then told that the police were unable to provide him with appointed counsel at the time, but that Maglio still had the right to refuse to answer questions until a lawyer was available.\(^6\) Maglio then agreed to talk without an attorney, and confessed.\(^6\) He later repeated his confession to a prosecutor under similar circumstances.\(^6\) These confessions were used to convict Maglio.\(^6\)

The Court of Appeals for the Sixth Circuit reversed Maglio's conviction, declaring that "the burden is on the State to establish waiver in every case in which it seeks to introduce a statement taken without the presence of counsel."\(^7\) As to the standard for evaluating Maglio's statement, "Maybe I should have an attorney,"\(^7\) the court relied on language from *Miranda* in determining that officers must cease questioning when the suspect "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking."\(^7\) The court, endorsing a per se rule, noted that the interrogating officer had recognized Maglio's facially equivocal statement as probably a request for counsel,\(^7\) and held the confession invalid as a violation of the Fifth Amendment.

In *Ochoa v. State*,\(^7\) defendant Ochoa was arrested for murdering a police officer.\(^7\) He was given the *Miranda* warnings four separate times: by the Sheriff, by a Justice of the Peace, by the county attorney, and

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\(^6\) See *supra* note 54 and accompanying text.

\(^5\) 580 F.2d 202 (6th Cir. 1978).

\(^4\) Id. at 203 n.1.

\(^3\) Id. at 203.

\(^2\) Id.

\(^1\) Id.

\(^6\) Maglio appeared to be confused during the police interrogation about his right to wait until an appointed lawyer was available before answering questions. Id.

\(^9\) Id. at 204.

\(^8\) Id. at 205.

\(^7\) Id. at 203.

\(^6\) Id. at 205 (quoting *Miranda v. Arizona*, 384 U.S. 436, 445 (1966) (emphasis in *Maglio*)).

\(^5\) Id. at 205.


\(^3\) Id. at 798.
again by the Sheriff. After the fourth reading, defendant Ochoa made an equivocal statement regarding counsel, but proceeded to talk with the Sheriff. Ochoa eventually signed a written statement, which was used by the prosecution in his trial.

The Texas Court of Criminal Appeals, like the Sixth Circuit, stressed a literal reading of *Miranda* in adopting the per se approach to equivocal or ambiguous requests for counsel. The court quoted the same "in any manner" passage from *Miranda*, noting that "[t]he [Miranda] Court emphasized that once a defendant indicate[s] in any way that he want[s] an attorney interrogation must cease altogether." The court concluded, in reversing Ochoa's conviction: "We read this language in *Miranda* literally; where a defendant indicates *in any way* that he desires to invoke his right to counsel, interrogation must cease." Thus the court rejected a requirement of a "formal request."

B. Threshold of Clarity

Before *Davis*, this narrowest of standards was adopted in only a few states. In contrast to the courts adopting a literal interpretation of *Miranda*’s "in any manner" language, the Kentucky Supreme Court in 1992 used a literal reading of *Edwards* to impose the requirement that requests for counsel be "unambiguous and unequivocal." In *Dean v. Commonwealth, 844 S.W.2d 417, 420 (Ky. 1992)* (citing *Eaton v. Commonwealth, 397 S.E.2d 385, 395-96 (Va. 1990)), *cert. denied, 114 S. Ct. 2737 (1994)*. The court stated: "In our opinion, this standard most closely and correctly interprets the direction in *Edwards* that custodial interrogation must cease when an accused who has received *Miranda* warnings and has begun responding to questions 'has clearly asserted his right to counsel.'" *Id.* at 420 (quoting *Edwards*, 451 U.S. at 485)
Commonwealth, defendant Dean was arrested and promptly given the Miranda warnings. During the ensuing questioning, defendant asked the following question: “Should, should I, should I have somebody here? I don’t know.” The interviewing officer responded, “Well, that’s up to you, but you told us, you know, you’re telling us your story. Now that’s up to you.” Dean agreed to continue, and made no objections nor any further statements that might be construed as requests for assistance of counsel.

Dean argued that his statement constituted an invocation of the right to counsel. The court disagreed, relying heavily on Edwards to conclude that questioning must cease only when the suspect “has clearly asserted his right to counsel.”

The Illinois Supreme Court chose a similar path in People v. Krueger. Defendant Krueger was arrested for murder. The usual routine of Miranda warnings, confirmation that the defendant understood, and the signing of a waiver-of-rights form was followed. Police officers then proceeded to question Krueger, first about some unrelated burglaries, and Krueger responded. The officers then moved on to the subject of the murder. At this point, Krueger made the ambiguous statement which formed the basis for his appeal. Shortly thereafter, Krueger gave an inculpatory written statement, admitting to stabbing the victim.

(footnotes)

91 Id. at 418.
92 Id.
90 Id. at 419.
91 Id.
92 Id.
93 Id.
94 Id. at 420 (quoting Edwards v. Arizona, 451 U.S. 477, 485 (1981)).
95 412 N.E.2d 537 (Ill. 1980). The Illinois Supreme Court decided Krueger in October, 1980, shortly before the U.S. Supreme Court decided Edwards in May, 1981.
96 Id. at 538.
97 Id.
98 The three detectives present each described Krueger’s reaction in slightly different terms. First: “Wait a minute. Maybe I ought to have an attorney. You guys are trying to pin a murder rap on me, give me 20 to 40 years.” Second: “Hey, you’re trying to pin a murder on me. Maybe I need a lawyer.” Third: “Just a minute. That’s a 20 to 40 years sentence. Maybe I ought to talk to an attorney. You’re trying to pin a murder rap on me.” Id.
99 Id. at 539.
The Illinois Supreme Court affirmed Krueger's conviction.\textsuperscript{100} It paid more deference to the “in any manner” language of Miranda\textsuperscript{101} than did the Supreme Court of Kentucky in Dean.\textsuperscript{102} Nonetheless, it held that Krueger's ambiguous statement categorically did not constitute an invocation of the right to counsel.\textsuperscript{103} The Krueger Court stated: “We do not believe, however, that the Supreme Court intended by this language that every reference to an attorney, no matter how vague, indecisive or ambiguous, should constitute an invocation of the right to counsel.”\textsuperscript{104}

C. Clarification

Adopted by most federal courts, the clarification approach allowed the police limited leeway when faced with an ambiguous statement.\textsuperscript{105} It was also seen as the best means of preserving a suspect's rights: both the right against self-incrimination and the right to speak freely.\textsuperscript{106}

In United States v. Gotay,\textsuperscript{107} law enforcement officers arrested defendant Gotay in her apartment on several federal drug felonies and read her the Miranda warnings.\textsuperscript{108} At the time of her arrest, during questioning at Drug Enforcement Administration (“DEA”) headquarters, and during questioning by a prosecutor the next day, Gotay made several statements referring in various manners to counsel or to her desire to talk.\textsuperscript{109} Gotay did not have

\textsuperscript{100} Id. at 541.
\textsuperscript{102} Dean v. Commonwealth, 844 S.W.2d 417, 420 (Ky. 1992). The Supreme Court of Illinois stated: “Miranda's 'in any manner' language directs that an assertion of the right to counsel need not be explicit, unequivocal, or made with unmistakable clarity.” Krueger, 412 N.E.2d at 540.
\textsuperscript{103} Krueger, 412 N.E.2d at 540.
\textsuperscript{104} Id.
\textsuperscript{105} See supra note 59.
\textsuperscript{106} See Nash v. Estelle, 597 F.2d 513, 517 (5th Cir.) (holding that statements to a district attorney, made only with assurance that such statements would not waive invocation of right to counsel at later stages, were not gained in violation of defendant’s rights), cert. denied, 444 U.S. 981 (1979).
\textsuperscript{107} 844 F.2d 971 (2d Cir. 1988).
\textsuperscript{108} Id. at 972-73.
\textsuperscript{109} Upon arresting her, a DEA agent asked “Are you willing to help us? ... If you can help us, we can try and help you. Are you willing to talk with us or do you want the lawyer[?]” Gotay replied, “No, no, I am very afraid. I don’t want to talk in front of these people.” At DEA headquarters, Gotay told the agent present that “she couldn’t afford a lawyer, that she was concerned about obtaining a lawyer.” The agent informed her that the court would appoint one, then proceeded with substantive questioning. During questioning by the prosecutor, Gotay stated that she needed appointed counsel. Id. at 973.
the assistance of counsel until her bail hearing. She was convicted on five counts.

The Court of Appeals for the Second Circuit reversed two counts of Gotay's conviction. The Court decided that Gotay's first statement was not even an ambiguous request for counsel. The statements in the second and third settings, however, constituted "at least" ambiguous requests. The court then held that, upon hearing those ambiguous statements, officers were under a duty immediately to stop interrogation "except for narrow questions designed to clarify the earlier statements and the suspect's desire for counsel." The Second Circuit, in rejecting the threshold of clarity rule, felt that "the Constitution, Miranda, and the cases construing it require that we take care that suspects be allowed to invoke their rights freely. Suspects should not be forced, on pain of losing a constitutional right, to select their words with lawyer-like precision." The court also expressed sentiment that the clarification standard would provide the best guidance for law enforcement authorities. "Allowing custodial authorities to clarify ambiguous requests will help them, as well as reviewing courts, to determine on which side of the bright line the request falls."

III. THE SUPREME COURT FROM EDWARDS TO DAVIS

Throughout the lower courts' development of the three aforementioned approaches to ambiguous requests, the Supreme Court declined to resolve the problem, offering only relatively minor refinements

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110 Id.
111 Id. at 972.
112 Id. at 973.
113 Id. at 975.
114 Id. at 975.
115 Id. at 975.
116 Id.
117 Id.
118 See supra notes 61-117 and accompanying text.
to the rules laid down in *Miranda* and *Edwards*. In *Smith v. Illinois*, the Court expressly took notice of the disagreement among lower courts, but chose not to resolve it.

Police arrested defendant Smith, took him to an interrogation room, and read him his *Miranda* rights. Police specifically asked Smith if he understood his right to have counsel present during questioning. Smith responded, "Uh, yeah. I'd like to do that." The officers continued interrogating Smith, ultimately eliciting incriminating information, which was used to convict him.

The Supreme Court reversed Smith's conviction. The Court declared Smith's statement to be a clear request for counsel, and added an element to the *Miranda-Edwards* doctrine: "Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease. . . . [A]n accused's postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself." This was due, in part, to a concern that the police, through badgering or overreaching, might (intentionally or not) coerce the suspect into forfeiting a previously clear request for counsel. By deciding that Smith had made a clear request for counsel, the Court avoided deciding the ambiguous request issue. It did, however, take notice of the division of opinion concerning the issue.

In *Connecticut v. Barrett*, defendant Barrett, after being arrested and properly Mirandized, said that he was willing to talk but would not sign any written statement without the presence of counsel. Questioning commenced, with one of the officers writing down what Barrett said. Barrett was convicted, based largely on the statements he made.

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119 See *supra* notes 17-52 and accompanying text.
121 *Id.* at 95-96.
122 *Id.* at 92-93.
123 *Id.* at 93.
124 Later in the interrogation, Smith made statements indicating that he was not requesting counsel. *Id.*
125 *Id.* at 92.
126 *Id.* at 98, 100.
127 *Id.*
128 *Id.* at 95-96.
130 *Id.* at 525.
131 The writing was not signed by Barrett. It was a transcript prepared by the officer because the officer did not have access to a functioning recorder. *Id.* at 526.
Barrett's conviction, overturned by the Supreme Court of Connecticut, was reinstated by the U.S. Supreme Court, which held that suspects may partially invoke the right to have counsel present during questioning by agreeing to give oral but not written statements without counsel.\textsuperscript{132} A suspect might also limit questioning to certain subject areas.\textsuperscript{133} The Court noted that the objective of \textit{Miranda} was “to assure that the individual's right to choose between speech and silence remains unfettered throughout the interrogation process.”\textsuperscript{134} In holding that Barrett's statement constituted a clear but limited request for counsel rather than an unclear, blanket request for counsel, the Court once again avoided the issue of what to do with ambiguous requests.\textsuperscript{135}

IV. \textit{Davis v. United States}\textsuperscript{136}

The clarification approach appeared to be well on its way to becoming the national standard for the ambiguous or equivocal request issue. All of the United States Circuit Courts of Appeals that had addressed the issue, except the Sixth Circuit, adopted the clarification approach in some form.\textsuperscript{137} The clarification approach had also become standard practice for most law enforcement authorities, including the Federal Bureau of Investigation.\textsuperscript{138}

However, the United States Supreme Court adopted the threshold of clarity approach in \textit{Davis v. United States},\textsuperscript{139} by a 5 to 4 vote.\textsuperscript{140} The four concurring Justices agreed with the Court's result because the investigators had in fact stopped and asked the defendant clarifying questions. They rejected the majority's position that the suspect's statement, "Maybe I should talk to a lawyer," was conclusively not an invocation of the right to counsel.\textsuperscript{141}

\textsuperscript{132} The Court noted that the precise nature of Barrett's request suggested a considerable comprehension of his rights. \textit{Id.} at 530.

\textsuperscript{133} For example, the suspect might be willing to talk about a theft, but not a murder. \textit{Id.} at 529-30.

\textsuperscript{134} \textit{Id.} at 528 (quoting \textit{Miranda v. Arizona}, 384 U.S. 436, 469 (1966)).

\textsuperscript{135} \textit{Id.} at 529-30 n.3.

\textsuperscript{136} 114 S. Ct. 2350 (1994).

\textsuperscript{137} See \textit{supra} notes 63-73 and accompanying text. The Sixth Circuit adopted the per se bar approach. See \textit{Maglio v. Jago}, 580 F.2d 202, 205 (6th Cir. 1978); \textit{supra} notes 61-73 and accompanying text. The Third Circuit does not appear to have addressed the issue.


\textsuperscript{139} \textit{Davis}, 114 S. Ct. at 2350.

\textsuperscript{140} \textit{Id.} at 2355.

\textsuperscript{141} \textit{Id.} at 2359 (Souter, J., concurring in judgment).
In Davis, the defendant, a Navy seaman, was questioned by Naval Investigative Service ("NIS") officers in connection with a murder.\textsuperscript{142} He was advised of his Miranda rights,\textsuperscript{143} and agreed to submit to questioning. After some time, Davis said: "Maybe I should talk to a lawyer."\textsuperscript{144} Officers immediately broke off substantive questioning, explained their intentions, and asked Davis whether he was asking for a lawyer, to which Davis replied "No."\textsuperscript{145} The officers paused momentarily, reminded Davis of his rights, then resumed questioning. After about an hour, Davis said, "I think I want a lawyer before I say anything else." The officers immediately ended the interview.\textsuperscript{146}

In a trial by court-martial, Davis was convicted of murder, in part on the basis of statements made during the second segment of the NIS interview. His conviction was affirmed by both the Navy-Marine Corps Court of Military Review and the United States Court of Military Appeals. The court-martial and the Court of Military Appeals both applied the "clarification" standard, determining that the officers had appropriately sought to clarify Davis' wishes before continuing.\textsuperscript{147}

The conviction was then affirmed by the United States Supreme Court. All of the Justices agreed that Davis' conviction should be affirmed, but divided sharply as to the proper standard to apply to Davis' statement, "Maybe I should talk to a lawyer."\textsuperscript{148}

A. Majority Opinion: O'Connor, J., with Rehnquist, C.J., and Scalia, Kennedy, and Thomas, JJ.

The majority's primary concern in hearing the case was to set a uniform standard for what had become a troublesome legal and factual question in several cases.\textsuperscript{149} The majority, like the Kentucky and

\textsuperscript{142} Id. at 2353.

\textsuperscript{143} Miranda is applied to the military by Presidential order and decisions of the Court of Military Appeals. Id. at 2354 n.*.

\textsuperscript{144} Id. at 2353.

\textsuperscript{145} An officer described the exchange as follows: "We made it very clear that we're [sic] not here to violate his rights, that if he wants [sic] a lawyer, then we will [sic] stop any kind of questioning with him, that we weren't going to pursue the matter unless we have [sic] it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, 'No, I'm not asking for a lawyer,' and then he continued on, and said, 'No, I don't want a lawyer.'" Id.

\textsuperscript{146} Id.

\textsuperscript{147} Id. at 2353-54.

\textsuperscript{148} Id. at 2357-59 (Souter, J., concurring in judgment).

\textsuperscript{149} Id. at 2355.
Virginia Supreme Courts, relied heavily on the language of *Edwards v. Arizona.* They noted that the right to counsel created by *Miranda* was not itself a constitutional right, but a procedural safeguard designed to help secure the Fifth Amendment right against self-incrimination.

The majority concluded that, since the right to have counsel present during custodial interrogation is not an inherent constitutional right, the danger of denying counsel to some suspects who do want counsel but, "because of fear . . . [or] lack of linguistic skills," fail to formulate their requests properly, is an acceptable danger.

The majority opinion viewed the two more lenient approaches to ambiguous requests as unnecessarily burdensome on police. "When the officers conducting the questioning reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity." The Court saw the initial requirements of information and waiver as sufficient protection for suspect's rights.

The majority also believed that the threshold of clarity standard was superior in ease of administration. They felt that the threshold of clarity standard's "bright-line" approach provided the best guidance to law enforcement officers, avoiding risky and burdensome judgment calls.

**B. Concurring Opinion: Souter, J., with Blackmun, Stevens, and Ginsburg, JJ.**

The four concurring justices endorsed the clarification approach predominant among the federal circuits. They viewed the clarification

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150 See supra note 87 and accompanying text.

151 It is "impermissible for authorities 'to reinterrogate an accused in custody if he has clearly asserted his right to counsel.'" *Davis,* 114 S. Ct. at 2355 (quoting *Edwards v. Arizona,* 451 U.S. 477, 485 (1981)) (emphasis in *Davis*).


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

154 "'Full comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process.'" *Id.* at 2356 (quoting *Moran v. Burbine,* 475 U.S. 412, 427 (1986)) (alterations in *Davis*).

155 "'[A] statement either is such an assertion of the right to counsel or it is not.'" (quoting *Smith v. Illinois,* 469 U.S. 91, 97-98 (1984) (per curiam)).

156 *Id.* at 2359 (Souter, J., concurring in judgment). See supra notes 137-38 and accompanying text.
approach as the rule that best advances and balances "concerns of fairness and practicality" present since *Miranda*. They noted amicus briefs submitted by, among others, the National District Attorneys Association, the National Sheriffs' Association, and the International Association of Chiefs of Police, Inc., all endorsing the clarification approach adopted by the Court of Military Appeals.

The concurring Justices viewed the clarification approach as the best way to advance two important concerns. First, it would "‘assure that the individual's right to choose between speech and silence remains unfettered throughout the interrogation process.’” Second, they said that *Miranda* should be able "‘to operate in the real world,’ where not everyone speaks "‘with the discrimination of an Oxford don.”’

The concurring Justices felt that the clarification approach would assure that suspects’ wishes were most accurately respected. They also interpreted the "‘clearly asserts’ phrase in *Edwards* differently than the majority, explaining it as an instruction for what to do when a request is clear, not what to do only when a request is not clear.

V. IMPLICATIONS OF EACH THEORY

A. Per Se Bar

The per se rule no doubt affords suspects the greatest amount of protection, whether they want it or not. Under this rule, police have no opportunity to persuade the suspect out of a possible request for counsel. Additionally, an ambiguous reference does not prevent communication with the suspect. It only requires the additional presence of the suspect’s lawyer.

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158 *Id.* (Souter, J., concurring in judgment).
159 *Id.* at 2356 n.2 (Souter, J., concurring in judgment).
160 *Id.* at 2360 (Souter, J., concurring in judgment) (quoting Connecticut v. Barrett, 479 U.S. 523, 528 (1987)) (emphasis in *Barrett*).
161 *Id.* at 2360, 2364 (Souter, J., concurring in judgment).
162 *Id.* at 2364 (Souter, J., concurring in judgment).
163 *Id.* at 2359-60 n.3 (Souter, J., concurring in judgment).
164 *See id.* at 2363-64 (Souter, J., concurring in judgment).
165 Michigan v. Mosley, 423 U.S. 96, 110 n.2 (1975) (White, J., concurring in result) (agreeing that there was no breach of *Miranda* principles where the defendant was given *Miranda* warnings, stated that he did not want to discuss the robberies, and later was again given *Miranda* warnings but, during the second interrogation, offered a statement without counsel); Maglio v. Jago, 580 F.2d 202, 205 (6th Cir. 1978) (holding that *Miranda* principles were violated where, after defendant stated that he wanted counsel,
The per se rule is also favored due to its perceived fairness across social lines. "A per se bar approach would ensure equal protection against self-incrimination to poor, uneducated defendants by treating their inartful requests for counsel as valid invocations."\(^{166}\) Edwards does allow, even under the per se approach, communication without the presence of an attorney to resume, but only at the suspect's initiative.\(^{167}\) But the ordinary suspect is, more than likely, completely unaware of this difference. The logical reaction of a suspect who has made a vague reference to an attorney (perhaps without even knowing it), and has seen the police immediately take their leave, is a belief that the police are finished with their questioning. In such a case, there is little chance that the suspect will know that only he may initiate any further conversation. Consequently, there will likely be no further conversation until the suspect is represented by counsel — whether the suspect wants it that way or not.

The per se bar approach has been criticized as punishing innocent police conduct and thwarting the effective administration of justice.\(^{168}\) This broadest of approaches also threatens the rights of suspects, because a necessary counterpart to the right to counsel is the ability to waive that right. Such an open interpretation of ambiguous references as advocated by Maglio can effectively prohibit an individual who sincerely wishes to talk from being able to do so.\(^{169}\)

**B. Threshold of Clarity**

The threshold of clarity approach was not widely advocated before Davis. In Davis, the Court did not want police officers to have to guess whether a suspect was invoking the right to counsel.\(^{170}\) Thus, the Court adopted a very rigid rule, placing the line very far to the side of favoring police.\(^{171}\)

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\(^{166}\) Clapp, *supra* note 54, at 541.  
\(^{167}\) See *supra* note 46 and accompanying text.  
\(^{168}\) See United States v. Gotay, 844 F.2d 971, 975 (2d Cir. 1988) (holding that an ambiguous request for counsel precludes further interrogation except for questions designed to clarify the ambiguity).  
\(^{169}\) Id.; Davis v. United States, 114 S. Ct. 2350, 2364 (1994) (Souter, J., concurring in judgment).  
\(^{170}\) See Davis, 114 S. Ct. at 2355-56; *supra* text accompanying note 154.  
\(^{171}\) See Davis, 114 S. Ct. at 2355-56; *supra* text accompanying note 154.
Foremost among the concerns which produced *Miranda* was the Court’s belief that a custodial interrogation is an inherently coercive proceeding.\(^{172}\) The *Davis* rule does much to undo *Miranda*. It all but ignores *Miranda*’s concern with coercion which might occur as a result of the interrogation setting and, instead, relies on the danger of coercion being cured in advance by the *Miranda* warnings and waiver.\(^{173}\) Understandably, many suspects, while understanding the basic nature of their rights and the language of the waiver form they sign, will not understand what they are getting into by agreeing to questioning without counsel.

*Davis* threatens to trample many legitimate attempts to obtain the assistance of counsel. A mere colloquialism could invalidate a request. A suspect can use the word “maybe” out of sarcasm, intimidation, or incomplete English fluency. To hold this vague term out as constituting an “ambiguous” statement is a questionable application and possible abuse of this standard.

### C. Clarification

Before *Davis*, most federal circuits had adopted the clarification approach as the appropriate balance between the accused’s right to counsel and the interest of society in the effective administration of justice.\(^{174}\) Under this approach, police are not penalized if they fail to recognize some vague reference to a lawyer. On the other hand, suspects are protected from police abuse of the custodial setting by the restriction to narrow clarifying questions. The clarification approach best ensures that suspects’ wishes, whether opting for *or against* counsel, are respected.

However, the clarification standard may present a danger because there is potential for abuse by police officers. It is feared that officers might take advantage of the opportunity to ask purported clarification questions to badger the suspect into saying that he was not really asking for counsel.\(^{175}\)

Finally, the clarification standard improves the reliability of statements which will be used at trial. Defendants will be less able to argue

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\(^{173}\) See *supra* note 155.

\(^{174}\) See *supra* notes 4, 59, 105-17 and accompanying text.

\(^{175}\) See *Davis*, 114 S. Ct. at 2363 (Souter, J., concurring in judgment); Clapp, *supra* note 54, at 537-39.
at trial that they were badgered or confused by questioning officers, if the
police can show that they took extra care to clarify a suspect’s intentions
regarding his rights during questioning.\footnote{176}

CONCLUSION

In a 1976 speech, Supreme Court Justice Lewis Powell described
what he saw as “a ‘sounder balance’ . . . developing between the rights of
accused persons and the rights of a civilized society to have a criminal
justice system that is effective as well as fair.”\footnote{177} The \textit{Davis} decision
shifts this balance by sharply curtailing the rights of suspects defined in
\textit{Miranda} and \textit{Edwards}.

The \textit{Davis} Court was motivated in part by a desire to simplify what
had been a difficult standard to apply.\footnote{178} The courts applying the
clarification standard had been faced with the sensitive factual issues of
what statements of suspects were susceptible to interpretation as possible
requests for counsel and what constituted appropriate clarifying questions
by police.\footnote{179} The former problem has not been solved, merely relocated
along a continuum. Now, the sensitive factual determination is whether
a particular statement is susceptible to interpretation \textit{only} as a request for
counsel.\footnote{180}

The \textit{Davis} decision has removed a level of responsibility from the
police. They no longer have a duty to clarify ambiguous remarks or
questions.\footnote{181} Judgment calls will no longer be made at the scene, with
the benefit of observing both the environment and the suspect’s demeanor
at the time of the interrogation. They will not be made by police officers,
those perhaps most familiar with suspects in custody. Now, the courts,
removed from the actual events in both distance and time, must decide
whether a given statement is a clear request or not. The problem has not

\footnote{176} See \textit{Davis}, 114 S. Ct. at 2363 (Souter, J., concurring in judgment); Clapp, \textit{supra} note 54, at 537-39.
\footnote{178} \textit{Davis v. United States}, 114 S. Ct. 2350, 2355 (1994).
\footnote{179} See, \textit{e.g.}, \textit{United States v. Fouche}, 776 F.2d 1398, 1404-05 (9th Cir. 1985)
(remanding the case to the trial court to determine whether investigating FBI agents
properly clarified the defendant’s ambiguous statement).
\footnote{180} See \textit{Davis}, 114 S. Ct. at 2356-57.
\footnote{181} See \textit{supra} note 4 and accompanying text.
been eliminated. Rather, the gray area has been relocated. Courts are now faced with the question of “how clear is ‘clear’?”182

It seems a simple task to determine a uniform standard for clarifying an ambiguous statement, just as the Miranda warnings have become standardized. A substantial majority of American television viewers could probably give a satisfactory recitation of the Miranda warnings. The clarification question would probably be even easier for suspects to understand than the initial Miranda warnings. For example, “Are you requesting the assistance of an attorney at this time?” should suffice, and police departments would have little trouble including it in their standard arrest and interrogation procedures.

Unlike the per se bar standard, the clarification approach does not threaten to disrupt the administration of justice in any meaningful manner. It imposes only a brief interruption to resolve and fulfill the actual intentions of the suspect. At worst it amounts to reminding the suspect of his rights. This might be viewed as a strategic disadvantage to police, but in that respect so is the existence of the Miranda warnings.183

The rules at the extremes, the per se rule and the threshold of clarity rule, attempt to locate a decisive line. On one side of this line, the suspect’s statement has no impact on required police procedure.184 On the other side of the line, the suspect’s statement requires a total cessation of questioning.185 Given the boundless combination of words that might come from a suspect’s mouth, along with the rule that subsequent utterances may not be used to explain the statement in question,186 either rule requires police to guess at the suspect’s intention, with grave consequences. Undoubtedly, numerous situations would arise with the adoption in Davis of the threshold of clarity rule, where the losing party cries foul at the hands of a “technicality.”

In contrast, the clarification standard provides for a broader area around the otherwise sharp line. It furnishes a manner of safety net, where a simple procedure, a clarification question, easily standardized as the Miranda warnings have been, can operate to avoid the potentially disastrous consequences of either of the sharp line approaches.

182 Davis, 114 S. Ct. at 2363 n.7 (Souter, J., concurring in judgment).
183 See id. at 2362-63 (Souter, J., concurring in judgment).
184 See supra notes 3, 57 and accompanying text.
185 See supra notes 2, 55 and accompanying text.
That the police are not to be put on notice by statements like "Maybe I should talk to a lawyer" is an open invitation to abuse. Whereas the per se bar rule, which took "in any manner" literally, failed properly to value an effective and efficient justice system, the threshold of clarity rule fails properly to respect the rights of the accused.

Even among the lower courts adopting the threshold of clarity approach, the standard did not appear to be defined as harshly as in Davis. Note the deference paid in Krueger to Miranda's "in any manner." Though the Illinois court made no mention of the clarification approach, additional language in Krueger suggests that the court might have supported the more lenient standard.

The Davis decision demonstrates a shift in the Supreme Court's composition. Miranda revealed an overriding concern with protecting individuals against the "system." Davis demonstrates a stronger concern for the rights of society, in particular the right to be protected from criminals by an administrable justice system. This is a laudable objective, however Davis departs too far from the Miranda Court's concerns, to the point of ignoring the coercive pressures of an interrogation which led to Miranda and Edwards.

Gregory J. Griffith

187 See supra notes 2, 54-55, 61-83 and accompanying text.
189 People v. Krueger, 412 N.E.2d 537, 540 (Ill. 1980); see supra note 102 and accompanying text.
190 "Officers must be allowed to exercise their judgment in determining whether a suspect has requested counsel." Krueger, 412 N.E.2d at 540.
191 See supra notes 17-52 and accompanying text.