Constitutional Law - Sixth Amendment - Right to Counsel - Ambiguous Requests

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CONSTITUTIONAL LAW—SIXTH AMENDMENT—RIGHT TO COUNSEL—AMBIGUOUS REQUESTS—The United States Supreme Court held that after a knowing and voluntary waiver of the *Miranda* rights, officers may continue questioning until the suspect makes an unambiguous request for counsel.


Robert L. Davis (the “Petitioner”) was a member of the United States Navy stationed at Charleston Naval Base. On October 2, 1988, the Petitioner was shooting a game of pool with another sailor, Keith Shackleford (the “Decedent”). The Decedent lost the game and a thirty dollar wager, but he refused to pay the debt. Early the next morning, the Decedent’s body was found on the loading dock behind the commissary beaten to death.

The Naval Investigative Service (the “NIS”) examination eventually focused on the Petitioner. The investigation found that the Decedent and the Petitioner were both at the same club on the night of the Decedent’s death; the Petitioner did not arrive for work the next morning; and the Petitioner owned two pool cues, one of which was stained with blood. In addition, some witnesses informed the NIS agents that the Petitioner had admitted committing the crime to them and others indicated that he had clearly recounted details that implicated him in the crime.

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5. *Davis*, 114 S. Ct. at 2353. The pathologist indicated that the injuries sustained were consistent with the type of injury that the butt end of a pool cue would inflict. *Davis*, 36 M.J. at 338.
8. *Id.* The Petitioner told one person the precise cause of death even though such knowledge was not common. *Davis*, 36 M.J. at 339. He told another individual that he did not commit the murder, but that he knew who did. *Id.*
In early November 1988, the NIS questioned the Petitioner and told him that he was a suspect. Agents advised the Petitioner that he was not required to make a statement, that any statement could be used against him, and that he could talk with an attorney and have an attorney present during questioning. The Petitioner waived both his right to remain silent and his right to have counsel present. Approximately ninety minutes into the NIS interview, the Petitioner said, "[m]aybe I should talk to a lawyer." The agents then made it clear to the Petitioner that if he wanted a lawyer, the agents would stop the questioning. The Petitioner indicated, however, that he was not asking for a lawyer, and the interview continued. After several hours of questioning, the interview was ceased when the Petitioner asked for the interview to stop until he obtained an attorney.

Based on the NIS investigation, the Petitioner was charged with murder without premeditation. In the course of the general court-martial, the Petitioner moved to suppress the state-
ments made during the NIS investigation. The military judge denied the motion. The Petitioner was convicted on one specification of murder without premeditation and was sentenced to life imprisonment. The Petitioner appealed the conviction, but the Navy-Marine Court of Military Review affirmed both the findings and the sentence.

The United States Court of Military Appeals granted discretionary review and affirmed the sentence. The appeals court concluded that because the Petitioner did not "unequivocally invoke" his right to counsel, the NIS agents properly clarified the Petitioner's ambiguous statement and correctly continued on with the questioning. The United States Supreme Court granted certiorari to resolve the issue of the procedure to be followed when a suspect made an ambiguous or equivocal reference for counsel during a custodial interrogation.

four other individuals. 10 U.S.C. § 816. Alternatively, before the court is convened, the accused can request, subject to the military judge's approval, a court consisting of only a military judge. Id.

19. Id. at 341. The judge held that the Petitioner's mention of a lawyer during the NIS investigation was not in the form of a request for an attorney and that the NIS agents adequately determined that the Petitioner was not exercising his right to counsel. Id.
22. The Courts of Military Review are intermediate appellate criminal courts that review court martial findings. BLACK'S LAW DICTIONARY 362 (6th ed. 1990). Each court has one or more panels of at least three appellate military judges; the court may sit in panels or en banc. Id.
24. The Court of Military Appeals is a civilian appellate tribunal that reviews court martial convictions of each branch of the services. BLACK'S LAW DICTIONARY 358 (6th ed. 1990). The court consists of three civilian judges appointed by the President. Id.
25. Davis, 114 S. Ct. at 2353.
27. Davis, 114 S. Ct. at 2354; see Davis v. United States, 114 S. Ct. 379 (1993) (granting certiorari). In Miranda, the Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436, 444 (1966) In Davis, the appeals court noted that there were three varying approaches being used when addressing the issue of ambiguous statements made by suspects in custodial interrogations regarding their right to counsel. Davis, 36 M.J. at 341. Some jurisdictions declared that any mention of a lawyer by the suspect required that all questioning cease. Id.; see also People v. Superior Court, 542 P.2d 1390, 1394-95 (Cal. 1975). A second approach attempted to determine a threshold standard of clarity, and if the suspect's request did not surpass that standard, questioning could continue. Davis, 36 M.J. at 341; see also People v. Krueger, 412 N.E.2d 537, 540 (Ill. 1980). Finally, a third approach required
Justice O'Connor, writing for the majority, first noted that before proceedings were officially initiated a criminal suspect had no constitutional right to the assistance of counsel. However, the Court recognized that in *Miranda v. Arizona*, the Court acknowledged that an individual in a custodial interrogation did have the right to consult with an attorney and have an attorney present during questioning. Further, the Supreme Court noted that *Miranda* established that the police had to explain these rights to the individual before questioning could proceed.

The Court also reviewed a second protection afforded subjects of custodial interrogations that was identified in *Edwards v. Arizona*. In *Edwards*, the Court held that once a suspect requested counsel during the interview questioning could not continue until a lawyer was made available to the suspect. The protection in *Edwards* required courts to determine if a suspect had invoked his right to counsel.

In *Davis*, the Court found that if the suspect's reference to an attorney was ambiguous or equivocal, questioning need not stop. The Court held that the suspect had to unambiguously request counsel, and any request that failed to meet this standard would not require the officers to stop the questioning. The Court asserted that *Miranda* warnings provided the
suspect's primary rights, and although *Edwards* gave additional protection, its protection had to be positively asserted.\(^{39}\) In conclusion, the Court held that after a knowing and voluntary waiver of the *Miranda* rights, officers could continue questioning until or unless the suspect clearly requested counsel.\(^{40}\)

Justice Souter, in a concurring opinion,\(^{41}\) took issue with the Court's position concerning clarification questions when a suspect makes an equivocal or ambiguous statement.\(^{42}\) Justice Souter challenged the majority's conclusion that even if the NIS investigators had not asked any clarifying questions, they could have continued the questioning because the Petitioner did not clearly request counsel.\(^{43}\) Justice Souter asserted that the proper rule should be that if the suspect made a statement that might be understood as a request for an attorney, substantive questioning should cease, and the investigator's questions should be confined to verifying whether the suspect was invoking his right to counsel.\(^{44}\) Justice Souter noted that *Miranda* was designed to assure an individual's right to choose silence throughout an interrogation with due regard to the actual practices and procedures that occur in a custodial interrogation.\(^{45}\) The concurring Justice asserted that the majority's approach failed to reinforce these precepts.\(^{46}\) Justice Souter noted the irony in the Court's acknowledgment that criminal suspects, often lacking a strong command of the English language, were thrown into unfamiliar surroundings and subjected to a menacing police interrogatory, yet required to use perfect English in invoking their right to counsel.\(^{47}\)

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39. *Davis*, 114 S. Ct. at 2356. The Petitioner's suggestion that *Edwards* should be expanded to require officers to cease questioning immediately upon the making of an ambiguous or equivocal statement was rejected by the Court. *Id.* at 2355.

40. *Id.* The Court noted that it would often be "good police practice" for the officers to ask clarifying questions when a suspect makes an ambiguous or equivocal statement, yet refused to adopt any rule requiring such clarifying questions. *Id.*

41. *Davis*, 114 S. Ct. at 2358-59 (Souter, J., concurring). Justices Blackmun, Stevens and Ginsburg joined in the concurrence. *Id.* Justice Scalia, also filed a concurring opinion, and contended that the government should have brought this case under the Crimes and Criminal Procedure Act which governs the admissibility of confessions in federal proceedings. *Id.* at 2357 (Scalia, J., concurring) (citing 18 U.S.C. § 3501 (1988)).

42. *Davis*, 114 S. Ct. at 2358-64 (Souter, J., concurring).

43. *Id.*

44. *Id.* at 2364.

45. *Id.* Justice Souter contended that the first safeguard of *Miranda* was to assure that the suspect's right to choose to remain silent was unrestricted throughout the interrogation process. *Id.* at 2360.

46. *Id.* at 2359.

47. *Davis*, 114 S. Ct. at 2360 (Souter, J., concurring) (quoting *Miranda*, 384
Justice Souter also took issue with the Court's contention that requiring an unambiguous request for counsel would enhance society's interest in effective law enforcement. He noted that although some confessions would be forfeited with his approach, *Miranda* itself has caused many confessions to be inadmissible at trial. The concurrence also disagreed with the Court's contention that the requirement for an unequivocal request for counsel allowed ease of application. Justice Souter concluded that his approach would actually be easier to apply. Only through the use of clarifying questions, would ambiguities be resolved.

The protection against self-incrimination during interrogation is grounded in the Sixth Amendment's right to counsel. The Sixth Amendment guarantees that a criminal defendant has "the Assistance of Counsel for his defence." The first case that interpreted the Sixth Amendment right to counsel was *Powell v. Alabama*. In *Powell*, the issue was the defendant's right to counsel before trial. The petitioners were indicted and arraigned on a rape charge, but were not provided with counsel until after the arraignment hearing.

On appeal, the Supreme Court first addressed the trial judge's appointment of all members of the bar to represent the petitioners. Additionally, Justice Souter remarked that the majority incorrectly put the burden on the suspect to show that he or she made an unequivocal request for counsel. *Davis*, 114 S. Ct. at 2361 (Souter, J., concurring).

48. *Davis*, 114 S. Ct. at 2361 (Souter, J., concurring).
49. *Id.* at 2362. The concurrence quoted *Escobedo v. Illinois*, in which the Court stated that "[n]o system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise his constitutional rights." *Id.* (quoting *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964)).
50. *Davis*, 114 S. Ct. at 2363 (Souter, J., concurring).
51. *Id.* at 2363.
52. *Id.*
53. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy trial . . . and to have the Assistance of Counsel for his defence." U.S. CONST. amend. IV.
54. U.S. CONST. amend. VI.
55. 287 U.S. 45 (1932).
56. *Powell*, 287 U.S. at 50.
57. *Id.* at 49-50. The three petitioners were African-American males accused of raping two white girls. *Id.* The trial judge appointed all the members of the bar to act as counsel during arraignment. *Id.* at 56. It was not determined until the beginning of the trial which specific attorney would represent the petitioners. *Id.* The trial took one day and the petitioners were found guilty of rape and sentenced to death. *Id.* at 50. The petitioners challenged their convictions on three different grounds. *Id.* First, they contended that they did not receive a fair trial. *Id.* Second, they contended that they were denied the right to counsel, including the normal incidents of pre-trial consultation with counsel. *Id.* Finally, the petitioners claimed that qualified members of their own race were excluded from the jury. *Id.*
The Supreme Court found the gesture to be worthless because the appointment accorded no representation to the petitioners at arraignment.\textsuperscript{58} The Court next noted that the Alabama Constitution provided that the accused in a criminal trial had the right to counsel.\textsuperscript{59} The Court reasoned, however, that to exercise that right only at trial, and not to provide a lawyer during the preparation phase of a criminal case would defeat the purpose of that right.\textsuperscript{60}

The Supreme Court held that when a defendant in a capital case was unable to obtain counsel or adequately represent himself, it was the duty of the court, whether requested or not, to assign counsel.\textsuperscript{61} The Court concluded that such a duty included ensuring that counsel was available at the early stages of the criminal proceeding, to ensure adequate preparation for trial.\textsuperscript{62}

The Supreme Court next addressed the accused's ability to waive his right to counsel, and how the waiver must be expressed by the accused in Johnson v. Zerbst.\textsuperscript{63} In Johnson, the petitioner was arrested for feloniously uttering and passing four counterfeit twenty dollar Federal Reserve notes.\textsuperscript{64} The petitioner was represented by counsel during preliminary hearings, but was unable to secure counsel for trial.\textsuperscript{65}

The Supreme Court first noted that the Sixth Amendment provided the accused in a criminal case with the right to counsel.\textsuperscript{66} The Court then noted that the presumption was that, un-
nder normal circumstances, a defendant would not waive his right to counsel. The Court declared that the determination of whether a waiver had been made by a defendant depended on the facts of each case, including the background, experience, and conduct of the accused. The Court opined that because the purpose of the right to counsel was to protect an accused from his own ignorance, the right would be worthless if it were nullified when an accused's lack of knowledge precluded him from exercising the right. In reversing the conviction and remanding the case, the Supreme Court held that the trial court had to determine if the petitioner did indeed waive his right to counsel.

The Supreme Court next considered whether the Sixth Amendment guarantee of assistance to counsel was applicable to the states through the Fourteenth Amendment in Betts v. Brady. In Betts, the petitioner was indicted for robbery. The petitioner, at arraignment, told the judge that he did not have the money to hire a lawyer and requested that counsel be appointed. The trial judge refused. The Supreme Court determined that the right to assistance of counsel had not been considered a fundamental right, but rather
had been considered one of legislative policy. In affirming the petitioner’s conviction, the Supreme Court concluded that while the Fourteenth Amendment prohibited a conviction and imprisonment based on an unfair trial, the amendment did not include an absolute right to assistance of counsel in every criminal action.

Although heavily criticized, the Betts decision stood for fifteen years, until Gideon v. Wainwright. In Gideon, the Court again considered whether the Sixth Amendment applied to the states through the Due Process Clause of the Fourteenth Amendment. The petitioner was charged with breaking and entering a poolroom with the intent to commit a misdemeanor. At trial, the petitioner requested that the trial court appoint counsel, but the trial judge refused.

On appeal to the Supreme Court, the Court asserted that the Fourteenth Amendment demanded that any provision of the Bill of Rights that was “fundamental and essential to a fair trial” had to be recognized by the states. The Court disagreed with

79. Betts, 316 U.S. at 465-71. The Court reviewed the original constitutions of the thirteen states and present-day state constitutions and statutes. Id. Rhode Island, North Carolina, South Carolina, Virginia, Maryland and New York had no provision in their original constitutions granting a right to counsel. Id. at 465-66 (citations omitted). Maryland, New York, Pennsylvania, New Hampshire, Delaware, Connecticut, Massachusetts and Georgia eventually placed into their constitutions a right to the effect that the accused should be allowed counsel. Id. The Supreme Court concluded that this material showed that the states did not consider the right to counsel fundamental, but rather merely deemed the matter as legislative policy. Id. at 467.

80. Id. at 473. The Court rejected the petitioner’s contention that Powell and Johnson supported the argument that the right to counsel applied to the states via the Fourteenth Amendment. Id. at 462-63. The petitioner reasoned that Powell and Johnson suggested that the right to assistance of counsel was so fundamental and essential to a fair trial that to deny the right was a violation of the petitioner’s due process right guaranteed by the Fourteenth Amendment. Id.

81. In Gideon v. Wainwright, the Court noted that there were numerous decisions and commentaries that criticized the result in Betts. See Gideon v. Wainwright, 372 U.S. 335, 338 n.2 (1963).


84. Id. at 337. Under Florida law, breaking and entering with the intent to commit a misdemeanor was classified as a felony offense. Id.

85. Id. Only an individual charged with a capital offense could have counsel appointed. Id. The petitioner represented himself and gave an opening statement, cross-examined witnesses presented by the state and presented witnesses on his behalf. Id. At the close of trial the petitioner was found guilty. Id. While incarcerated, the petitioner filed a petition for writ of habeas corpus to the Florida Supreme Court attacking the trial court’s refusal to appoint counsel. Id. The petitioner alleged that the trial court’s action denied him rights guaranteed by the Constitution and the Bill of Rights. Id.

86. Id. at 342. The Court noted that in Powell, the Court asserted that the Fourteenth Amendment “embraced those fundamental principles of liberty and justice
Betts that the Sixth Amendment guarantee of assistance of counsel was not a fundamental right. The Court noted that ten years before Betts the right had been recognized as fundamental in Powell. The Supreme Court held that any accused individual who was too poor to employ counsel could only be assured a fair trial if counsel was provided. The Court therefore reversed the petitioner's conviction.

The Court next interpreted the Sixth Amendment's right to counsel in Massiah v. United States. In Massiah, incriminating statements made to a co-defendant were overheard by the police by way of electronic equipment. The petitioner had invoked his right to counsel during the indictment; after his release on bail, however, he made several incriminating statements recorded through police surveillance. These statements were admitted at trial over defense counsel's objections, and the petitioner was convicted.

The Court reaffirmed its assertion that once an individual was indicted, questioning without the presence of counsel, violated the basic inclination of fairness and the basic rights of persons which lie at the base of our civil and political institutions.” Id. at 341 (quoting Powell v. Alabama, 287 U.S. 45, 68 (1932)).

87. Gideon, 372 U.S. at 342.
88. Id. at 342-43. The Court noted that the Powell holding was limited to the particular facts and circumstances at issue, but the conclusion that the right to counsel was fundamental was clear. Id. at 343.
89. Id. at 344.
90. Id. at 345. The Supreme Court noted that Betts departed from the wisdom and reasoning on which Powell rested. Id. Florida, and two other states, argued that Betts should be upheld, but twenty-two other states disagreed and called Betts "an anachronism when handed down." Id.
92. Massiah, 377 U.S. at 202-03. The petitioner was a merchant seaman assigned to the S.S. Santa Maria. Id. at 202. The petitioner had been arrested, arraigned and indicted for the possession of narcotics while aboard a U.S. vessel. Id. Possession of narcotics aboard a U.S. vessel was a violation of the federal narcotics laws. See 21 U.S.C. § 184a (1988). After retaining an attorney, petitioner pleaded not guilty and was released on bail. Massiah, 377 U.S. at 202. A co-defendant was released at the same time. Id. Unbeknownst to the petitioner, the co-defendant had agreed to cooperate with the police. Id.
93. Massiah, 377 U.S. at 203. The government agents, with the co-defendant's consent, placed a radio transmitter under the front seat of his automobile, and the government agent sat in another car equipped with a radio receiver. Id.
94. Id. The actual trial was based upon a second superseding indictment which included additional counts. Id. at 203 n.4. The petitioner alleged that his Fifth and Sixth Amendment rights were violated because the government had deliberately elicited incriminating statements from him after he was indicted and in the absence of his retained counsel. Id. at 203-04. The petitioner also alleged that the use of the radio equipment violated his Fourth Amendment right. Id. at 203. The alleged Fourth Amendment violation was not addressed by the Court. Id. at 204.
charged with a crime.\textsuperscript{95} The Court reasoned that the situation in \textit{Massiah} was especially violative of the Sixth Amendment because the petitioner did not even know that he was under interrogation.\textsuperscript{96} In reversing the conviction, the Supreme Court held that the petitioner was denied his basic protection of the Sixth Amendment because the government agents elicited the statements after his indictment in the absence of his counsel.\textsuperscript{97}

In \textit{Escobedo v. Illinois},\textsuperscript{98} the Supreme Court reviewed an individual's constitutional right to counsel before trial or arraignment.\textsuperscript{99} In \textit{Escobedo}, the petitioner, before being formally charged, was handcuffed and placed into a police car and taken to the police station.\textsuperscript{100} When the petitioner's lawyer arrived at the police station, he was not permitted to see the petitioner.\textsuperscript{101} After repeatedly asking for his attorney, the police told the petitioner that his lawyer did not want to talk to him.\textsuperscript{102}

The Court opined that in a case where the investigation had become so focused, the suspect was equal to an accused.\textsuperscript{103} The Court reasoned that as the questioning continued, and a suspect becomes highlighted, the suspect had the same constitutional rights as if he was indicted.\textsuperscript{104} The Court held that when an investigation moved from a general inquiry of an unsolved

\textsuperscript{95} \textit{Id.} at 204-05.  
\textsuperscript{96} \textit{Id.} at 206.  
\textsuperscript{97} \textit{Id.} at 207.  
\textsuperscript{98} 378 U.S. 478 (1964).  
\textsuperscript{99} \textit{Escobedo}, 378 U.S. at 479.  
\textsuperscript{100} \textit{Id.} During the ride, police told the petitioner that someone had named him as the one who shot the deceased and that he might as well confess. \textit{Id.} On the ride to the station, the petitioner indicated he would not say anything until he talked to his lawyer. \textit{Id.}  
\textsuperscript{101} \textit{Id.} at 480. The attorney first talked with the duty sergeant who told the attorney that the petitioner had been moved from lockup to the homicide bureau and that he could not see him. \textit{Id.} The attorney next talked to several homicide detectives who also told the attorney that he could not see his client. \textit{Id.} The attorney was then told he could not see his client because the police had not completed questioning. \textit{Id.}  
\textsuperscript{102} \textit{Id.} at 481. After several hours of questioning, the petitioner finally admitted some knowledge of the crime, and eventually made further incriminating statements. \textit{Id.} at 482-83. During the interrogation the petitioner was handcuffed and had to remain standing. \textit{Id.} at 482. An officer who grew up in the petitioner's neighborhood and also spoke the petitioner's primary language, Spanish, allegedly told the petitioner that if he implicated a co-defendant, he could go home. \textit{Id.} at 482. The petitioner told the officer that the co-defendant, who said that the petitioner was the shooter, was lying, so the officer arranged for the two to confront each other. \textit{Id.} at 482-83. During the confrontation, the petitioner said "I didn't shoot Manuel, you did it," thus, for the first time indicating his knowledge about the crime. \textit{Id.} The police acknowledged that the petitioner was never advised of his constitutional rights. \textit{Id.} at 483.  
\textsuperscript{103} \textit{Id.} at 490-91.  
\textsuperscript{104} \textit{Escobedo}, 378 U.S. at 492.
crime, and began to focus on an individual certain rights arose.\textsuperscript{105} Specifically, the court contended that when an individual was brought to the police station for questioning and the individual was not advised of his right to remain silent, the accused was denied his Sixth Amendment right to counsel.\textsuperscript{106}

Two years later, in \textit{Miranda v. Arizona},\textsuperscript{107} the Court articulated specific safeguards to protect the constitutional rights of a suspect who was not yet officially arraigned or indicted.\textsuperscript{108} At issue was the admissibility of a suspect's written confession made during a custodial interrogation when he was not advised of his right to counsel and was denied the ability to speak with an attorney when he requested counsel.\textsuperscript{109} The written confession was allowed into evidence and the petitioner was convicted of kidnapping and rape.\textsuperscript{110}

On appeal, the Court noted that constitutional rights could be violated during incommunicado interrogations in a police dominated atmosphere.\textsuperscript{111} The Court concluded that a strong rela-

\textsuperscript{105} \textit{Id.} at 490-91.
\textsuperscript{106} \textit{Id.}
\textsuperscript{107} 384 U.S. 436 (1966).
\textsuperscript{108} \textit{Miranda}, 384 U.S. at 444.
\textsuperscript{109} \textit{Id.} at 439-40. The petitioner was arrested and taken to the Phoenix police station. \textit{Id.} at 491. The petitioner was brought to the police station in connection with a kidnapping and rape investigation. \textit{Id.} at 492. After two hours of questioning, the officers emerged with a signed confession. \textit{Id.} at 491-92. The written confession contained a typed portion stating that the confession was voluntary and not the result of any threats or promises. \textit{Id.} at 492. Additionally, the statement indicated that the confession was made with full knowledge of his legal rights and with the understanding that the confession could be used against him. \textit{Id.} The interrogating officers admitted that the petitioner was not advised that he had a right to have an attorney present during questioning. \textit{Id.} at 491. One of the officers said that he did read the written statement to the petitioner, however, that reading took place after the petitioner had already orally confessed. \textit{Id.} at 492 n.67.

\textsuperscript{110} \textit{Id.} at 492. On appeal, the Supreme Court of Arizona found no constitutional violations and affirmed. \textit{Id.} The Arizona Supreme Court relied heavily on the fact that the petitioner never requested counsel. \textit{Id.}

\textsuperscript{111} \textit{Id.} at 445. The Court noted several studies from the 1930's that highlighted the earlier police practices of physical abuse during incommunicado interrogations. \textit{Id.} at 445 n.5 (citing IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (1931); Bates Booth, \textit{Confessions, and Methods Employed in Procuring Them}, 4 S. CAL. L. REV. 83 (1930); and Kauper, \textit{Judicial Examination of the Accused — A Remedy for the Third Degree}, 30 MICH. L. REV. 1224 (1932)). These reports illustrated that police violence during interrogations was commonplace. \textit{Miranda}, 384 U.S. at 445. The Court also made reference to the Commission on Civil Rights, which had in 1961, shown that some police still resorted to violence during incommunicado interrogations. \textit{Id.} (citing Comm'n on Civil Rights Rep., Justice, pt. 5, at 17 (1961)). The Court also undertook a lengthy review of police manuals and texts that demonstrated some of the psychological practices used to obtain statements during custodial interrogations. \textit{Miranda}, 384 U.S. at 448-49. The manuals advised that the "principal psychological factor contributing to a successful interrogation is privacy." \textit{Id.} at 449 n.10 (citing INBAU & REID, CRIMINAL
tionship existed between police questioning of a suspect and that suspect's right against self-incrimination.\textsuperscript{112}

In reversing the petitioner's conviction, the Supreme Court reasoned that because the petitioner was not advised of his right against self-incrimination nor advised of his right to counsel, the statements were inadmissible.\textsuperscript{113} The Court held that a prosecutor could not use any statements resulting from a custodial interrogation unless the prosecutor established that procedural safeguards which effectively secured the accused's rights were used.\textsuperscript{114} The Court articulated several procedural safeguards needed to secure the rights of the accused.\textsuperscript{115} The Court concluded that if the accused indicated "in any manner and at any stage of the process" his desire to speak to an attorney, further questioning was prohibited.\textsuperscript{116}

In \textit{Edwards v. Arizona},\textsuperscript{117} the Supreme Court considered whether police could initiate communication after the suspect invoked his right to counsel.\textsuperscript{118} The petitioner, after invoking his \textit{Miranda} rights, was approached the next day, re-advised of his rights and questioned by the police.\textsuperscript{119} Statements obtained from this subsequent questioning session were then used against the petitioner.\textsuperscript{120} The Supreme Court held that once the ac-
cused had invoked his right to counsel, the accused was not subject to further interrogation until counsel was available to him.\(^{121}\) The Court noted that the only exception to that rule was if the accused initiated such communication.\(^{122}\) The Court reasoned that while *Miranda* allowed the accused to waive those rights, if the accused invoked them, additional safeguards were necessary to protect him from being badgered into answering questions.\(^{123}\)

The Supreme Court declared two particular safeguards to protect the accused once he invoked his right to counsel.\(^{124}\) First, once the right was invoked all questioning had to cease, and the police were forbidden from initiating any further contact.\(^{125}\) Second, a waiver of the right to counsel could not be proven by simply showing that an accused responded to police-initiated questioning.\(^{126}\)

Two years later, in *Oregon v. Bradshaw*,\(^{127}\) the Supreme Court further clarified its holding in *Edwards*.\(^{128}\) At issue in *Bradshaw* was whether a question asked by the respondent after he invoked his right to counsel was an initiation that would allow police to continue questioning.\(^{129}\) The respondent invoked his right to counsel, and then asked the officer what was going to happen next.\(^{130}\) This inquiry led to a lengthy discussion that resulted in incriminating statements.\(^{131}\)

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\(^{121}\) *Id.* at 484.

\(^{122}\) *Id.*

\(^{123}\) *Edwards*, 451 U.S. at 484.

\(^{124}\) *Id.* at 484-85.

\(^{125}\) *Id.*

\(^{126}\) *Id.* at 484.


\(^{128}\) *Bradshaw*, 462 U.S. at 1044.

\(^{129}\) *Id.* at 1042-44.

\(^{130}\) *Id.*

\(^{131}\) *Id.* During questioning, the respondent requested an attorney and questioning stopped. *Id* at 1041-42. Later, the respondent asked the officer "well, what is going to happen to me now?" *Id.* at 1042-44. The officer told him that he did not have to say anything else and respondent said he understood, but continued to talk to the officer. *Id.* at 1042. During this conversation, the officer suggested that a lie detector test might help the respondent, and the next day, after the respondent signed a waiver of his rights, he took the test. *Id.* At trial, over the respondent's objections, the statements were admitted into evidence and the respondent was found guilty. *Id.* at 1043. The respondent was convicted of first-degree manslaughter, driving while under the influence of intoxicants, and driving while his license was revoked. *Id.* The Oregon Court of Appeals applied *Edwards* and concluded that the statements were obtained in violation of the respondent's Fifth Amendment rights. *Id.* The court of appeals reasoned that the respondent's question was not an initia-
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The Supreme Court asserted that Edwards required a two step process to determine if the right to counsel had been waived. First, whether the police or the accused re-initiated the contact had to be determined. If the accused had initiated the contact, the court had to determine whether the accused made a valid waiver of his previously invoked right to counsel. The Supreme Court determined that the respondent did waive his previously invoked right when the respondent made further inquiries. The Bradshaw decision clarified that an initiation of communication by the accused and a waiver of the right to counsel were separate issues. The Court concluded that a subsequent initiation of communication did not indicate that the accused's previous invocation of a right to counsel was ambiguous.

In Smith v. Illinois, the Supreme Court addressed the problem of an accused who invoked his right to counsel, but then continued to answer the police investigator's questions. At
issue, was whether the suspect's subsequent responses, after he invoked his right to counsel could be used to show that his initial request for counsel was ambiguous. The Supreme Court ruled that the accused's responses, after invoking his right to counsel, could not be used to cloud his initial request for counsel. In reaching this conclusion, the Court reasoned that invoking the right to counsel and the waiver of that right were separate and distinct. The Court concluded that once the accused invoked his right to counsel, statements made afterward were only germane to whether there was a waiver and not whether the statement was ambiguous.

In *Connecticut v. Barrett*, the respondent in a custodial interrogation was advised of his *Miranda* rights and signed an acknowledgement that he had been made aware of his rights. The respondent admitted his involvement in a crime, and then at trial, moved to suppress his oral statements. The trial court allowed the statements to be admitted and held that the respondent understood his rights and had voluntarily waived his right to counsel.

The Supreme Court addressed the issue of whether a limited invocation of the right to counsel acted as an all-inclusive

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140. Id. at 97.
141. Id. at 100.
142. Id. at 98.
143. Id. The Court noted that lower courts had adopted conflicting standards when an accused made an ambiguous or equivocal reference to an attorney. Id. at 95. However, the Supreme Court declined to address that issue in this case because the petitioner's request was a clear and unequivocal request for counsel. Id. at 95-96.
145. Barrett, 479 U.S. at 525. The suspect agreed to talk to police, but said he did not want to make a written statement until his attorney was present. Id.
146. Id. at 525-26.
147. Id. The respondent was subsequently convicted. Id. On appeal, the Connecticut Supreme Court reversed, holding that the respondent's desire for counsel before making a written statement served as an all encompassing invocation of his right to counsel. Id. The Connecticut Supreme Court used the rule established in *Smith* and held that because defendant did not initiate the conversation, the statements were improperly admitted. Id. at 527.
148. The limited invocation was exhibited here by the respondent's receiving and understanding his *Miranda* rights, and waiving the right as far as making oral statements was concerned, but invoking the right concerning written statements. Id. at 526.
invocation. The Court held that a clear limited request invoking one of the respondent's rights had to be respected by police. The Court reasoned that case law allowed a suspect to exercise his own will in making statements, so that a limited request had to be honored. The Court rejected the respondent's argument for a broad construction of the law pertaining to requests for counsel.

Prior to Davis v. United States lower courts employed three varying approaches to respond to ambiguous requests for counsel. Some jurisdictions declared that any mention of a lawyer required that all questioning stop. A second approach set a threshold standard of clarity, and if the request for counsel did not meet that level, questioning could continue. Finally, some jurisdictions required that once an accused made an ambiguous statement, substantive questioning had to stop, but allowed police to ask narrow questions to determine the meaning of the suspect's ambiguous statement. In Davis, the Court of Military Appeals chose the third method and found that because the investigators, through clarification questions, had determined what the suspect was asking, they were correct in continuing the questioning.

149. Id. at 525-26.
150. Barrett, 479 U.S. at 528-29.
151. Id. at 529. This is also referred to as “less than an all-inclusive request” for counsel. Id.
152. Id. at 528.
153. Id. The respondent argued that Bradshaw and Edwards had given broad effect to requests for counsel. Id. The Court opined that only an ambiguous statement would need to be interpreted, and in this case the Court determined that the respondent's request was clear and was honored by the police. Id. The Court noted that because it rejected any claim that the statement was an ambiguous or equivocal response, there was no reason to address the question that Smith left open. Id. Smith left open the question of the varying approaches the lower courts were using to deal with ambiguous requests for counsel. See Smith, 469 U.S. at 98. In Barrett, Justice Brennan concurred in the result, but for different reasons. See Barrett, 479 U.S. at 530 (Brennan, J., concurring). Justice Brennan affirmed because the state eliminated any apparent ambiguity of the situation by showing the waiver was voluntary, knowing and intelligent. Id. at 531. Justice Brennan contended that if the respondent had not asserted that he fully understood his rights, he could not have concurred with the result. Id. at 533. Justice Stevens, joined by Justice Marshall, dissented. Barrett, 479 U.S. at 530 (Stevens, J., dissenting). Justice Stevens dissented for two reasons, first, the facts did not give rise to any significant issue, therefore, certiorari should not have been granted. Id. at 530. Second, the respondent's statement was no less ambiguous than the statement in Edwards where the Court found the statement inadmissible. Id.
154. Davis, 114 S. Ct. at 2353-54.
155. See, e.g., People v. Superior Court, 542 P.2d 1390, 1394-95 (Cal. 1975).
156. See, e.g., People v. Krueger, 412 N.E.2d 537, 540 (Ill. 1980).
157. See, e.g., Thompson v. Weinwright, 601 F.2d 768, 771-72 (5th Cir. 1979).
158. Davis, 36 M.J. at 341-42.
The Supreme Court rejected this method and adopted the second approach and set an extremely high standard of clarity that the suspect's request must meet. With Davis, the Supreme Court made it clear that if during custodial interrogation a suspect said almost anything less articulate than, "I want a lawyer" then police can completely ignore the suspect's statement and continue questioning.

The Davis decision makes law enforcement more difficult because it forces police officers to determine what is an ambiguous statement. Ambiguity is different than unintelligible or inaccurate language. Words are ambiguous when they can be given more than one meaning by individuals trained to understand the particular words being used. Case law books and law review articles are replete with page-after-page explanations of interpretation standards to settle disputes that arise when ambiguous language is found in a contract. Davis places this difficult determination of when a statement is ambiguous on the interrogating officer who is untrained in determining what the legal field considers ambiguous and may often be biased.

The holding in Davis places the burden on the suspect to prove that he positively invoked his right to counsel. In Johnson, the Supreme Court noted that a suspect was normally presumed not to have waived his right to counsel. Johnson required the prosecutor to show that any alleged waiver was given knowingly and intelligently. Further, Miranda held that the police investigator had a positive duty to inform the suspect of his right to counsel. With a single case, the Supreme Court shifted the burden of proving that the suspect invoked his right to counsel from the less than neutral interrogating officer to the scared, intimidated and probably less knowledgeable suspect.

Finally, Davis is antithetical to the basic reasoning in Powell and the case law that followed Powell. The safeguards erected since Powell will remain dormant because a scared, legally untrained, probably uneducated, possibly non-English speaking suspect does not put his request in perfect King's English. This holding is in direct opposition with the landmark cases handed down since Powell. In Powell, the Court's very reason for of-

159. Davis, 114 S. Ct. at 2356.
160. Id. at 2356-57.
163. Id. at 469. For further discussion of Johnson see notes 67-73 and accompanying text.
164. Miranda, 384 U.S. at 444.
165. The Court in Powell noted that even intelligent and literate men might
fering further protection to a suspect, was because of the vulnerable position a suspect is put into during custodial interrogation. The Court properly determined that this hostile environment demanded certain safeguards to protect the suspect's rights.\footnote{166}

The Supreme Court in \textit{Gideon} had overruled \textit{Betts} and returned to the logic and reasoning of \textit{Powell}.\footnote{167} The \textit{Gideon} Court rediscovered how fundamental and essential the right to assistance of counsel is in the adversarial system. \textit{Miranda}'s language surely demands a different result than that reached in \textit{Davis}. The Court in \textit{Miranda} asserted that if the accused indicates "in any manner and at any stage of the process" his desire to speak to an attorney, further questioning must stop.\footnote{168} The words, "any manner" clearly place the burden on the police interrogator to determine if the suspect's statement is in "any manner" a request for counsel. The only way an officer can do this is by asking further questions, maybe as simple as, "are you asking to speak with an attorney?" A yes or no answer to that question would leave little doubt to the interrogator or to the courts as to what the suspect meant by his statement.

In both \textit{Barrett} and \textit{Smith} the Court avoided addressing the issue of ambiguous requests for counsel. In both cases, the Supreme Court found that there was nothing ambiguous in the suspect's request for counsel.\footnote{169} The Court instead focused on the separate issue of whether he subsequently waived his right to counsel after the suspect made his clear request. That analysis was satisfactory for those cases, but when the request is ambiguous, to allow the questioning to continue nullifies the reasoning of the Court since \textit{Powell}.

As with \textit{Betts}, \textit{Davis} will be criticized, and eventually a case will present itself which will give the Court an opportunity to overrule \textit{Davis}. If \textit{Davis} is not overruled then suspects who make statements like, "I'd like to call Mr. Smith," will be ignored because the interrogator did not know that Mr. Smith was the accused's lawyer. Further, a statement like, "my lawyer told me never to speak to police without him" may be considered not understand the criminal procedures of a trial. \textit{See Powell}, 287 U.S. at 69. \textit{Gideon} draws substantially from \textit{Powell}'s review of the dangers that a scared and undereducated suspect faces during a custodial interrogation. \textit{See Gideon}, 372 U.S. at 341. \textit{Miranda} placed a positive duty on investigators to make suspects aware of their rights. \textit{See Miranda}, 384 U.S. at 344.

\footnote{166} \textit{See Powell}, 287 U.S. at 69.\footnote{167} \textit{See Gideon}, 372 U.S. at 342-45.\footnote{168} \textit{Miranda}, 384 U.S. at 444-45.\footnote{169} \textit{See Barrett}, 479 U.S. at 529; \textit{Smith}, 469 U.S. at 95-96.
ambiguous and therefore could be ignored. If the interrogator thinks that the statement is ambiguous he can ignore the statement and continue questioning. Only by holding that when an ambiguous request is made, all substantive questioning must stop, and by requiring clarifying questions, can the accused's right to assistance of counsel be protected.\textsuperscript{170}  

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