SUPREME COURT OF THE UNITED STATES

No. 92–1949

ROBERT L. DAVIS, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

[June 24, 1994]

JUSTICE SOUTER, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE GINSBURG join, concurring in the judgment.

In the midst of his questioning by naval investigators, petitioner said "maybe I should talk to a lawyer." The investigators promptly stopped questioning Davis about the killing of Keith Shackleton and instead undertook to determine whether he meant to invoke his right to counsel, see *Miranda* v. *Arizona*, 384 U. S. 436 (1966). According to testimony accepted by the courts below, Davis answered the investigators' questions on that point by saying, "I'm not asking for a lawyer," and "No, I don't want to talk to a lawyer." Only then did the interrogation resume (stopping for good when petitioner said, "I think I want a lawyer before I say anything else").

I agree with the majority that the Constitution does not forbid law enforcement officers to pose questions (like those directed at Davis) aimed solely at clarifying whether a suspect's ambiguous reference to counsel was meant to assert his Fifth Amendment right. Accordingly I concur in the judgment affirming Davis's conviction, resting partly on evidence of statements given after agents ascertained that he did not wish to deal with them through counsel. I cannot, however, join in my colleagues' further conclusion that if the investigators here had been so inclined, they were at liberty to disregard Davis's reference to a lawyer entirely, in accordance with a general rule that interrogators have no legal obligation to discover

what a custodial subject meant by an ambiguous statement that could reasonably be understood to express a desire to consult a lawyer.

Our own precedent, the reasonable judgments of the majority of the many courts already to have addressed the issue before us,[1] and the advocacy of a considerable body of law enforcement officials[2] are to the contrary. All argue against the Court's approach today, which draws a sharp line between interrogated suspects who "clearly" assert their right to counsel, *ante*, at 9, and those who say something that may, but may not, express a desire for counsel's presence, the former suspects being assured that questioning will not resume without counsel present, see *Miranda*, *supra,* at 474, *Edwards* v. *Arizona*, 451 U. S. 477, 484–485 (1981); *Minnick* v. *Mississippi*, 498 U. S. 146

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[1]See, *e.g.*, *United States* v. *Porter*, 776 F. 2d 370 (CA1 1985) (en banc); *United States* v. *Gotay*, 844 F. 2d 971, 975 (CA2 1988); *Thompson* v. *Wainwright*, 601 F. 2d 768, 771–772 (CA5 1979) (en banc); *United States* v. *Fouche*, 833 F. 2d 1284, 1287 (CA9 1987); *United States* v. *March*, 999 F. 2d 456, 461–462 (CA10 1993); *United States* v. *Mendoza-Cecelia*, 963 F. 2d 1467, 1472 (CA11 1992); see also *Howard* v. *Pung*, 862 F. 2d 1348 (CA8 1988). The weight of state-court authority is similarly lopsided, see, *e.g.*, *People* v. *Benjamin*, 732 P. 2d 1167, 1171 (Colo. 1987); *Crawford* v. *State*, 580 A. 2d 571, 576–577 (Del. 1990); *Martinez* v. *State*, 564 So. 2d 1071, 1074 (Fla. 1990); *State* v. *Robinson*, 427 N. W. 2d 217, 223 (Minn. 1988).

[2]See Brief for Americans for Effective Law Enforcement, Inc., International Association of Chiefs of Police, Inc. National District Attorneys Association, and National Sheriffs' Association as *Amici Curiae* 5 (the approach advocated here "is a common sense resolution of the problem. It fully accommodates the rights of the subject, while at the same time preserv[ing] the interests of law enforcement and of the public welfare"); see also Brief for United States 20 (approach taken by the Court does not "fulfill the fundamental purpose of *Miranda*") (internal quotation marks omitted).

(1990), the latter being left to fend for themselves. The concerns of fairness and practicality that have long anchored our *Miranda* case law point to a different response: when law enforcement officials "reasonably do not know whether or not the suspect wants a lawyer," *ante*, at 7, they should stop their interrogation and ask him to make his choice clear.

While the question we address today is an open one,[3] its answer requires coherence with nearly three

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[3]The majority acknowledges, *ante*, at 4, that we have declined (despite the persistence of divergent approaches in the lower courts) to decide the operative rule for such ambiguous statements, see, *e.g.*, *Connecticut* v. *Barrett*, 479 U. S. 523, 529, n. 3 (1987); *Mueller* v. *Virginia*, 507 U. S. ___ (1993) (White, J., dissenting from denial of certiorari), but then suggests that the conclusion it reaches was foreshadowed by *McNeil* v. *Wisconsin*, 501 U. S. 171 (1991), where we noted that the "*likelihood* that a suspect would wish counsel to be present" was not dispositive. *Id.*, at 178. But we were not addressing the degree of clarity required to activate the counsel right (let alone endorsing the standard embraced today), as is evident from the very page of *McNeil* cited, where we were careful to say only that the *Miranda* counsel right "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *Ibid.* *McNeil* instead made the different and familiar point that courts may not presume that a silent defendant "would" want a lawyer whenever circumstances suggest that representation "would" be in his interest.

Nor may this case be disposed of by italicizing the words of *Edwards* v. *Arizona*, 451 U. S. 477, 485 (1981) to the effect that when a suspect "clearly assert[s]" his right, questioning must cease. See *ante*, at 7. Even putting

decades of case law addressing the relationship between police and criminal suspects in custodial interrogation. Throughout that period, two precepts have commanded broad assent: that the *Miranda* safeguards exist "to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process," see *Connecticut* v. *Barrett*, 479 U. S. 523, 528 (1987) (quoting *Miranda*, 384 U. S., at 469, and supplying emphasis), and that the justification for *Miranda*

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aside that the particular statement in that case was not entirely clear (the highest court to address the question described it as "equivocal," see *State* v. *Edwards*, 122 Ariz. 206, 211, 594 P. 2d 72, 76 (1979); see also 451 U. S., at 480, n. 6), *Edwards* no more decided the legal consequences of a less than "clear" statement than *Miranda*, by saying that explicit waivers are sufficient, 384 U. S., at 475, settled whether they are necessary. See *North Carolina* v. *Butler*, 441 U. S. 369, 373 (1979) (holding they are not). Were it otherwise, there would have been no need after *Edwards* to identify the issue as unresolved, but see *Barrett*, *supra; Smith* v. *Illinois*, 469 U. S. 91, 95–96 (1984) *(per curiam)*.

Nor, finally, is it plausible to read *Miranda* itself as a presage of the Court's rule, on account of language suggesting that questioning need not stop when a request for counsel is "`indecisive.'" *Ante*, at 8 (quoting *Miranda*, 384 U. S., at 485). The statement quoted, however, is not taken from the Court's holding, but rather from a lengthy direct quotation of a letter to the Court from the Solicitor General, purporting to summarize then-current FBI practice (which the Court observed was "consistent," *id.*, at 484, with the rule announced). In any event, the letter further explains that, under the FBI policy, the "indecisive" suspect may be "question[ed] on whether he did or did not waive counsel," *id.*, at 485, an approach closer to the one advocated here than to the one the Court adopts.

rules, intended to operate in the real world, "must be consistent with . . . practical realities." *Arizona* v. *Roberson*, 486 U. S. 675, 688 (1988) (KENNEDY, J., dissenting). A rule barring government agents from further interrogation until they determine whether a suspect's ambiguous statement was meant as a request for counsel fulfills both ambitions. It assures that a suspect's choice whether or not to deal with police through counsel will be "scrupulously honored," *Miranda*, *supra,* at 479; cf. *Michigan* v. *Mosley*, 423 U. S. 96, 110, n. 2 (1975) (White, J., concurring in result), and it faces both the real-world reasons why misunderstandings arise between suspect and interrogator and the real-world limitations on the capacity of police and trial courts to apply fine distinctions and intricate rules.

Tested against the same two principles, the approach the Court adopts does not fare so well. First, as the majority expressly acknowledges, see *ante*, at 8, criminal suspects who may (in *Miranda*'s words) be "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures," 384 U. S., at 457, would seem an odd group to single out for the Court's demand of heightened linguistic care. A substantial percentage of them lack anything like a confident command of the English language, see, *e.g.*, *United States* v. *De la Jara*, 973 F. 2d 746, 750 (CA9 1992); many are "woefully ignorant," *Miranda*, *supra,* at 468; cf. *Davis* v. *North Carolina*, 384 U. S. 737, 742 (1966); and many more will be sufficiently intimidated by the interrogation process or overwhelmed by the uncertainty of their predicament that the ability to speak assertively will abandon them.[4] Indeed, the awareness of just these

[4]Social science confirms what common sense would suggest, that individuals who feel intimidated or

realities has, in the past, dissuaded the Court from placing any burden of clarity upon individuals in custody, but has led it instead to require that requests for counsel be "give[n] a broad, rather than a narrow, interpretation," see *Michigan* v. *Jackson*, 475 U. S. 625, 633 (1986); *Barrett*, 479 U. S., at 529, and that courts "indulge every reasonable presumption," *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938) (internal quotation marks omitted), that a suspect has not waived his right to counsel under *Miranda*, see, *e.g.*, *Oregon* v. *Bradshaw*, 462 U. S. 1039, 1051 (1983) (Powell, J., concurring) ("We are unanimous in agreeing . . . that the *[Miranda]* right to counsel is a prime example of those rights requiring the special protection of the knowing and intelligent waiver standard") (internal quotation marks and brackets omitted); cf. *Minnick*, 498 U. S., at 160 (SCALIA, J., dissenting) ("[W]e have adhered to the principle that nothing less than the *Zerbst* standard" is appropriate for *Miranda* waivers).

Nor may the standard governing waivers as expressed in these statements be deflected away by

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powerless are more likely to speak in equivocal or nonstandard terms when no ambiguity or equivocation is meant. See W. O'Barr, Linguistic Evidence: Language, Power and Strategy in the Courtroom 61–71 (1982). Suspects in police interrogation are strong candidates for these effects. Even while resort by the police to the "third degree" has abated since *Miranda*, the basic forms of psychological pressure applied by police appear to have changed less. Compare, *e.g.*, *Miranda*, *supra*, at 449 ("`[T]he `principal psychological factor contributing to a successful interrogation is *privacy*'") (quoting F. Inbau & J. Reid, Criminal Interrogations and Confessions 1 (1962)), with F. Inbau, J. Reid, & J. Buckley, Criminal Interrogation and Confessions 24 (3d ed. 1986) ("The principal psychological factor contributing to a successful interrogation is privacy").

drawing a distinction between initial waivers of *Miranda* rights and subsequent decisions to reinvoke them, on the theory that so long as the burden to demonstrate waiver rests on the government, it is only fair to make the suspect shoulder a burden of showing a clear subsequent assertion. *Miranda* itself discredited the legitimacy of any such distinction. The opinion described the object of the warning as being to assure "a continuous opportunity to exercise [the right of silence]," *id.,* at 444; see also *Moran* v. *Burbine*, 475 U. S., at 458 (STEVENS, J., dissenting); accord, *id.*, at 423, n. 1. "[C]ontinuous opportunity" suggests an unvarying one, governed by a common standard of effectiveness. The suggestion is confirmed by the very first statement that follows, that "there can be no questioning" if the suspect "indicates in any manner and at any stage of the process that he wishes to consult with an attorney," *Miranda,* 384 U. S. at 444–445. "[A]t any stage" obviously includes the stage after initial waiver and the commencement of questioning, and "indicates in any manner" is a rule plainly in tension with the indication "with a vengeance," see *id.,* at 505 (Harlan, J., dissenting) that the Court would require for exercise of the "continuous" right at some point after initial waiver.

The Court defends as tolerable the certainty that some poorly expressed requests for counsel will be disregarded on the ground that *Miranda* warnings suffice to alleviate the inherent coercion of the custodial interrogation. *Ante*, at 8. But, "a once-stated warning, delivered by those who will conduct the interrogation cannot itself suffice" to "assure that the . . . right to choose between silence and speech remains unfettered throughout the interrogation process," 384 U. S., at 469. Nor does the Court's defense reflect a sound reading of the case it relies on, *Moran* v. *Burbine*, *supra:*

"Beyond [the] duty to inform, *Miranda* requires

> that the police respect the [suspect's] decision to exercise the rights outlined in the warnings. `If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, or [if he] states that he wants an attorney, the interrogation must cease.'" *Id.,* at 420 (quoting *Miranda*, *supra*, at 473–474).

While *Moran* held that a subject's knowing and voluntary waiver of the right to counsel is not undermined by the fact that police prevented an unsummoned lawyer from making contact with him, it contains no suggestion that *Miranda* affords as ready a tolerance for police conduct frustrating the suspect's subjectively held (if ambiguously expressed) desire for counsel. See 475 U. S. at 423 (contrasting *Escobedo* v. *Illinois*, 378 U. S. 478, 481 (1964), where "police incorrectly told the *suspect* that his lawyer `didn't want to see him'"); see also *Miranda*, *supra*, at 468 (purpose of warnings is to "show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it").

Indeed, it is easy, amidst the discussion of layers of protection, to lose sight of a real risk in the majority's approach, going close to the core of what the Court has held that the Fifth Amendment provides. The experience of the timid or verbally inept suspect (whose existence the Court acknowledges) may not always closely follow that of the defendant in *Edwards* v. *Arizona*, (whose purported waiver of his right to counsel, made after having invoked the right, was held ineffective, lest police be tempted to "badge[r]" others like him, see *Michigan* v. *Harvey*, 494 U. S. 344, 350 (1990)). Indeed, it may be more like that of the defendant in *Escobedo* v. *Illinois*, *supra*, whose sense of dilemma was heightened by his interrogators' denial of his requests to talk to a lawyer. When a suspect understands his (expressed) wishes to have been ignored (and by hypothesis, he has said something that an objective listener could

"reasonably," although not necessarily, take to be a request), in contravention of the "rights" just read to him by his interrogator, he may well see further objection as futile and confession (true or not) as the only way to end his interrogation.[5]

Nor is it enough to say that a "`statement either is . . . an assertion of the right to counsel or it is not.'" *Ante*, at 7 (quoting *Smith* v. *Illinois*, 469 U. S., at 97–98 (omitting brackets and internal quotation marks). In *Smith*, we neither denied the possibility that a reference to counsel could be ambiguous, see *id.*, at 98; accord, *id.*, at 101 (REHNQUIST, J., dissenting), nor suggested that particular statements should be considered in isolation. *Id.*, at 98.[6] While it might be fair to say that every statement is meant either to express a desire to deal with police through counsel or not, this fact does not dictate the rule that interrogators who hear a statement consistent with

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[5]See *People* v. *Harper*, 94 Ill. App. 3d 298, 300, 418 N. E. 2d 894, 896 (1981) (defendant who asked interrogator to retrieve an attorney's business card from his wallet but was told that it "`wouldn't be necessary'" held not to have "availed himself" of right to counsel); see also *Cooper* v. *Dupnik*, see 963 F. 2d 1220, 1225 (CA9 1992) (en banc) (describing elaborate police Task Force plan to ignore systematically a suspect's requests for counsel, on the theory that such would induce hopelessness and thereby elicit an admission, which would then be used to keep the suspect off the witness stand, see *Oregon* v. *Haas*, 420 U. S. 714 (1975) (statements obtained in violation of *Miranda* rules admissible for impeachment purposes)).

[6]Indeed, our *Smith* decision was quoting from the dissent below, which adverts in the same sentence to the possibility of "*bona fide* doubt the officer may still have as to whether the defendant desires counsel," in which case "strictly" limited questioning is prescribed. See *People* v. *Smith,* 102 Ill. 2d 365, 375 46 N. E. 2d 236, 241 (1984) (opinion of Simon, J.).

either possibility may presume the latter and forge ahead; on the contrary, clarification is the intuitively sensible course.

The other justifications offered for the "requisite level of clarity" rule, *ante*, at 7, are that, whatever its costs, it will further society's strong interest in "effective law enforcement," *ante*, at 8, and maintain the "ease of application," *id.*, at 9, that has long been a concern of our *Miranda* jurisprudence. With respect to the first point, the margin of difference between the clarification approach advocated here and the one the Court adopts is defined by the class of cases in which a suspect, if asked, would make it plain that he meant to request counsel (at which point questioning would cease). While these lost confessions do extract a real price from society, it is one that *Miranda* itself determined should be borne. Cf. Brief for Americans for Effective Law Enforcement, Inc., et al. as *Amici Curiae* 5 (the clarification approach "preserves the interests of law enforcement and the public welfare"); *Escobedo*, 378 U. S. at 490 ("No 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").

As for practical application, while every approach, including the majority's, will involve some "difficult judgment calls,"[7] the rule argued for here would

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[7]In the abstract, nothing may seem more clear than a "clear statement" rule, but in police stations and trial courts the question, "how clear is clear?" is not so readily answered. When a suspect says, "uh, yeah, I'd like to do that" after being told he has a right to a lawyer, has he "clearly asserted" his right? Compare *Smith* v. *Illinois*, 469 U. S. 91, 97 (1984) *(per curiam)* (statement was "`neither indecisive nor ambiguous'") (citation omitted)), with *id.*, at 101 (REHNQUIST, J., dissenting) (questioning clarity); see also *Oregon* v. *Bradshaw*, 462 U. S. 1039,

relieve the officer of any responsibility for guessing "whether the suspect in fact wants a lawyer even though he hasn't said so," *ante*, at 9. To the contrary, it would assure that the "judgment call" will be made by the party most competent to resolve the ambiguity, who our case law has always assumed should make it: the individual suspect.

Although I am convinced that the Court has taken the wrong path, I am not persuaded by the

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1041–1042 (1983) (plurality opinion) ("I do want an attorney before it goes very much further"); *Edwards*, 451 U. S., at 479 ("`I want an attorney before making a deal'"); cf. n. 3, *supra*. Indeed, in this case, when Davis finally said, "I think I want a lawyer before I say anything else," the agents ceased questioning; but see *People* v. *Kendricks*, 121 Ill. App. 3d 442, 446, 459 N. E. 2d 1137, 1139 (1984) (agents need not stop interrogation when suspect says, "`I think I might need a lawyer'"); Cf. *People* v. *Santiago*, 133 App. Div. 429, 430–431, 519 N. Y. S. 2d 413, 414–415 (1987) ("`Will you supply [a lawyer] now so that I may ask him should I continue with this interview at this moment?'" held "not . . . an unequivocal invocation"). See generally *Smith*, *supra*, at 101 (REHNQUIST, J., dissenting) (noting that statements are rarely "crystal-clear . . . . [D]ifferences between certainty and hesitancy may well turn on the inflection with which words are spoken, especially where [a] statement is isolated from the statements surrounding it").

As a practical matter, of course, the primary arbiters of "clarity" will be the interrogators themselves, who tend as well to be courts' preferred source in determining the precise words a suspect used. And when an inculpatory statement has been obtained as a result of an unrecorded, incommunicado interrogation, these officers rarely lose "swearing matches" against criminal defendants at suppression hearings.

petitioner's contention, that even ambiguous statements require an end to all police questioning. I recognize that the approach petitioner urges on us can claim some support from our case law, most notably in the "indicates in any manner" language of *Miranda*, and I do not deny that the rule I endorse could be abused by "clarifying" questions that shade subtly into illicitly badgering a suspect who wants counsel, but see *Thompson* v. *Wainwright*, 601 F. 2d 768, 771–772 (CA5 1979); cf. *State* v. *Walkowiak*, No. 92–1558–CR (Wis. May 13, 1994) (Abrahamson, J., concurring) (suggesting means properly to focus clarification enquiry). But the petitioner's proposal is not entirely in harmony with all the major themes of *Miranda* case law, its virtues and demerits being the reverse images of those that mark the Court's rule. While it is plainly wrong, for example, to continue interrogation when the suspect wants it to stop (and so indicates), the strong bias in favor of individual choice may also be disserved by stopping questioning when a suspect wants it to continue (but where his statement might be understood otherwise), see *Michigan* v. *Mosley*, 423 U. S. 96, 109 (1975) (White, J., concurring in result) ("[W]e have . . . rejected [the] paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case"). The costs to society of losing confessions would, moreover, be especially hard to bear where the suspect, if asked for his choice, would have chosen to continue. One need not sign the majority's opinion here to agree that resort to the rule petitioner argues for should be had only if experience shows that less drastic means of safeguarding suspects' constitutional rights are not up to the job, see generally *United States* v. *Leon* 468 U. S. 897, 927–928 (1984) (BLACKMUN, J., concurring) (exclusionary rule exception must be "tested in the real world of state and federal law enforcement, and this Court will attend to the results").

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Our cases are best respected by a rule that when a suspect under custodial interrogation makes an ambiguous statement that might reasonably be understood as expressing a wish that a lawyer be summoned (and questioning cease), interrogators' questions should be confined to verifying whether the individual meant to ask for a lawyer. While there is reason to expect that trial courts will apply today's ruling sensibly (without requiring criminal suspects to speak with the discrimination of an Oxford don) and that interrogators will continue to follow what the Court rightly calls "good police practice" (compelled up to now by a substantial body of state and Circuit law), I believe that the
case law under *Miranda* does not allow them to do otherwise.