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 O'CONNOR delivered the opinion of the Court.

In *Edwards* v. *Arizona*, 451 U. S. 477 (1981), we held that law enforcement officers must immediately cease questioning a suspect who has clearly asserted his right to have counsel present during custodial interrogation. In this case we decide how law enforcement officers should respond when a suspect makes a reference to counsel that is insufficiently clear to invoke the *Edwards* prohibition on further questioning.

Pool brought trouble—not to River City, but to the Charleston Naval Base. Petitioner, a member of the United States Navy, spent the evening of October 2, 1988, shooting pool at a club on the base. Another sailor, Keith Shackleford, lost a game and a $30 wager to petitioner, but Shackleford refused to pay. After the club closed, Shackleford was beaten to death with a pool cue on a loading dock behind the commissary. The body was found early the next morning.

The investigation by the Naval Investigative Service (NIS) gradually focused on petitioner. Investigative agents determined that petitioner was at the club that evening, and that he was absent without

authorization from his duty station the next morning. The agents also learned that only privately owned pool cues could be removed from the club premises, and that petitioner owned two cues—one of which had a bloodstain on it. The agents were told by various people that petitioner either had admitted committing the crime or had recounted details that clearly indicated his involvement in the killing.

On November 4, 1988, petitioner was interviewed at the NIS office. As required by military law, the agents advised petitioner that he was a suspect in the killing, that he was not required to make a statement, that any statement could be used against him at a trial by court-martial, and that he was entitled to speak with an attorney and have an attorney present during questioning. See Art. 31, Uniform Code of Military Justice (UCMJ), 10 U. S. C. §831; Mil. Rule Evid. 305; Manual for Courts-Martial A22–13 (1984). Petitioner waived his rights to remain silent and to counsel, both orally and in writing.

About an hour and a half into the interview, petitioner said, "Maybe I should talk to a lawyer." App. 135. According to the uncontradicted testimony of one of the interviewing agents, the interview then proceeded as follows:

> "[We m]ade it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, 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.*, at 136.

After a short break, the agents reminded petitioner of his rights to remain silent and to counsel. The interview then continued for another hour, until petitioner said, "I think I want a lawyer before I say anything else." *Id.*, at 137. At that point, questioning ceased.

At his general court-martial, petitioner moved to suppress statements made during the November 4 interview. The military judge denied the motion, holding that "the mention of a lawyer by [petitioner] during the course of the interrogation [was] not in the form of a request for counsel and . . . the agents properly determined that [petitioner] was not indicating a desire for or invoking his right to

counsel." *Id.*, at 164. Petitioner was convicted on one specification of unpremeditated murder, in violation of Art. 118, UCMJ, 10 U. S. C. §918. He was sentenced to confinement for life, a dishonorable discharge, forfeiture of all pay and allowances, and a reduction in rank to the lowest pay grade. The convening authority approved the findings and sentence. The Navy-Marine Corps Court of Military Review affirmed. App. to Pet. for Cert. 12a-15a.

The United States Court of Military Appeals granted discretionary review and affirmed. 36 M. J. 337 (1993). The court recognized that the state and federal courts have developed three different approaches to a suspect's ambiguous or equivocal request for counsel:

> "Some jurisdictions have held that any mention of counsel, however ambiguous, is sufficient to require that all questioning cease. Others have attempted to define a threshold standard of clarity for invoking the right to counsel and have held that comments falling short of the threshold do not invoke the right to counsel. Some jurisdictions . . . have held that all interrogation about the offense must immediately cease whenever a suspect mentions counsel, but they allow interrogators to ask narrow questions designed to clarify the earlier statement and the [suspect's] desires respecting counsel." *Id.*, at 341 (internal quotation marks omitted).

Applying the third approach, the court held that petitioner's comment was ambiguous, and that the NIS agents properly clarified petitioner's wishes with respect to counsel before continuing questioning him about the offense. *Id.*, at 341–342.

Although we have twice previously noted the varying approaches the lower courts have adopted with respect to ambiguous or equivocal references to counsel during custodial interrogation, see *Connecticut* v. *Barrett*, 479 U. S. 523, 529–530, n. 3

(1987); *Smith* v. *Illinois*, 469 U. S. 91, 96, n. 3 (1984) *(per curiam)*, we have not addressed the issue on the merits. We granted certiorari, 510 U. S. ___ (1993), to do so.

The Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings, see *United States* v. *Gouveia*, 467 U. S. 180, 188 (1984), and before proceedings are initiated a suspect in a criminal investigation has no constitutional right to the assistance of counsel. Nevertheless, we held in *Miranda* v. *Arizona*, 384 U. S. 436, 469–473 (1966), that a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and that the police must explain this right to him before questioning begins. The right to counsel established in *Miranda* was one of a "series of recommended `procedural safeguards' . . . [that] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." *Michigan* v. *Tucker*, 417 U. S. 433, 443–444 (1974); see U. S. Const., Amdt. 5 ("No person . . . shall be compelled in any criminal case to be a witness against himself").[1]

[1]We have never had occasion to consider whether the Fifth Amendment privilege against self incrimination, or the attendant right to counsel during custodial interrogation, applies of its own force to the military, and we need not do so here. The President, exercising his authority to prescribe procedures for military criminal proceedings, see Art. 36(a), UCMJ, 10 U. S. C. §836(a), has decreed that statements obtained in violation of the Self-Incrimination Clause are generally not admissible at trials by court-martial. Mil. Rules Evid. 304(a) and (c)(3). Because the Court of Military Appeals has held that our cases

The right to counsel recognized in *Miranda* is sufficiently important to suspects in criminal investigations, we have held, that it "requir[es] the special protection of the knowing and intelligent waiver standard." *Edwards* v. *Arizona*, 451 U. S., at 483. See *Oregon* v. *Bradshaw*, 462 U. S. 1039, 1046–1047 (1983) (plurality opinion); *id.*, at 1051 (Powell, J., concurring in judgment). If the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him. *North Carolina* v. *Butler*, 441 U. S. 369, 372–376 (1979). But if a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation. *Edwards* v. *Arizona*, *supra*, at 484–485.

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construing the Fifth Amendment right to counsel apply to military interrogations and control the admissibility of evidence at trials by court-martial, see, *e.g.*, *United States* v. *McLaren*, 38 M. J. 112, 115 (1993); *United States* v. *Applewhite*, 23 M. J. 196, 198 (1987), and the parties do not contest this point, we proceed on the assumption that our precedents apply to courts-martial just as they apply to state and federal criminal prosecutions.

We also note that the Government has not sought to rely in this case on 18 U. S. C. §3501, "the statute governing the admissibility of confessions in federal prosecutions," *United States* v. *Alvarez-Sanchez*, 511 U. S. ___, ___ (1994) (slip op., at 1), and we therefore decline the invitation of some *amici* to consider it. See Brief for Washington Legal Foundation et al. as *Amici Curiae* 7–14. Although we will consider arguments raised only in an *amicus* brief, see *Teague* v. *Lane*, 489 U. S. 288, 300 (1989) (plurality opinion), we are reluctant to do so when the issue is one of first impression involving the interpretation of a federal statute on which the Department of Justice expressly declines to take a position. See Tr. of Oral Arg. 44–47.

This "second layer of prophylaxis for the *Miranda* right to counsel," *McNeil* v. *Wisconsin*, 501 U. S. 171, 176 (1991), is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Michigan* v. *Harvey*, 494 U. S. 344, 350 (1990). To that end, we have held that a suspect who has invoked the right to counsel cannot be questioned regarding any offense unless an attorney is actually present. *Minnick* v. *Mississippi*, 498 U. S. 146 (1990); *Arizona* v. *Roberson*, 486 U. S. 675 (1988). "It remains clear, however, that this prohibition on further questioning—like other aspects of *Miranda*—is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose." *Connecticut* v. *Barrett*, *supra*, at 528.

The applicability of the "`rigid' prophylactic rule" of *Edwards* requires courts to "determine whether the accused *actually invoked* his right to counsel." *Smith* v. *Illinois*, *supra*, at 95 (emphasis added), quoting *Fare* v. *Michael C.*, 442 U. S. 707, 719 (1979). To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry. See *Connecticut* v. *Barrett*, *supra*, at 529. Invocation of the *Miranda* right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *McNeil* v. *Wisconsin*, *supra*, at 178. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning. See *ibid.* ("the *likelihood* that a suspect would wish counsel to be present is not the test for applicability of *Edwards*"); *Edwards* v. *Arizona*, *supra*, at 485 (impermissible for authorities "to reinterrogate an accused in custody if

he has *clearly asserted* his right to counsel") (emphasis added).

Rather, the suspect must unambiguously request counsel. As we have observed, "a statement either is such an assertion of the right to counsel or it is not." *Smith* v. *Illinois*, 469 U. S., at 97–98 (brackets and internal quotation marks omitted). Although a suspect need not "speak with the discrimination of an Oxford don," *post*, at 12 (SOUTER, J., concurring in judgment), he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect. See *Moran* v. *Burbine*, 475 U. S. 412, 433, n. 4 (1986) ("the interrogation must cease until an attorney is present *only* [i]f the individual states that he wants an attorney") (citations and internal quotation marks omitted).

We decline petitioner's invitation to extend *Edwards* and require law enforcement officers to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney. See *Arizona* v. *Roberson*, *supra*, at 688 (KENNEDY, J., dissenting) ("the rule of *Edwards* is our rule, not a constitutional command; and it is our obligation to justify its expansion"). The rationale underlying *Edwards* is that the police must respect a suspect's wishes regarding his right to have an attorney present during custodial interrogation. But 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," *Michigan* v. *Mosley*, 423 U. S. 96, 102 (1975), because it would needlessly prevent the police from questioning a suspect in the absence of

counsel even if the suspect did not wish to have a lawyer present. Nothing in *Edwards* requires the provision of counsel to a suspect who consents to answer questions without the assistance of a lawyer. In *Miranda* itself, we expressly rejected the suggestion "that each police station must have a `station house lawyer' present at all times to advise prisoners," 384 U. S., at 474, and held instead that a suspect must be told of his right to have an attorney present and that he may not be questioned after invoking his right to counsel. We also noted that if a suspect is "indecisive in his request for counsel," the officers need not always cease questioning. See *id.*, at 485.

We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present. But the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves. "[F]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process." *Moran* v. *Burbine*, *supra*, at 427. A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted. Although *Edwards* provides an additional protection—if a suspect subsequently requests an attorney, questioning must cease—it is one that must be affirmatively invoked by the suspect.

In considering how a suspect must invoke the right to counsel, we must consider the other side of the *Miranda* equation: the need for effective law enforcement. Although the courts ensure compliance with the *Miranda* requirements through the exclusionary rule, it is police officers who must

actually decide whether or not they can question a suspect. The *Edwards* rule—questioning must cease if the suspect asks for a lawyer—provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information. But if we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney, this clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he hasn't said so, with the threat of suppression if they guess wrong. We therefore hold that, after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.

Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. That was the procedure followed by the NIS agents in this case. Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel. But we decline to adopt a rule requiring officers to ask clarifying questions. If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.

To recapitulate: We held in *Miranda* that a suspect is entitled to the assistance of counsel during custodial interrogation even though the Constitution does not provide for such assistance. We held in *Edwards* that if the suspect invokes the right to counsel at any time, the police must immediately

cease questioning him until an attorney is present. But we are unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect *might* want a lawyer. Unless the suspect actually requests an attorney, questioning may continue.

The courts below found that petitioner's remark to the NIS agents—"Maybe I should talk to a lawyer"—was not a request for counsel, and we see no reason to disturb that conclusion. The NIS agents therefore were not required to stop questioning petitioner, though it was entirely proper for them to clarify whether petitioner in fact wanted a lawyer. Because there is no ground for suppression of petitioner's statements, the judgment of the Court of Military Appeals is

Affirmed.