

ARTICLES

DEFLECTING A SUSPECT FROM REQUESTING AN ATTORNEY

*Welsh S. White** **

INTRODUCTION

Max Alexander Soffar, who had been arrested for motorcycle theft in Harris County, Texas, hinted to the arresting officer that he had been involved in the killing of bowling alley employees in Houston, Texas. At the police station, officers summoned Officer Clawson to assist in the interrogation. Soffar had previously worked as an informant for Clawson and viewed him as a friend. Clawson gave Soffar a new set of *Miranda* warnings and Soffar waived his rights. A little later, Detective Schultz questioned Soffar and Soffar recounted details relating to the killings that Schultz believed “only the perpetrator would know.”¹

After about thirty minutes of questioning, Schultz exited the interrogation room and told Clawson he had “hit a brick wall” with Soffar. Clawson then again spoke with Soffar. During this conversation, they had the following interchange according to Clawson:

Soffar: Should I get an attorney or talk to the detective?

* Born, April 17, 1940, Philadelphia, Pennsylvania; died, December 31, 2005, Pittsburgh, Pennsylvania. Professor White held the Bessie McKee Walthour Endowed Chair at the University of Pittsburgh School of Law. He completed this article after his diagnosis of lung cancer in August 2005.

** The Law Review thanks Linda T. White for allowing us to publish her late husband’s final article. We also thank Albert W. Alschuler for reviewing our extremely minimal editing of this article.

1. Soffar v. Cockrell, 300 F.3d 588, 591 (5th Cir. 2002).

Clawson: If [you were] involved in the crime, you should tell the detective [you were] in it; otherwise [you] should get a lawyer.²

Soffar then asked Clawson “how he could get a lawyer.”³ In response, Clawson asked Soffar “if he could afford a lawyer,” despite “knowing that he could not.”⁴ Soffar next asked Clawson how he could get a court-appointed lawyer and how soon he could have one. Although Clawson knew that Harris County had a 72-hour rule, which provides that a suspect must be charged (and provided with an attorney) or released within 72 hours, he did not tell that to Soffar. Instead, Clawson replied “that he did not know Harris County procedures,” but he “guessed that it could take as little as one day or as long as a month.”⁵ Soffar then said, “so you’re telling me I’m on my own.”⁶ Clawson remained silent.

Soffar then agreed to answer questions. Subsequently, he signed statements in which he admitted participating in the Houston bowling alley killings. These statements were used by the government to obtain Soffar’s conviction and death sentence.⁷

A panel of the Fifth Circuit held that Clawson’s responses to Soffar violated Soffar’s right to have an attorney present during a custodial interrogation,⁸ as guaranteed by *Miranda v. Arizona*⁹ and *Edwards v. Arizona*.¹⁰ Following Fifth Circuit precedent, the panel held that Clawson’s responses to Soffar’s questions violated *Miranda* and *Edwards* because an officer responding to an ambiguous or equivocal request for an attorney is not permitted to “mislead [a suspect] into abandoning his equivocal request for counsel.”¹¹

On rehearing en banc, however, the Fifth Circuit reached the opposite result. The en banc court concluded that the Supreme Court’s decision in

2. *Id.* at 605 (DeMoss, J., dissenting).

3. *Id.* at 591 (majority opinion).

4. *Id.*

5. *Id.*

6. *Id.* In the state habeas hearing, which took place earlier, Clawson testified that he had told Soffar, “yes, you are.” See *id.* at 591 n.3.

7. *Id.* at 591.

8. *Soffar v. Johnson*, 237 F.3d 411, 457 (5th Cir. 2000), *reh’g en banc granted, vacated*, 253 F.3d 227 (5th Cir. 2001), *reh’g en banc sub nom. Soffar v. Cockrell*, 300 F.3d 588 (5th Cir. 2002).

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

10. 451 U.S. 477 (1981).

11. *Soffar v. Johnson*, 237 F.3d at 453 (quoting *Thompson v. Wainwright*, 601 F.2d 768, 772 (5th Cir. 1979)).

*Davis v. United States*¹² preempted the Fifth Circuit's pre-*Davis* prohibition on interrogation tactics designed to mislead suspects who asked about or made equivocal references to requesting an attorney.¹³ It further concluded that Clawson's misleading statements did not invalidate Soffar's prior waiver of his *Miranda* rights and, therefore, Soffar's waiver of his right to request an attorney during his custodial interrogation was valid.¹⁴

The interchanges between Soffar and Clawson provide two examples of the tactics police interrogators employ when a suspect in police custody refers to the possibility of requesting an attorney or asks an officer about having one. The two *Soffar* opinions, moreover, provide some indication of the approaches courts have adopted in addressing whether such tactics violate suspects' rights. In particular, the Fifth Circuit's en banc *Soffar* opinion suggests that the Supreme Court's decision in *Davis* may have had unanticipated consequences, providing the police with extraordinarily wide leeway to employ interrogation tactics that deflect suspects from requesting an attorney during a custodial interrogation.

In this article, I describe interrogation tactics that the police employ to deflect suspects from requesting an attorney and consider approaches that the courts are or should be using to safeguard the suspect's right to have an attorney present during custodial interrogation. In Part I, I provide some background relating to the suspect's right to request an attorney during a custodial interrogation, explaining how pre-*Miranda* interrogation manuals addressed this issue, surveying the most recent empirical data relating to it and tracing ways in which the Court addressed it in *Miranda* and in post-*Miranda* cases. In Part II, I provide an overview of the tactics employed by interrogators when a suspect refers to or asks a question about having an attorney. In Part III, I discuss the tests employed by lower court cases after *Davis*. As I explain, most lower courts have interpreted the Court's decisions in *Moran v. Burbine*¹⁵ and *Davis* to provide tests that allow interrogators to employ a wide range of tactics that are designed to deflect suspects from invoking their right to an attorney. In Part IV, I argue that stricter tests are appropriate. Drawing especially from the Court's analysis in *Missouri v.*

12. 512 U.S. 452 (1994).

13. *Soffar v. Cockrell*, 300 F.3d at 595-96 & n.6 (noting that *Davis* "established a bright-line rule" where "a statement either is such an assertion of the right to counsel or it is not") (quoting *Davis*, 512 U.S. at 459), while the panel opinion utilized a totality of circumstances analysis and held that Soffar had "unambiguously requested counsel" (citing *Soffar v. Johnson*, 237 F.3d at 457).

14. *Soffar v. Cockrell*, 300 F.3d at 596.

15. 475 U.S. 412 (1986).

Seibert,¹⁶ I argue that interrogators should be prohibited from employing interrogation tactics that are likely to have the effect of undermining a suspect's understanding of the right to have an attorney present or the nature of the protection provided by that right. In addition, because a suspect's waiver of the *Miranda* rights must be intelligent,¹⁷ I argue that the police should be required to answer accurately suspects' questions relating to the circumstances under which an attorney will be provided if the suspect requests one. In Part V, I illustrate how these tests should apply in practice by considering ten examples. In Part VI, I offer concluding observations.

I. BACKGROUND

As the Court recognized in *Miranda v. Arizona*, interrogation training manuals advise interrogators that an essential element of a successful interrogation is "to deprive [the suspect] of any outside support."¹⁸ The latest interrogation materials continue to emphasize that the interrogator needs to be alone with the suspect in order to develop a relationship that will encourage the suspect to confess or at least to make potentially incriminatory statements to the interrogator.¹⁹ The relationship may be one in which the interrogator dominates the suspect (i.e., overpowering "his will to resist"),²⁰ one in which he establishes a bond with the suspect so that the suspect will trust him,²¹ or simply one in which he convinces the suspect that it is in his best interest to

16. 542 U.S. 600 (2004).

17. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

18. *Id.* at 455.

19. See, e.g., FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 51-64 (4th ed. 2001) (advising interrogators how they can physically arrange the interrogation room so as to enhance the suspect's feelings of isolation). See generally Charles D. Weisselberg, *The Detention and Treatment of Aliens Three Years After September 11: A New New World?*, 38 U.C. DAVIS L. REV. 815, 844-46 (2005) (quoting from sources showing pre- and post-*Miranda* interrogators' emphasis on isolating the suspect and depriving her of outside support).

20. *Miranda*, 384 U.S. at 455. See also Weisselberg, *supra* note 19, at 841-43 (quoting the Director of the Defense Intelligence Agency's description of techniques designed to undermine the resistance of aliens detained for interrogation).

21. See, e.g., *State v. Reilly*, No. 5285 (Conn. Super. Ct. Apr. 12, 1974), *vacated*, 355 A.2d 324 (Conn. Super. Ct. 1976) (noting that the interrogator led the eighteen-year-old suspect to view him as a "father"). See generally Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 615 nn.175-78 (1979) [hereinafter White, *Police Trickery*] (quoting from interrogations of *Reilly* and other cases in which interrogators successfully established bonds of trust with suspects).

disclose information to him.²² Depending on the circumstances, establishing such a relationship may take considerable time.²³

If the suspect is allowed to have an attorney present during the interrogation, this is likely to prevent the interrogator from having sufficient time alone with the suspect to develop the necessary relationship. Pre-*Miranda* interrogation manuals thus advised interrogators how to deal with suspects who requested or asked about the presence of an attorney. The leading interrogation manual (which was then authored by Fred Inbau and John Reid) advised the interrogator to suggest to the suspect that, “particularly if he [was] innocent of the offense under investigation,” he would be better off dealing with the police by himself and thus saving himself or his family from the expense of paying an attorney.²⁴ The interrogator might add, “Joe, I’m only looking for the truth, and if you’re telling the truth, that’s it. You can handle this by yourself.”²⁵ During the pre-*Miranda* era, police were frequently able to obtain incriminating statements from suspects who requested an attorney or asked about the possibility of having one. In some cases, interrogators simply ignored the suspect’s request;²⁶ in others, they were able to dissuade the suspect from contacting an attorney.²⁷

22. See INBAU ET AL., *supra* note 19, at 419 (stating that in order “to persuade a suspect whom the investigator believes to be lying about involvement in a crime to tell the truth,” the investigator must convince “the suspect to believe that he will benefit in some way by telling the truth”).

23. See *id.* at 395 (observing that interrogations may last “several hours”); see also Weisselberg, *supra* note 19, at 842 (quoting the Director of the Defense Intelligence Agency’s statement that effective interrogation of detained aliens “is a process that can take a significant amount of time” and that in some cases “interrogators have been unable to obtain valuable intelligence from a subject until months, or even years, after the interrogation process began”).

24. FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 112 (1962).

25. *Id.* Other pre-*Miranda* interrogation manuals were similar. See W.R. KIDD, POLICE INTERROGATION 169-72 (1953) (advising interrogators how to deal with a suspect who asks for the presence of counsel; among other things, the interrogator is advised that he might say to the suspect, “Why should this very confidential matter get into the hands of a third person? Maybe this lawyer is your friend, but maybe he will use the information against you at some later time. You have nothing to fear if innocent.”); HAROLD MULBAR, INTERROGATION 13 (1951) (advising interrogators to keep phones out of the interrogation room so that the suspect won’t think of calling an attorney; if the suspect asks to call an attorney, the interrogator should “get into a long harangue about the needlessness of his contacting anyone”).

26. See, e.g., *Spano v. New York*, 360 U.S. 315, 318 & n.1 (1959) (noting that the defendant asked to call his attorney but that the officers told him they could not find the attorney’s name in the phone book—a statement about which the Court expressed skepticism because the attorney’s name in fact appeared in the phone book).

27. See, e.g., *State v. Biron*, 123 N.W.2d 392, 394, 396 (Minn. 1963) (stating that the tape of the defendant’s six-hour interrogation indicates that, when the defendant told the police he “would like to have his sister call a lawyer,” police interrogators asked him what lawyer he wanted them to call and dropped the subject when the defendant could not name a lawyer; later, the police told the defendant the police were

In *Miranda*, the Court held that the police may not interrogate a suspect in custody unless they first warn him of certain rights, including the right to have an attorney present during the interrogation and the right to have an attorney appointed to represent him if he can't afford one.²⁸ *Miranda* also stated that if the suspect requests an attorney, the police are not permitted to interrogate him unless one is present.²⁹ In *Edwards v. Arizona*,³⁰ decided fifteen years later, the Court reaffirmed this rule, holding that "when an accused has invoked his right to have counsel present during custodial interrogation," the accused may not be "subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication . . . with the police."³¹

From the time *Miranda* was decided, *Miranda*'s critics have recognized that, of the rights provided by *Miranda*, the suspect's right to have an attorney present during a custodial interrogation has the greatest potential for reducing an interrogator's ability to obtain confessions. In his *Miranda* dissent, Justice Harlan observed that warning the suspect of his right to remain silent and that his statements could be used against him were "minor obstructions,"³² but "to suggest or provide counsel for the suspect simply invites the end of the interrogation."³³ Critics associated with law enforcement issued even more dire predictions.³⁴

Post-*Miranda* interrogators' success in obtaining suspects' incriminating statements following their valid *Miranda* waivers demonstrates that these predictions were erroneous. *Miranda*'s requirements relating to warning suspects and providing them with an attorney did not "end" or even significantly impair police interrogation. During the nineties, empirical data

the only friends he had and they were the ones who could help him). A six-hour tape recording of the Biron interrogation is on file in the libraries of the University of Michigan and the University of Minnesota Schools of Law. For more information relating to the Biron tape, see White, *Police Trickery*, *supra* note 21, at 615 n.177.

28. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

29. *Id.* at 444-45.

30. 451 U.S. 477 (1981).

31. *Id.* at 484-85.

32. *Miranda*, 384 U.S. at 516 (Harlan, J., dissenting).

33. *Id.* at 517.

34. Professor Otis Stephens pointed out that "an array of Supreme Court critics" accused the Warren Court of "'coddling criminals,' 'handcuffing police,' and otherwise undermining 'law and order' at the very time when police faced their most perilous and overwhelming challenge." OTIS H. STEPHENS, JR., *THE SUPREME COURT AND CONFESSIONS OF GUILT* 165 (1973). For comments by other conservative critics of *Miranda*, see WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* 57 (2001).

indicated that police interrogators were able to obtain valid *Miranda* waivers from approximately 80% of all suspects.³⁵ As the Court stated in *Dickerson v. United States*,³⁶ moreover, once a court has determined that a defendant has validly waived his *Miranda* rights, incriminating statements made by the suspect to the police will nearly always be admissible.³⁷

Nevertheless, modern critics of *Miranda* have continued to focus on *Miranda*'s requirements that the police warn the suspect of this right to have an attorney and cease interrogation if he requests one. In his pre-*Dickerson* article asserting that *Miranda*'s warning and waiver requirements should be replaced by an alternative that includes videotaping police interrogations,³⁸ then-Professor (now Judge) Paul Cassell recommended dispensing "with the *Miranda* offer of counsel" which he stated has been "identified as a particularly harmful aspect of *Miranda*."³⁹ In a subsequent article, Cassell emphasized that, under his proposal, law enforcement would be able to obtain more incriminating statements from suspects because the "police would not have to fold up the tent just because a suspect said the magic words 'I want a lawyer.'"⁴⁰

The limited available data tends to confirm that the right to request an attorney provides the most powerful safeguard for suspects confronted with the possibility of custodial interrogation. In an empirical study analyzing cases in which Salt Lake City interrogators warned suspects of their *Miranda* rights and the suspects responded,⁴¹ Cassell and Bret Hayman found that when

35. See Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 859 & n.115 (1996) (noting that 83.7 percent of suspects from a sample of 129 waived their rights); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 (1996) (noting that 78.3 percent of suspects from a sample of 175 waived their rights).

36. 530 U.S. 428 (2000).

37. *Id.* at 444 ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." (quoting *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984))). See Welsh S. White, *Miranda's Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1219-20 n.54 (2001) (noting that in cases during the years 1999 and 2000 "in which the police obtained valid *Miranda* waivers, there were only four cases in 1999 and five in 2000 in which courts held the suspect's post-waiver confession involuntary").

38. Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 497 (1996).

39. *Id.*

40. Paul G. Cassell, *Reply: All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U. L. REV. 1084, 1123 (1996).

41. See Cassell & Hayman, *supra* note 35. In this study, which was conducted over a six-week period during the summer of 1994, researchers attended screening sessions held by the District Attorney's office in Salt Lake County, Utah to assess the prosecutorial merit of 219 suspects in felony cases. *Id.* at

suspects invoked either the right to an attorney or the right to remain silent, the interrogation ceased.⁴² In addition, they found that of the fifteen suspects who invoked their rights, nine invoked the right to an attorney and six the right to remain silent,⁴³ suggesting that suspects may be more likely to invoke the former right than the latter.

Through its decisions in *Edwards*⁴⁴ and *Michigan v. Mosley*,⁴⁵ the Court has provided stronger protection for suspects who invoke the right to an attorney than for those who invoke the right to remain silent. If the suspect invokes the right to an attorney, the police are not allowed to initiate further attempts to obtain incriminating statements;⁴⁶ if he invokes the right to remain silent, on the other hand, the police may persist in seeking to interrogate him so long as they “scrupulously honor” his invocation of his right.⁴⁷ Thus, even if suspects invoke their right to an attorney and their right to remain silent with about equal frequency, suspects’ invocations of their right to an attorney will likely have the effect of terminating more interrogations.

Professor George Thomas’s 2004 study of courts’ rulings on *Miranda* issues⁴⁸ provides support for this conclusion. Based on a survey in June of 2002 of 211 cases in which *Miranda* issues were decided by courts, Thomas found twenty cases in which suspects claimed to have invoked their right to an attorney and six in which they claimed to have invoked their right to remain silent.⁴⁹ In eleven of the twenty cases in which the suspect claimed to have invoked the right to an attorney, the government was unable to introduce any incriminating statements because either the suspects’ statements were suppressed or there was no questioning; in the six cases in which the suspects claimed to have invoked the right to remain silent, on the other hand, the defendants’ claims were rejected and their incriminating statements

851-52. The screening sessions consisted of forty-five minute interviews by the prosecutor of the police officer who conducted the interrogation, and the interviews addressed the evidence supporting the filing of charges. *Id.* at 851. Researchers were allowed to attend all screening sessions except in a few cases that were particularly sensitive. *Id.* at 851 & n.80. During the screening sessions, the researchers filled out survey forms detailing the cases’ relevant characteristics. *Id.* at 851.

42. *See id.* at 861. *But see* Leo, *supra* note 35, at 268, 276 (noting that in 7 of the 122 interrogations observed during nine months of first-hand observation of police interrogation, detectives continued to question suspects even after they invoked their *Miranda* rights).

43. Cassell & Hayman, *supra* note 35, at 859-60 & tbl.3.

44. *Edwards v. Arizona*, 451 U.S. 477 (1981).

45. 423 U.S. 96 (1975).

46. *See supra* text accompanying note 31.

47. *See Mosley*, 423 U.S. at 103.

48. *See generally* George C. Thomas III, *Stories About Miranda*, 102 MICH. L. REV. 1959 (2004).

49. *Id.* at 1970, 1972-73 tbl.2.

admitted.⁵⁰ As Thomas states, these “data suggest what our intuition tells us: the way for a suspect to avoid incriminating himself after he is given *Miranda* warnings is to request counsel.”⁵¹

After the Court’s decision in *Davis v. United States*,⁵² the words used by the suspect when she seeks to request counsel are critical. Prior to *Davis*, lower courts had split as to how interrogators were required to respond when a suspect made an ambiguous reference to an attorney.⁵³ The majority of lower courts held that, if the suspect referred to an attorney in a way that might indicate she desired to have an attorney present, the police were required to ask clarifying questions designed to ascertain whether the suspect was requesting an attorney.⁵⁴ Some of these courts stated, moreover, that the officer’s clarifying questions should be strictly limited to determining the suspect’s desire for counsel.⁵⁵ The officer would not be permitted to ask questions designed to dissuade the suspect from requesting an attorney.⁵⁶ In

50. *Id.* at 1973 tbl.3.

51. *Id.* at 1979.

52. 512 U.S. 452 (1994).

53. Lower courts took three positions on this issue. Some courts held that any reference to an attorney, no matter how ambiguous, required the termination of police questioning. *See, e.g.,* Maglio v. Jago, 580 F.2d 202, 206-07 (6th Cir. 1978). Others held that a suspect had to meet a certain level of clarity for his invocation of counsel to end all questioning. *See, e.g.,* People v. Krueger, 412 N.E.2d 537, 540 (Ill. 1980). The majority of lower courts, however, held that, upon an ambiguous reference to counsel, the police were required to limit their questions to clarifying the suspect’s reference to counsel before continuing with the interrogation. *See infra* notes 54-56 and accompanying text; *see also* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 301-02 & nn.212-16 (1993) (citing cases); Scott R. Goings, Comment, *Ambiguous or Equivocal Requests for Counsel in Custodial Interrogations After Davis v. United States*, 81 IOWA L. REV. 161, 166-67 (1995) (citing cases).

54. *See, e.g.,* United States v. De La Jara, 973 F.2d 746, 750 (9th Cir. 1992); United States v. Mendoza-Cecelia, 963 F.2d 1467, 1472 (11th Cir. 1992). *See generally* Ainsworth, *supra* note 53, at 308-11 (citing additional cases); Goings, *supra* note 53, at 162 n.7 (citing additional cases).

55. *See, e.g.,* United States v. Gotay, 844 F.2d 971, 975 (2d Cir. 1988); United States v. Fouche, 833 F.2d 1284, 1287 (9th Cir. 1987); United States v. Porter, 764 F.2d 1, 18 (1st Cir. 1985) (Campbell, C.J., dubitante) (citing *Thompson v. Wainwright*, 601 F.2d 768, 771-72 (5th Cir. 1979)); Nash v. Estelle, 597 F.2d 513, 517 (5th Cir. 1979); United States v. Riggs, 537 F.2d 1219, 1222 (4th Cir. 1976).

56. *See, e.g.,* United States v. March, 999 F.2d 456, 461-62 (10th Cir. 1993) (“[W]hen confronted with an equivocal request for counsel, the interrogating officers must cease all substantive questioning and limit further inquiries to clarifying the subject’s ambiguous statements. These clarifying questions must be purely ministerial, not adversarial, and cannot be designed to influence the subject not to invoke his rights.” (citations omitted)). The court said in *Thompson v. Wainwright*, 601 F.2d 768, 772 (5th Cir. 1979): [T]he limited inquiry permissible after an equivocal request for legal counsel may not take the form of an argument between interrogators and suspect about whether having counsel would be in the suspect’s best interests or not. Nor may it incorporate a presumption by the interrogator to tell the suspect what counsel’s advice to him would be if he were present. Such measures are foreign to the purpose of clarification, which is not to persuade but to discern.

Davis, the Court adopted a narrower test that had previously been applied by only a minority of jurisdictions:⁵⁷ If the suspect unambiguously requests an attorney, the police must cease the interrogation;⁵⁸ if the suspect makes only an ambiguous or equivocal reference to an attorney, however, the police may simply continue the interrogation. They have no obligation to clarify whether the suspect in fact desires an attorney.⁵⁹

Davis did not address the question of how police interrogators are permitted to respond when the suspect makes an ambiguous reference to an attorney or asks a question about having one. Since *Davis* eliminated the need for clarifying questions, however, some lower courts have concluded that the restrictions imposed on interrogators responding to a suspect's reference to an attorney or questions as to whether he should have an attorney no longer apply.⁶⁰ As a result, in some jurisdictions, interrogators' freedom to employ tactics designed to deflect suspects from invoking their right to an attorney is broader now than it was prior to *Davis*.

II. INTERROGATION TACTICS THAT DEFLECT A SUSPECT FROM REQUESTING AN ATTORNEY

Even before *Davis*, it was clear that interrogators employed tactics that had the effect of dissuading suspects from invoking their right to an attorney. In a 1993 article, Professor Janet Ainsworth identified several such tactics.⁶¹ Since *Davis*, it appears that interrogators have refined these tactics. Because of the law governing post-*Davis* interrogation tactics, moreover, these tactics are now more likely to be successful in the sense that they not only deflect suspects from requesting attorneys but also result in the admission of the suspects' incriminating statements.

In contrast to the pre-*Miranda* Inbau interrogation manual,⁶² post-*Miranda* interrogation manuals do not advise interrogators to employ tactics that are designed to dissuade suspects who express an interest in having an

57. *Davis v. United States*, 512 U.S. 452, 461-62 (1994); see also *supra* note 53.

58. *Davis*, 512 U.S. at 461-62. The Court stated that, in order to make an unambiguous request, a suspect "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." *Id.*

59. *Id.*

60. See, e.g., *Soffar v. Cockrell*, 300 F.3d 588, 595-97 (5th Cir. 2002); *Coleman v. Singletary*, 30 F.3d 1420, 1424 (11th Cir. 1994). For further discussion of the approach adopted by these cases, see *infra* text accompanying notes 82-84, 98-100.

61. See Ainsworth, *supra* note 53, at 312.

62. See *supra* text accompanying notes 24-25.

attorney from requesting one.⁶³ To date, moreover, there is no clear evidence that interrogation training advises police interrogators as to how to respond when suspects make statements or ask questions relating to the possibility of requesting an attorney.

Nevertheless, examples from reported cases indicate that post-*Davis* interrogators often employ sophisticated strategies to deflect suspects from requesting attorneys. Although the interrogation tactics employed can be classified in various ways,⁶⁴ it is perhaps most useful to focus on the action by the suspect that precipitates the interrogation tactic. I will thus consider: (1) tactics employed when the suspect makes an ambiguous request for an attorney or otherwise refers to the possibility of having one present at the interrogation; (2) tactics employed when the suspect asks the interrogator whether she should have an attorney; and (3) tactics employed when the suspect asks a question concerning the circumstances under which an attorney will be provided. In this Part, I briefly explain the tactics interrogators employ in these situations. In Part V, I discuss ten examples drawn from nine post-*Davis* cases in which courts provide apparently full and accurate accounts of the interchanges between interrogators and suspects.⁶⁵ As these examples suggest, in terms of both deflecting suspects from requesting an attorney and in obtaining admissible incriminating statements, post-*Davis* interrogators have been remarkably successful. In all of these cases, the police successfully dissuaded the suspect from requesting an attorney, and the courts held that the suspects' subsequent statements to the police were admissible.

63. Post-*Miranda* interrogation manuals typically state that, if the suspect requests an attorney, the interrogation must cease until an attorney is present. See, e.g., ARTHUR S. AUBRY, JR. & RUDOLPH R. CAPUTO, CRIMINAL INTERROGATION 158-59 (3d ed. 1980); CHARLES L. YESCHKE, INTERVIEWING: A FORENSIC GUIDE TO INTERROGATION 9 (2d ed. 1993); DAVID E. ZULAWSKI & DOUGLAS E. WICKLANDER, PRACTICAL ASPECTS OF INTERVIEW AND INTERROGATION 38 (1992).

64. Ainsworth identifies five tactics, including "suggesting to a suspect that she does not yet need a lawyer" and "advising her that having counsel would not be in her best interests." Ainsworth, *supra* note 53, at 312. The number of tactics that could be identified depends, of course, on the degree of specificity used to describe each tactic.

65. In seven of the nine cases from which the examples are drawn, the court either states or it appears clear that the portions of the colloquy between the police and the suspect deemed relevant by the court were electronically recorded. In the other two cases, *Clark v. Murphy*, 317 F.3d 1038 (9th Cir. 2003) and *Soffar v. Cockrell*, 300 F.3d 588 (5th Cir. 2002), the court's version of the colloquy between the suspect and the police deemed relevant by the court is based on the officers' testimony, and there is no indication that the defense disputed any material aspect of this testimony.

A. Tactics Employed When the Suspect Refers to the Possibility of Requesting an Attorney

When the suspect refers to the possibility of requesting an attorney, the most frequently employed interrogation strategy is to make it clear to the suspect that invoking her right to have an attorney present will make it more difficult for her to tell her story to the police. In some cases, simply making this clear to the suspect will be enough to deflect the suspect from requesting an attorney. Some suspects mistakenly believe that the immediate benefits of telling their stories to the police outweigh the potential harmful consequences of not requesting an attorney. In other cases, the officer may also implicitly or explicitly advise the suspect that telling his story to the police (which he can only do only without an attorney) will be to his advantage. In some cases, the police will suggest or imply to the suspect that telling his story will be to his legal advantage because it will enable him to “help himself,”⁶⁶ in others, they may simply explain to him that telling his story will make him feel better because it will enable him to “get this off [his] chest.”⁶⁷

B. Responding to a Suspect’s Question Relating to Whether He Should Have an Attorney

When the suspect asks a police officer whether he should request an attorney, officers have employed a variety of strategies. He can decline to answer the suspect’s question but then tell or suggest to the suspect that, if he requests an attorney, he will probably not be able to tell his story to the police and obtain the advantages that could accrue from telling his story.⁶⁸ Alternatively, he can answer the suspect’s question and tell him either that he shouldn’t request an attorney at all⁶⁹ or, as in the *Soffar* case,⁷⁰ that he shouldn’t request one if a certain condition is met. Or the officer can provide

66. See, e.g., *Commonwealth v. Redmond*, 568 S.E.2d 695, 697 (Va. 2002). For a discussion of the *Redmond* case, see *infra* text accompanying notes 178-80.

67. *Harper v. State*, No. 03-00-00677-CR, 2001 Tex. App. LEXIS 7497, at *5 (Tex. Ct. App. Nov. 8, 2001). For a discussion of the *Harper* case, see *infra* text accompanying notes 174-78.

68. See *People v. Adams*, 627 N.W.2d 623, 628-29 (Mich. Ct. App. 2001). During the interrogation in *Adams*, the suspect asked if he could have some time to decide whether he wanted to talk to an attorney. The officer told him he “certainly [could]” but added that “once you say you want a lawyer, our interview is done. And quite possibly the chances for an explanation as to what went wrong that day goes out the tubes. Possibly. Very probably. Okay? As I told you before, this is your one shot.” *Id.*

69. *Mueller v. Angelone*, 181 F.3d 557, 573-74 (4th Cir. 1999).

70. See *supra* text accompanying notes 1-7.

an apparently non-responsive answer that is likely to dissuade the suspect from requesting an attorney.⁷¹

C. Responding to a Suspect's Question Concerning the Circumstances Under Which an Attorney Will Be Provided

When the suspect asks the officer a question relating to the circumstances under which an attorney will be provided, even the officer's accurate answer may dissuade the suspect from requesting an attorney. If the suspect learns that he will not be able to see the attorney for a considerable time, he may decide to proceed without one.⁷² In some cases, however, the officer will answer the suspect's question inaccurately, perhaps, as in *Soffar*,⁷³ exaggerating the time that the suspect will have to wait before he can see an attorney. In some cases, moreover, the officer will explain the suspect's options in a way that may confuse the suspect as to the protection he will be afforded by requesting an attorney.⁷⁴

III. TESTS APPLIED BY LOWER COURTS IN THE POST-*DAVIS* ERA

In contrast to pre-*Davis* cases, which sometimes imposed significant restrictions on police interrogation tactics that dissuaded a suspect from requesting an attorney,⁷⁵ post-*Davis* cases have provided remarkably little restraint on such tactics. In fact, most courts seem to have interpreted *Davis*'s holding to mean that tactics designed to deflect suspects from requesting counsel will be subject to little or no scrutiny. In some cases involving such police tactics, courts do not even discuss the possibility that the tactics vitiated the suspect's waiver of the right to an attorney, but simply conclude that the suspect did not invoke his right to an attorney because he did not make a sufficiently unambiguous request to satisfy the *Davis* test.⁷⁶

Courts that have addressed the validity of post-*Davis* interrogation tactics have adopted several approaches that make it especially difficult for a defendant to establish that an interrogation tactic vitiated his waiver of the

71. See *Clark v. Murphy*, 317 F.3d 1038, 1041-42 (9th Cir. 2003). For a discussion of the *Murphy* case, see *infra* text accompanying notes 191-95.

72. See *infra* text accompanying notes 169-72.

73. See *supra* text accompanying note 5.

74. See *United States v. Bezanson-Perkins*, 390 F.3d 34, 36-38 (1st Cir. 2004). For a discussion of the *Bezanson-Perkins* case, see *infra* text accompanying notes 201-04.

75. See *supra* notes 53-56 and accompanying text.

76. See *supra* note 13 and accompanying text.

right to an attorney. First, in dealing with police responses to suspects' references to or questions about attorneys, some courts have held that *Davis*'s elimination of the requirement that the police ask clarifying questions when a suspect makes an ambiguous reference to an attorney has also eliminated any requirement that the police refrain from dissuading the suspect from requesting an attorney.⁷⁷ Second, in dealing with cases in which the police interrogation tactics that dissuade a suspect from requesting an attorney occur after the suspect's initial waiver of his *Miranda* rights, some courts have held that in order to invalidate the suspect's prior waiver, the defendant will have to negate the evidence showing that he understood his *Miranda* rights at the time he waived them.⁷⁸ And, third, in determining whether the police use of interrogation tactics results in an involuntary waiver of the suspect's right to an attorney, some courts have applied a very permissive test that places emphasis on the suspect's knowledge and background as well as the coercive effect of the police interrogation tactics.⁷⁹ As the *Soffar* case illustrates,⁸⁰ moreover, some courts apply more than one of these tests in the same case.

A. The Elimination of Restrictions on Misleading Clarification Questions

As I have indicated,⁸¹ in *Soffar v. Cockrell*,⁸² the Fifth Circuit en banc held that, since *Davis* eliminated any requirement that the police ask clarifying questions relating to whether the suspect was requesting an attorney, restrictions on tactics designed to dissuade the suspect from making such a request were also eliminated.⁸³ Other courts have also relied on *Davis* to abandon or modify pre-*Davis* restrictions on clarifying questions that were designed to dissuade suspects from requesting an attorney.⁸⁴

77. See *infra* notes 81-84 and accompanying text.

78. See *infra* notes 89-91 and accompanying text.

79. See *infra* notes 95-103 and accompanying text.

80. See *infra* notes 81-83 and accompanying text.

81. See *supra* text accompanying notes 12-14.

82. 300 F.3d 588 (5th Cir. 2002).

83. See *id.* at 596.

84. See, e.g., *Diaz v. Senkowski*, 76 F.3d 61, 65 (2d Cir. 1996); *Coleman v. Singletary*, 30 F.3d 1420, 1423-24 (11th Cir. 1994). *But cf.* *Steckel v. State*, 711 A.2d 5, 10-11 (Del. 1998), *aff'd*, 795 A.2d 651 (Del. 2002) (stating in dicta that, under the state constitution, police are required to respond to a suspect's equivocal reference to an attorney with clarifying questions that are not designed to dissuade the suspect from requesting an attorney).

B. Requiring Defendants to Bear a Heavy Burden to Invalidate Prior Waivers

In *Soffar*, the Fifth Circuit’s en banc opinion also stated that, because Soffar had waived his *Miranda* rights several times before he asked Clawson questions relating to his right to an attorney, the issue to be considered was “whether Clawson’s misleading statements invalidated the multiple waivers Soffar had given *prior* to the interview.”⁸⁵

Because Soffar had already waived his rights, the court held that *Miranda*’s prohibition on inducing waivers through “trickery”⁸⁶ did not apply. Instead, the court stated that “trickery or deceit is only prohibited to the extent it deprives the suspect ‘of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.’”⁸⁷ In this case, the court concluded that Clawson’s trickery could not have deprived Soffar of the knowledge of his rights because Soffar had been given the *Miranda* warnings and waived his rights numerous times prior to his interview with Clawson.⁸⁸

Other courts have also held that a suspect who has waived his *Miranda* rights has to meet a higher burden in order to show that the police violated his right to an attorney.⁸⁹ Based on these courts’ analyses, the nature of the evidence required to invalidate a prior waiver is unclear. *Soffar*’s analysis suggests that police trickery will invalidate the suspect’s prior waiver only if the suspect can show that he did not understand the nature of his rights.⁹⁰ Since the suspect’s prior waiver establishes that the suspect understood the nature of his rights at the time of his waiver, it will be extremely difficult, if not impossible, for a suspect to show that an interrogator’s misleading statements or other tactics vitiated his prior understanding of his rights.⁹¹

85. *Soffar v. Cockrell*, 300 F.3d at 596.

86. *Miranda v. Arizona*, 384 U.S. 436, 476 (1966).

87. *Soffar v. Cockrell*, 300 F.3d at 596 (quoting *Moran v. Burbine*, 475 U.S. 412, 424 (1986)).

88. *Soffar v. Cockrell*, 300 F.3d at 596.

89. *See, e.g., Michigan v. Mosley*, 423 U.S. 96, 105-06 (1975); *Jackson v. Commonwealth*, 587 S.E.2d 532, 540-41 (Va. 2003); *Medley v. Commonwealth*, 602 S.E.2d 411, 417 (Va. Ct. App. 2004).

90. *See supra* text accompanying note 87.

91. In *Mueller v. Angelone*, 181 F.3d 557 (4th Cir. 1999), a suspect, who had waived his *Miranda* rights, asked the police officer during the subsequent interrogation, “Do you think I need an attorney here?” *Id.* at 573. The officer responded by “shaking his head slightly from side to side, moving his arms and hands in a ‘shrug-like manner,’ and stating, ‘You’re just talking to us.’” *Id.* at 573-74. The court rejected the suspect’s argument that this exchange invalidated his prior waiver, stating that “[i]t is clear from the record that [the suspect], with his extensive experience in such matters, understood both his rights and the consequences of their abandonment. [The officer’s] expression of his opinion on the advisability of [the

Consistent with this view, the First Circuit in *United States v. Bezanson-Perkins*⁹² expressed doubt as to whether “police misstatements” of any kind could invalidate a suspect’s prior *Miranda* waiver,⁹³ and at least one state court intimated that, once the suspect has waived his *Miranda* rights, the only way he can establish a violation of his right to an attorney is by showing that he made a request that meets the requirements of *Davis*.⁹⁴

C. Determining Whether the Defendant’s Waiver of the Right to an Attorney Was Involuntary

In considering whether a defendant has validly waived his right to an attorney, both pre- and post-*Davis* cases focus on whether a suspect’s waiver of this right was voluntary.⁹⁵ Although *Miranda* stated that police “trickery” would render a defendant’s waiver involuntary,⁹⁶ post-*Miranda* cases have generally applied a totality of circumstances test that assesses not only the potential impact of police interrogation tactics but also the individual characteristics of the suspects on whom such tactics are employed.⁹⁷ In assessing these factors, post-*Davis* cases have generally found that, even in cases in which police employ clearly deceptive interrogation tactics, the suspect’s waiver of his right to counsel is voluntary.

The *Soffar* case again provides a good illustration. In concluding that Soffar’s waiver of his right to an attorney was voluntary, the Fifth Circuit said very little about Clawson’s misleading statements or their probable impact on Soffar. Instead, the court emphasized that Soffar “instigated the discussion” about the crime the police were investigating,⁹⁸ that he subsequently waived his rights, and that he “continuously volunteered information about the crime during his interrogation.”⁹⁹ In finding other suspects’ waivers to be voluntary, courts have taken into account the suspects’ backgrounds, including their prior experiences with criminal procedure.¹⁰⁰

suspect’s] consulting with counsel could not change that understanding.” *Id.* at 575.

92. 390 F.3d 34 (1st Cir. 2004).

93. *Id.* at 41.

94. See *State v. Leyva*, 951 P.2d 738, 743 (Utah 1997).

95. See, e.g., *United States v. Banks*, 282 F.3d 699, 705 (9th Cir. 2002), cert. granted, 527 U.S. 1187 (2003), rev’d, 540 U.S. 124 (2003); *United States v. Anderson*, 929 F.2d 96, 102 (2d Cir. 1991).

96. *Miranda v. Arizona*, 384 U.S. 436, 476 (1966); see also *infra* text accompanying notes 104-05.

97. See *Soffar v. Cockrell*, 300 F.3d 588, 593 (5th Cir. 2002).

98. *Id.*

99. *Id.*

100. See, e.g., *United States v. Leon-Delfis*, 203 F.3d 103, 110-11 (1st Cir. 2000); *Coleman v.*

In rare instances, post-*Davis* cases applying a totality of circumstances test have concluded that an officer's deceptive interrogation tactics rendered the suspect's waiver of his right to an attorney involuntary.¹⁰¹ In the great majority of such cases, however, courts have concluded that, based on an assessment of the totality of circumstances, sometimes including the suspect's maturity or prior experience with the police,¹⁰² the suspect's waiver was voluntary.¹⁰³

IV. ASSURING THAT THE SUSPECT HAS AN ADEQUATE UNDERSTANDING OF THE RIGHT TO HAVE AN ATTORNEY DURING A CUSTODIAL INTERROGATION

A. *Miranda's Prohibition on Waivers Induced by Trickery*

In *Miranda*, the Court made it clear that, when the interrogation of a suspect proceeds without the presence of an attorney, the government must "demonstrate that the defendant knowingly and intelligently waived . . . his right to retained or appointed counsel" in order to admit the defendant's statements into evidence.¹⁰⁴ The Court added, moreover, that "any evidence that the accused was threatened, tricked, or cajoled into a waiver" will render the defendant's waiver involuntary.¹⁰⁵

While the Court has never repudiated *Miranda's* dicta stating that "trickery" will render a defendant's waiver involuntary, post-*Miranda* cases have emphasized that a suspect can make a voluntary and intelligent waiver of his *Miranda* rights even though the police have failed to provide him with information that would allow him to make a more informed choice as to whether he should exercise his rights. In *Moran v. Burbine*,¹⁰⁶ the defendant

Singletary, 30 F.3d 1420, 1426 (11th Cir. 1994); *United States v. Owens*, 142 F. Supp. 2d 255, 260, 266 (D. Conn. 2001).

101. See *Hart v. Attorney Gen. of Fla.*, 323 F.3d 884, 888-89, 895 (11th Cir. 2003) (holding 17-year-old defendant's *Miranda* waiver involuntary where, after defendant signed the waiver form, detective made "statements contradicting the *Miranda* warnings," including the statement that "honesty wouldn't hurt him" and that, in her opinion, the disadvantage of requesting an attorney was "I'm going to want to ask you questions and he's going to tell you you can't answer me.").

102. See, e.g., *United States v. Lynch*, 92 F.3d 62, 65 (2d Cir. 1996); *Kaczmarek v. State*, 91 P.3d 16, 27-28 (Nev. 2004); *Harte v. State*, 13 P.3d 420, 426 (Nev. 2000).

103. See *supra* notes 100, 102. With the exception of *United States v. Leon-Delfis*, 203 F.3d at 111-12, the courts in all the cases cited in those notes found the suspect's waiver voluntary.

104. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (citing *Escobedo v. Illinois*, 378 U.S. 478, 490 n.14).

105. *Miranda*, 384 U.S. at 476.

106. 475 U.S. 412 (1986).

was in police custody following his arrest for murder. At the request of the defendant's sister, an attorney called the police and informed them that she would act as the defendant's counsel in the event the police intended to question him. The police promised the attorney they would not question her client that evening. Later that same evening, however, the police questioned the defendant after they had warned him of his *Miranda* rights and received his signed waiver.¹⁰⁷ When they informed him of his right to an attorney, they did not tell him about the attorney's phone call or say anything that would indicate an attorney was seeking to represent him during police interrogation. While the lower court held that the failure to inform the defendant of the attorney's phone call vitiated his "otherwise valid" waiver,¹⁰⁸ the Supreme Court reversed. In an opinion by Justice O'Connor, the majority admitted that information relating to the attorney's call might be relevant to the defendant's "decision to confess."¹⁰⁹ It concluded, however, that the police are not required to "supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights."¹¹⁰ Rather, in assessing the validity of a suspect's waiver, the focus must be on whether he understood his rights and voluntarily relinquished them.¹¹¹ While the interrogators' withholding of information might be objectionable "as a matter of ethics," it "is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."¹¹²

Moran's holding indicated that the interrogators' failure to disclose the attorney's telephone call did not constitute "trickery" that would vitiate a *Miranda* waiver. In a later case, the Court indicated that "affirmative misrepresentation" is more likely than the withholding of information to establish such trickery. In *Colorado v. Spring*,¹¹³ ATF agents arrested the defendant for firearms offenses. When the agents gave the defendant his *Miranda* warnings, they failed to inform him that they would also question him about a shooting that had occurred in Colorado. The Court declined to hold that "mere silence by law enforcement officials as to the subject matter of an interrogation is 'trickery' sufficient to invalidate a suspect's waiver of

107. *Id.* at 417-18.

108. *Id.* at 419.

109. *Id.* at 422.

110. *Id.*

111. *Id.* at 422-23.

112. *Id.* at 423-24.

113. 479 U.S. 564 (1987).

Miranda rights.”¹¹⁴ In a footnote, however, the Court distinguished a failure to provide the suspect with relevant information from “affirmative misrepresentations” relating to the nature of *Miranda* rights.¹¹⁵ The Court cited pre-*Miranda* due process confession cases as examples in which affirmative misrepresentations by the police had “invalidate[d] a suspect’s waiver of the Fifth Amendment privilege”¹¹⁶ but declined to delineate the circumstances in which affirmative misrepresentations would invalidate the suspect’s *Miranda* waiver.¹¹⁷

B. Seibert’s Prohibition on Interrogation Tactics Designed to Undermine the Suspect’s Understanding of the Miranda Rights

In *Missouri v. Seibert*,¹¹⁸ the Court held that deceptive interrogation tactics employed in that case vitiated a suspect’s *Miranda* waiver. In *Seibert*, the police arrested the defendant for her involvement in an arson that resulted in the death of a mentally ill teenager. Consistent with an interrogation strategy taught by a national police training organization,¹¹⁹ the arresting officer conducted what is known as a “two-stage interrogation.”¹²⁰ He did not give the defendant *Miranda* warnings when he first interrogated her. During the initial interrogation, the suspect made incriminating statements including an admission that the mentally retarded teenager was “to die in his sleep.”¹²¹ After a twenty minute break, the same officer gave the defendant *Miranda* warnings and obtained her signed waiver of her rights.¹²² He then questioned her further about the fire, using her pre-warning statement to obtain admissions similar to those she had made in that statement.¹²³

114. *Id.* at 576.

115. *Id.* at 576 n.8.

116. *Id.* (citing *Lynumn v. Illinois*, 372 U.S. 528 (1963); *Spano v. New York*, 360 U.S. 315 (1959)).

117. The Court specifically declined to decide whether a waiver of *Miranda* rights would be valid when obtained by affirmative misrepresentations by law enforcement officials as to the scope of the investigation. *Spring*, 479 U.S. at 576 n.8.

118. 542 U.S. 600 (2004).

119. An officer of that police department testified that the interrogation strategy of withholding *Miranda* warnings until after the suspect confessed was not only utilized widely by his own department, but also was promoted by a national police training organization and utilized in other departments. *Id.* at 609-10.

120. *Id.*

121. *Id.* at 605.

122. *Id.*

123. In particular, after some prodding from the officer, the defendant admitted in her first statement that she knew the mentally ill teenager was meant to die in the fire. *Id.* During the second questioning, the officer reminded her that she had said the teenager was “supposed to die in his sleep” during the fire. After

The purpose of the “two-stage interrogation” technique is to increase the likelihood that the suspect will give incriminating statements during the second stage of the interrogation, after she has been given the *Miranda* warnings for the first time. The interrogators who designed this tactic believed that the suspect’s second statement would be admissible under *Oregon v. Elstad*,¹²⁴ which held that, when a suspect makes a statement that is inadmissible under *Miranda*, a later statement given after the suspect has been given the *Miranda* warnings and waived her rights will be admissible so long as neither the first nor the second statement was involuntary.¹²⁵

In *Seibert*, however, the Court by a 5-4 decision held that the defendant’s second statement was inadmissible, regardless of whether either her first or second statement was involuntary. In an opinion by Justice Souter, a four-Justice plurality concluded that the admission of the defendant’s second statement violated *Miranda* because, prior to giving that statement, the defendant was not “‘adequately and effectively’ advised of the choice the Constitution guarantees.”¹²⁶ The plurality determined that in *Seibert* the warnings did not effectively advise the defendant of her rights because “just after making a confession, a suspect would hardly think he had a genuine right to remain silent.”¹²⁷ In reaching its conclusion, the plurality emphasized that in *Seibert* there were “facts . . . which by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings.”¹²⁸ The plurality intimated, however, that whenever the police employ the “two-step interrogation technique” under circumstances in which the suspect has made significant incriminating admissions in the first interrogation, the second interrogation occurs soon after the first, and the second interrogation is designed to obtain essentially the same material that was obtained in the first, the *Miranda* warnings will not effectively advise the defendant of her choice to remain silent or to have an attorney present. At best, the defendant will likely be “perplex[ed]” as to the nature of the choices to be made,¹²⁹ and,

some further prodding, the defendant reaffirmed that statement. *Id.*

124. 470 U.S. 298 (1985).

125. *Id.* at 309-14.

126. *Missouri v. Seibert*, 542 U.S. 600, 611 (2004) (plurality opinion) (citing *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)).

127. *Seibert*, 542 U.S. at 613.

128. *Id.* at 616. Specifically, these facts included “the completeness and detail of the questions and answers” in the first interrogation, “the overlapping content of the two statements,” the close proximity between the two, “the continuity of police personnel,” and the “degree to which” the interrogator treated the second interrogation “as continuous with the first.” *Id.* at 615.

129. *Id.* at 613.

because of her admissions during the first interrogation, she might reasonably believe that exercising her rights would be “of no avail.”¹³⁰

Justice Kennedy, who provided the fifth vote necessary to support the Court’s decision, concluded that the defendant’s second statement would be inadmissible because “the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warnings.”¹³¹ Explaining that the plurality’s test “envisions an objective inquiry from the perspective of the suspect,”¹³² Justice Kennedy stated that, under his test, statements made during the second interrogation would be excluded only when the police intentionally employed the two-step interrogation strategy and adequate “curative measures [were not] taken.”¹³³ While he criticized the plurality for applying a multi-factor test to assess the suspect’s awareness of his rights, Justice Kennedy did not explain what factors would be used to determine whether police interrogators intentionally employed a two-step interrogation strategy. He did state that his test would be narrower than the plurality’s¹³⁴ and that it would apply “only in the infrequent case . . . in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning.”¹³⁵

Seibert’s analysis indicates that affirmative misrepresentation that is designed to prevent the defendant from being “adequately and effectively advised” of the protections provided by *Miranda* will vitiate the suspect’s waiver of the *Miranda* rights. Based on Justice Kennedy’s concurring opinion, however, *Seibert* could be read narrowly so as to apply only when there was clear evidence that the interrogating officers were employing an interrogation strategy designed to undermine the *Miranda* rights. The case’s impact might then be limited to situations such as *Seibert* itself in which the officers admitted employing such a strategy or ones in which extrinsic evidence—such as evidence that the officers were employing an interrogation tactic that interrogation manuals or interrogation training recommended that the police use for the purpose of undermining one or more of the *Miranda* rights¹³⁶—provided clear evidence of the officers’ intent.

130. *Id.*

131. *Id.* at 622 (Kennedy, J., concurring).

132. *Id.* at 621.

133. *Id.* at 622. According to Justice Kennedy, “[c]urative measures should be designed to ensure that a reasonable person in the suspect’s situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver.” *Id.*

134. *Id.*

135. *Id.*

136. One example of such an interrogation tactic is questioning “outside *Miranda*.” This tactic,

C. *The Tension Between Seibert and Davis*

Seibert provides a basis for prohibiting interrogation tactics that are designed to undermine a suspect's understanding of the right to request an attorney during a custodial interrogation. There is some tension, however, between *Seibert* and *Davis*. According to the *Davis* majority, the primary safeguards provided to suspects facing custodial interrogation are "the *Miranda* warnings themselves."¹³⁷ The *Seibert* plurality, on the other hand, would prohibit interrogation tactics that undermine a suspect's understanding of one or more of the *Miranda* rights. In order to resolve the tension between the two opinions, it is necessary to determine when an interrogation tactic should be viewed as undermining a suspect's understanding of a *Miranda* warning, even though the *Miranda* warnings are generally viewed as providing suspects with sufficient information to safeguard them from coercive interrogation.

Justice Kennedy would resolve the tension by prohibiting only interrogation tactics that were *intentionally* designed to undermine the suspect's understanding of a *Miranda* right. In this context, however, focusing on the officer's intent seems especially inappropriate. When an officer informs a suspect of her *Miranda* rights, the officer's goal is to conduct a successful interrogation. The more clearly the suspect understands her *Miranda* rights, the more likely she is to invoke them and thereby thwart the officer's goal of conducting a successful interrogation. As a result, the officer will inevitably have a strong motive to undermine the suspect's understanding of her *Miranda* rights.

Because a suspect's right to have an attorney present during the interrogation is the constitutional safeguard that is most likely to thwart a

which is taught in interrogation training, is employed after a suspect has invoked one of his *Miranda* rights. Typically, the interrogator will then tell the suspect that he would like to talk to him "off the record" because he wants to understand what happens. Through this tactic, the interrogator hopes to obtain statements that will be admissible for the purpose of impeaching the suspect's credibility in the event he testifies at trial. See *Oregon v. Hass*, 420 U.S. 714, 714-18 (1975). For a full analysis of the strategy of questioning "outside *Miranda*," see Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 132-40 (1998).

137. *Davis v. United States*, 512 U.S. 452, 460 (1994). Significantly, the four Justices who joined Justice Souter's plurality opinion in *Seibert* disagreed with this aspect of the majority opinion in *Davis*. In his concurring opinion for those four Justices in *Davis*, Justice Souter indicated that suspects who made an equivocal reference to an attorney should be entitled to more protection than that provided by the majority ruling in *Davis*. See *id.* at 467 (Souter, J., concurring).

successful interrogation,¹³⁸ moreover, the officer is likely to be especially concerned that the suspect not have a full understanding of the possible benefits of requesting an attorney. When dealing with a suspect who evidences a possible interest in requesting an attorney, a sophisticated interrogator may thus want to employ any legally permissible tactics that will undermine the suspect's understanding of the right to request an attorney. Distinguishing between an officer's desire to achieve a result and his conscious purpose to achieve it will inevitably be unproductive. The focus should be on what interrogating officers are permitted to do, not on what they intend to do.

In determining whether an officer has complied with *Miranda*, moreover, the Court has consistently adopted objective tests that focus on the likely effect of the police conduct on the suspect rather than on the officer's subjective intentions.¹³⁹ In *Seibert* itself, all of the Justices except Justice Kennedy concluded that, in determining whether there has been a *Miranda* violation, an officer's subjective intent should not be relevant.¹⁴⁰ This approach is consistent with the Fifth Amendment privilege, which bars compulsion whether or not it is intended.

In addition, an objective test provides relatively clear guidelines for the police. Over the past three decades, various Justices have emphasized the value of maintaining *Miranda*'s clarity.¹⁴¹ Indeed, in his concurring opinion in *Seibert*, Justice Kennedy declared that "*Miranda*'s clarity is one of its strengths."¹⁴² In contrast to a test that depends on determining an interrogating officer's intent to undermine the *Miranda* warnings, assessing an interrogation tactic's likely impact on an average suspect's understanding of the right to

138. See *supra* text accompanying note 33.

139. See, e.g., *Yarborough v. Alvarado*, 541 U.S. 652, 662 (2004) (emphasizing that "custody must be determined based on how a reasonable person in the suspect's situation would perceive his circumstances"); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (holding that in determining whether a suspect is in custody "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation"); *New York v. Quarles*, 467 U.S. 649, 656 (1984) (holding that a public safety exception to *Miranda* applies when "police officers ask questions reasonably prompted by a concern for the public safety"); *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (stating that interrogation includes "words or actions . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect").

140. See *Missouri v. Seibert*, 542 U.S. 600, 613 (2004) (plurality opinion) (evaluating whether *Miranda* warnings will be effective by "any objective measure"); *id.* at 624 (O'Connor, J., dissenting) (agreeing with the plurality in its "rejection of an intent-based test").

141. See, e.g., *Yarborough*, 541 U.S. at 667 ("The objective test furthers 'the clarity of [*Miranda*]'s rule." (citing *Berkemer*, 468 U.S. at 430)); *Arizona v. Roberson*, 486 U.S. 675, 680 (1988) ("[O]ne of the principal advantages of the *Miranda* [doctrine] . . . is the ease and clarity [of that rule].").

142. See *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring).

have an attorney present during a custodial interrogation should lead to relatively clear lines for the police.

D. Formulating Appropriate Tests

If an objective approach is adopted, when will a police interrogation tactic prevent a suspect from being “adequately and effectively advised” of the right to have an attorney present during a custodial interrogation? In *Miranda*, the Court viewed the suspect’s right to have an attorney present during custodial interrogation as “indispensable to the protection of the [suspect’s] Fifth Amendment privilege”¹⁴³ because the presence of an attorney might be necessary to preserve the suspect’s “right to choose between silence and speech.”¹⁴⁴ If the suspect felt he was not able to deal with police interrogators on his own, the presence of an attorney was necessary to advise the suspect and thereby prevent the possibility of coercion.

In post-*Miranda* cases, the Court has made it clear that the suspect does not have an absolute right to have an attorney present whenever she is interacting with the police while in custody. Rather, when a suspect in custody requests an attorney, she has a right to have an attorney present during police *interrogation*.¹⁴⁵ This means that the police must either provide her with an attorney or cease any attempt to interrogate her.¹⁴⁶

Nevertheless, the essence of the safeguard provided by the right to have an attorney present during a custodial interrogation is that a defendant can choose to have an attorney advise her with respect to how she should deal with the police during a custodial interrogation rather than being required to deal

143. *Miranda v. Arizona*, 384 U.S. 436, 469 (1966).

144. *Id.*

145. *See Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (holding that when an accused requests counsel, he is not to be “subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police”).

146. In *Duckworth v. Eagen*, 492 U.S. 195 (1989), the Court made it clear that, when a suspect responds to the *Miranda* warnings by requesting an attorney, the police have no obligation to supply the suspect with an attorney so long as they do not interrogate him. In *Duckworth*, the officer who gave the defendant the *Miranda* warnings stated to him, “[W]e have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.” *Id.* at 198. In a 5-4 decision, the Court held that this warning was sufficient to satisfy *Miranda*. After stating that the officer’s statement accurately described Indiana’s procedure, the Court stated that the warning was sufficient because “*Miranda* does not require that attorneys be producible on call, but only that the suspect be informed, as here, that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one.” *Id.* at 204.

with police interrogators on her own.¹⁴⁷ The suspect should understand that, if she is subject to police interrogation, she has the right to the assistance of an attorney who will advise her as to whether she should exercise her right to remain silent. In addition, the suspect should understand that, until the attorney requested is present, the police will not be permitted to interrogate her.

Based on *Seibert*, the police should not be permitted to employ interrogation tactics that will be likely to undermine the suspect's understanding of either her right to request an attorney or the protections that such a request will safeguard. In order to employ such a tactic, moreover, an interrogator need not communicate false or inaccurate information to the suspect. In *Seibert*, the interrogator did not affirmatively misrepresent the nature of the suspect's *Miranda* rights. He did not tell her, for example, that exercising her right to remain silent would not help her because she had already incriminated herself. Nevertheless, the Court concluded that the tactics employed prior to giving the suspect her warnings prevented her from being "'adequately and effectively' advised of the choice the Constitution guarantees."¹⁴⁸ At best, she would be confused as to the nature of the protection provided by the *Miranda* rights. Based on *Seibert*, an interrogation tactic that is likely to confuse or mislead the suspect as to the nature of the protection that requesting an attorney will provide should be prohibited.

In *Seibert*, the interrogation tactics that undermined the defendant's awareness of her *Miranda* rights occurred prior to the suspect's waiver of her rights. In dealing with tactics that undermine the suspect's understanding of the nature of the right to request an attorney during the interrogation, however, it should not matter whether the interrogation tactics that undermine the suspect's understanding of the right occur prior to or after the suspect's initial waiver of her *Miranda* rights. In both *Miranda* and post-*Miranda* cases,¹⁴⁹ the Court has made it clear that the suspect has the right to request the presence of an attorney at any time during a custodial interrogation. Since the suspect's

147. The Court has adopted the position, originally expressed by Justice White in his concurring opinion in *Michigan v. Mosley*, 423 U.S. 96, 110 n.2 (1975) (White, J., concurring), that when a suspect requests an attorney he is expressing the "view that he is not competent to deal with the authorities without legal advice," and, therefore, his "later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." *Arizona v. Roberson*, 486 U.S. 675, 681 (1988) (quoting *Mosley*, 423 U.S. at 110 n.2).

148. *Missouri v. Seibert*, 542 U.S. 600, 611 (2004).

149. *See, e.g., Moran v. Burbine*, 475 U.S. 412, 420 (1986) (quoting *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966) ("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.")).

right to request an attorney applies throughout the interrogation, the prohibition on interrogation tactics that undermine the suspect's understanding of that right should also apply throughout the interrogation.¹⁵⁰

In some cases, of course, determining whether interrogation tactics undermine the suspect's understanding of her right to have an attorney present or the nature of the safeguard provided by requesting an attorney will be difficult. Even if an interrogation tactic does not convey inaccurate information relating to the suspect's right to an attorney, it may mislead the suspect as to the value of having an attorney. In such cases, there is obviously some tension between the *Davis* majority's view that "the *Miranda* warnings themselves" provide the "primary protection" for suspects subjected to custodial interrogation¹⁵¹ and the *Seibert* plurality's view that the suspect must be "adequately and effectively apprised" of her *Miranda* rights.¹⁵² In resolving this tension, the focus should be on whether the police interrogation tactic would be likely to distort the suspect's understanding of any of her *Miranda* rights.

In deflecting suspects from requesting an attorney, interrogators frequently emphasize that requesting an attorney will impair the suspect's ability to tell her story to the police.¹⁵³ In determining whether this tactic undermines the suspect's understanding of her right to request an attorney, the focus should be on whether its employment seems likely to distort the suspect's understanding of the second *Miranda* warning. If a police interrogator simply tells the suspect that, if she requests an attorney, she will not be able to tell her story to the interrogator at that time, this should not be improper. Since the interrogator is not stating or intimating to the suspect that telling her story to the police will result in a tangible legal benefit, the meaning of the second *Miranda* warning has not been distorted. On the other hand, if the interrogator tells the suspect that, once she requests an attorney she will not be able to provide the police with an explanation that might lead to a reduced charge, this tactic should be deemed improper because the interrogator is distorting the meaning of the right to an attorney by falsely

150. Otherwise, the police could undermine the effect of the suspect's right to have an attorney by providing a suspect who initially waives her *Miranda* rights with misinformation relating to the right to an attorney that would convince the suspect that it would not be in her interest to request an attorney. The officer might tell the suspect, for example, that she made a wise decision in not requesting an attorney because the attorney who would be appointed would really be seeking to advance the prosecutor's interest rather than the suspect's.

151. *Davis v. United States*, 512 U.S. 452, 460 (1994).

152. *Seibert*, 542 U.S. at 608 (quoting *Miranda*, 384 U.S. at 467).

153. See *supra* note 66 and accompanying text.

suggesting that a suspect who is assisted by an attorney will not be able to provide exculpatory material to the authorities and “vitiat[ing] the intended impact”¹⁵⁴ of the second *Miranda* warning by intimating to the suspect that it will be as likely that statements she makes to the police can be used in her favor as against her.¹⁵⁵

Between these two relatively clear examples, there are obviously a range of cases that pose difficult problems. Without expressly saying so, an officer may intimate to a suspect that talking to him without an attorney will improve her legal position. Or he may simply redirect the conversation so that the suspect will receive the impression that requesting an attorney will cause her to lose some benefit she might otherwise obtain from the police or prosecutor. In these and many other cases, the proposed test will help to focus the court’s inquiry on the right issues but will not supply clear answers. Ultimately, the court will have to decide whether the officer’s interrogation tactics would mislead the suspect (or a reasonable person in the suspect’s position) as to the nature of the legal protection provided by any of the *Miranda* rights.¹⁵⁶ In some cases, both the government and the defendant will be able to make reasonable arguments in support of their positions.

Consistent with *Davis*, moreover, a defendant will not be able to establish a *Seibert* violation by merely showing that an officer responded to a suspect’s statements or questions relating to an attorney in a way that dissuaded the suspect from requesting one. When dealing with a suspect who refers to an attorney or asks a question about having one, the police have no obligation to provide her with information that will enable her to make a wise decision with respect to whether she should request an attorney. If the suspect is misguided as to how an attorney will safeguard her rights, the police have no obligation to enlighten her. If the suspect makes statements relating to requesting an attorney that do not amount to an unequivocal request, the police do not have

154. *Commonwealth v. Singleton*, 266 A.2d 753, 755 (Pa. 1970).

155. *Cf. id.* at 755-56 (holding that delivering the second *Miranda* warning by telling the suspect that “any statement he gave could be used ‘for or against him’ at trial” is impermissible because it “vitiates the intended impact of the warning”).

156. A clearer test would be one that prohibits the police from discouraging a suspect from requesting her right to an attorney. Such a test could be formulated as follows: The police may neither attempt to discourage a suspect from invoking her right to an attorney nor act in such a way that a reasonable person in a suspect’s position would believe that the police were communicating such a message.

While the Court that decided *Miranda* would almost certainly have endorsed this kind of test, it seems unlikely that the post-*Miranda* Court would adopt such a test, especially since it appears to go beyond *Seibert*’s prohibition that the police not employ tactics that prevent the suspect from being adequately “apprised” of the *Miranda* rights. State courts could, of course, adopt this kind of test as a matter of state constitutional law.

to respond.¹⁵⁷ And if the suspect asks an officer to advise her as to whether she should exercise that right, the officer may simply decline to provide such advice. Consistent with *Davis*, the *Miranda* warnings provide the suspect with sufficient information for her to make that decision on her own.

If a suspect asks such a question, however, the police should not be permitted to provide misinformation that will distort the suspect's understanding of the nature of the safeguard provided by the right to request an attorney.¹⁵⁸ Again, the focus should be on whether the officer's answer would be likely to distort the suspect's understanding of any of her *Miranda* rights. If the officer tells the suspect she should not have an attorney because it is better for her to talk to the police by herself, this should be improper because it undermines her understanding of her right to the assistance of an attorney. The suspect's right to an attorney during a custodial interrogation stems from *Miranda's* recognition that a custodial interrogation is an adversary procedure between the police and the suspect in which the suspect has the right to the assistance of counsel if she believes she is not capable of dealing with the police on her own.¹⁵⁹ Through telling the suspect that she is better off dealing with the police on her own, the police distort the suspect's understanding of the *Miranda* warnings by leading her to believe that she is not facing an adversary procedure in which the assistance of counsel may be necessary.¹⁶⁰

In addition, if the suspect is seeking information relating to the *circumstances* under which the right to an attorney will be provided, the police should be required to supply that information. In *Davis*, the Court stated that "[t]he rationale underlying *Edwards* is that the police must respect a suspect's wishes regarding his right to have an attorney present during custodial interrogation."¹⁶¹ *Davis's* conclusions—that a suspect's ambiguous reference to an attorney is not sufficient to constitute a request for an attorney or to

157. See *Davis v. United States*, 512 U.S. 452, 461-62 (1994).

158. Cf. *Almeida v. State*, 737 So. 2d 520, 525 (Fla. 1999) (holding that when a defendant asks a question requesting information relating to his right to counsel, officers are obligated to stop questioning and give a good-faith straightforward answer).

159. See, e.g., *Michigan v. Mosley*, 423 U.S. 96, 110 n.2 (1975) (White, J., concurring).

160. Through seeking an officer's advice as to how she should deal with a custodial interrogation, the suspect of course demonstrates that she does not fully understand that she is engaged in an adversary procedure with the police. Under *Davis*, the police have no obligation to inform the suspect that she is dealing with an adversary procedure at which the advice of counsel may be helpful. *Davis*, 512 U.S. at 459-61. Under *Seibert*, however, the police should not be allowed to communicate information that distorts the suspect's understanding of her right to have the assistance of an attorney during an adversary procedure. *Missouri v. Seibert*, 542 U.S. 600, 611-13 (2004).

161. *Davis*, 512 U.S. at 460.

trigger an obligation that the police ask clarifying questions—apparently stemmed from the Court’s concern that either rule would burden the police by requiring a finding that suspects who didn’t wish to request an attorney when they made an equivocal reference to one had invoked their right to have one.¹⁶² When the suspect asks a question relating to the circumstances under which an attorney will be appointed, however, the question indicates that she believes she needs factual information in order to decide whether to request an attorney. When the factual information requested is clear and indisputable, the suspect should be entitled to that information because she has indicated that she needs it in order to make an informed decision as to whether to invoke her right.

V. APPLYING THE TESTS

In this part, I will apply the tests developed in Part IV to ten examples drawn from nine cases that illustrate the interrogation tactics discussed in Part II. In all of these examples, the courts’ opinions apparently provide full and accurate accounts of the police interrogation tactics employed.¹⁶³ I will consider four cases in which the suspect refers to the possibility of requesting an attorney, three in which an officer responds to a suspect’s question relating to whether he should have an attorney, and three in which an officer responds to a suspect’s question relating to the circumstances under which an attorney will be provided. In each case, I will seek to determine whether the interrogator prevented the suspect from being “adequately and effectively” apprised of his right to have an attorney present by either employing an interrogation tactic that would be likely to have the effect of undermining the suspect’s understanding of the right or failing to provide requested factual information that would be relevant to an informed waiver of the right.

162. In *Davis*, the Court stated that its basis for rejecting a rule that the police should treat a suspect’s reference to an attorney as a request for an attorney was that “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.” *Id.* at 460. Although the majority did not say so, it may have also concluded that requiring clarification whenever a suspect makes an ambiguous reference to an attorney would lead some suspects who did not initially desire the presence of an attorney to decide to request one.

163. See *supra* note 66.

A. Tactics Employed When the Suspect Refers to the Possibility of Requesting an Attorney

*1. Kaczmarek v. State*¹⁶⁴

The detectives read Kaczmarek his *Miranda* rights. Kaczmarek responded that his “attorney was coming this afternoon and [he] wondered if [the detectives] can talk to him then.”¹⁶⁵ The detectives responded that they were “here now,” wanted to speak with the defendant, and would be busy in the afternoon.¹⁶⁶ The detectives then told Kaczmarek that if he wanted to speak with the detectives, he could do so “now.”¹⁶⁷ Kaczmarek then said he would talk to the detectives; after the detectives again warned him of his *Miranda* rights and received his signed waiver, they questioned him and he gave a statement implicating himself in the crime.¹⁶⁸

Kaczmarek is a typical example of a case in which the police take advantage of the suspect’s misguided belief that it will be to his advantage to tell his story to the police. The defendant might argue that, through emphasizing that they would not wait until the afternoon to hear his story, the police may be tacitly suggesting to him that it would be to his advantage to tell his story to them as soon as he can.

In this case, however, the defendant’s argument is weak. While the officers’ attitudes might have suggested to Kaczmarek that he would be losing something by not taking advantage of his immediate opportunity to tell his story to them, the officers did not explicitly or implicitly suggest to him that talking to them could improve his legal position. Through failing to inform the suspect that it might be to his advantage to consult with an attorney before deciding whether he should talk to them without one, the officers are taking advantage of Kaczmarek’s ignorance. Based on the Court’s analysis in *Moran*, however, this does not constitute a failure to adequately apprise the suspect of his right to an attorney.

164. 91 P.3d 16 (Nev. 2004).

165. *Id.* at 24.

166. *Id.*

167. *Id.*

168. *Id.*

2. United States v. Eastman¹⁶⁹

Tribal officers arrested Eastman for sexual abuse of a minor. Later, detectives informed him of his *Miranda* rights. After Eastman read the waiver of rights portion of the form, the following dialogue occurred:

EASTMAN:	What about a public defender?
DETECTIVE NORRIS:	Phillip, that's up to you in your entirety to make that decision. But if you do, I'm going to send this file as is to the U.S. Attorney's Office without Phillip Eastman's side of the story.
EASTMAN:	I know I didn't rape anyone because why would I have these [pointing to hickeys he had on his face and neck area]?
DETECTIVE NORRIS:	Phillip, if you want to tell me anything about what you did or didn't do or anything, I need you to sign the form if you want to talk to myself and Larry—Detective LeBeau.
EASTMAN:	Well, I know I didn't do anything so I'll talk to you guys. ¹⁷⁰

Eastman then signed the waiver form and subsequently made incriminating admissions.¹⁷¹

The detective told Eastman that, if he requested an attorney, his file would go to the U.S. Attorney's office without his story in it. This statement was presumably accurate. If Eastman requested an attorney, the detective had probably decided that he would send the file to the U.S. Attorney without trying to question Eastman in the presence of Eastman's attorney.

The government might argue that this case is indistinguishable from *Kaczmarek*. As in that case, the police gave the suspect no explicit or implicit assurance that talking to the police could improve his legal position. At most, there is a tacit suggestion that talking to the police could help him in some way.

In this case, however, the defense has a stronger argument than it did in *Kaczmarek*. The average person in Eastman's position would know that the U.S. Attorney's office will determine what, if any, charges will be brought against Eastman, but would not know that the inclusion of Eastman's statement would almost certainly have no effect on the U.S. Attorney's

169. 256 F. Supp. 2d 1012 (D.S.D. 2003).

170. *Id.* at 1016.

171. *Id.*

charging decision. The only reason for Detective Norris to make the statement relating to the absence of “Phillip Eastman’s side of the story” would be to lead Eastman to believe that including his story in the file would lead the prosecutor to treat him more favorably. In this case, unlike *Kaczmarek*, there is thus an implicit suggestion to the suspect that requesting an attorney will impair his legal position because it will prevent him from telling his story to the police. Since the likely effect of the detective’s statement would be to undermine the suspect’s understanding of the second *Miranda* warning—leading him to believe that what he says to the police can be used in his favor as well as against him¹⁷²—the detective’s statement is arguably sufficient to invalidate the suspect’s waiver of his right to an attorney.

3. *Harper v. State*¹⁷³

Police arrested Harper for several robberies including one in which a person had been killed. After he had been warned of his *Miranda* rights, Harper admitted committing one robbery. When the detectives continued the interrogation, the following colloquy occurred:

DETECTIVE PEYTON: It’s not? Where is it?
MR. HARPER: It’s a toy gun. I gave it to my little brother.
DETECTIVE PEYTON: Okay. Well, that’s nice of you. Okay.
MR. HARPER: I don’t even want to talk unless I have me a lawyer and go through this shit. I don’t have to go through this shit, right?
DETECTIVE PEYTON: Well, the first thing that’s going to happen is, you know, you’re going to get your fingers stitched up.
MR. HARPER: No. I don’t want them stitched up.
DETECTIVE PEYTON: Well, that’s between you and the medics, okay? All right. The next thing that’s going to happen is you’re going to get woke up after while and you’re going to go before the judge and the judge is going to see that you have warrants out for you for a long time, a year. . . . And the judge is going to see that you’ve been on the run for a year, and then he’s going to see that the judge issued—another judge issued a warrant for your arrest for aggravated robbery, a first degree felony that could put you in the penitentiary for the rest of your life.
What’s really—what’s really interesting is that you have a chance to get this off your chest, and I know it’s eating you up. I know what happened last night is eating you up.

172. See *supra* text accompanying notes 153-55.

173. No. 03-00-00677-CR, 2001 Tex. App. LEXIS 7497 (Tex. Ct. App. Nov. 8, 2001).

MR. HARPER: I don't know what you're talking about.
 DETECTIVE PEYTON: When things go wrong.
 DETECTIVE JOHNSON: Bobby Joe, you made mention of an attorney.
 MR. HARPER: Huh?
 DETECTIVE JOHNSON: You made mention of an attorney.
 MR. HARPER: Yeah.
 DETECTIVE JOHNSON: We've got a good system here and I believe in it and we told you you had the right to request an attorney before and during any questioning. Are you telling us you want to terminate this interview and speak to an attorney or do you want us to continue to discuss this matter?
 MR. HARPER: Now?
 DETECTIVE JOHNSON: Yes.
 MR. HARPER: It's fine.
 DETECTIVE JOHNSON: What's fine?
 MR. HARPER: We can discuss this.¹⁷⁴

Harper then confessed to another robbery and murder.¹⁷⁵

In this case, Harper's statement, "I don't even want to talk unless I have me a lawyer and go through this shit," seems to constitute a request for an attorney that is sufficiently unambiguous to meet the *Davis* test. If it is, then Detective Peyton's statements to Harper that he had a "chance to get this off [his] chest" by talking to the police would appear to constitute interrogation in violation of *Edwards* because Peyton made these statements before Harper initiated further "communications or exchanges" with the police.¹⁷⁶

If Harper's statement is not viewed as an unequivocal request for an attorney, then the detectives' subsequent interrogation tactics raise two questions: First, did the detectives violate Harper's rights by failing to answer his question, "I don't have to go through this shit, right?" And, second, did their subsequent tactics—which eventually deflected him from requesting an attorney—undermine his understanding of any of the *Miranda* rights?

Taken in context, Harper's question can best be understood as asking for clarification as to what would happen if he requested an attorney. In effect, he was asking the detectives whether his request for an attorney would prevent them from questioning him without one. An accurate answer to his question would be: "If you request an attorney, we will not be permitted to question you until an attorney is present." Since under *Davis* the *Miranda* warnings themselves provide suspects with sufficient information relating to their

174. *Id.* at *4-6.

175. *Id.* at *6.

176. See *supra* text accompanying notes 30-31.

constitutional rights, however, the detectives had no obligation to answer his question.

Detective Peyton's subsequent interrogation tactics deflected Harper from requesting an attorney by focusing his attention on the value of telling his story to the police. In deciding whether Detective Peyton's interrogation tactics were permissible, the focus should be on whether the detective suggested to Harper that failing to tell his story to the police would result in adverse legal consequences. If it did, then, based on the analysis presented in *Eastman*,¹⁷⁷ the detectives' tactics should be impermissible because their likely effect would be to undermine the suspect's understanding of the second *Miranda* warning.

The defendant could argue that the point of Detective Peyton's iteration of Harper's legal problems—the warrants against him, including “a warrant for his arrest for [a felony] that could put [him] in the penitentiary for the rest of [his] life”—is to suggest to Harper that he is in a “bad place” and, therefore, it is in his best interest to cooperate with the police. The fact that Detective Peyton recounts these matters immediately after Harper asks about having an attorney arguably strengthens this argument because Peyton's timing communicates to Harper that, in view of his serious legal problems, he has a better alternative than requesting an attorney. Peyton's next sentence communicates to him that that alternative is to tell his story to the police. Detective Johnson's statement that requesting an attorney will lead them to “terminate this interview,” moreover, would emphasize to Harper that he must choose between requesting an attorney or telling his story to the police without one.

The government can argue, however, that, while the detectives undoubtedly deflected Harper from requesting an attorney, they did not accomplish this by suggesting to him that his failure to tell his story to the police would result in adverse legal consequences. Instead, Detective Peyton merely explained to Harper that telling his story to the police would enable him “to get this off [his] chest” and thereby enable him to feel better.

Although this is a close case, the government's argument seems stronger than the defendant's. There does not appear to be clear evidence that the detectives' interrogation tactics would be likely to lead Harper (or a reasonable suspect in his position) to believe that telling his story to the police without an attorney would improve his legal position. Accordingly, their

177. See *supra* text accompanying notes 169-72.

tactics did not undermine Harper's understanding of any of his *Miranda* rights and should not vitiate his waiver of his right to request an attorney.

4. Commonwealth v. Redmond¹⁷⁸

Detective Molleen arrested Redmond for murder; after Molleen read him his *Miranda* rights, Redmond waived his rights and answered some questions. About two hours into the interrogation, the following colloquy occurred:

REDMOND: These are some pretty deep charges.
 DETECTIVE MOLLEEN: Listen to what I got to say. I don't think. I don't want you to seem arrogant. Okay. I don't want you to seem arrogant. I want you to do the best thing for yourself. And the best thing for yourself is you need to take some of the heat off your back. Yeah, they are very serious charges. This is the only opportunity you're ever going to [have to] talk and give your side. Period. This is . . .
 REDMOND: Can I speak to my lawyer? I can't even talk to a lawyer before I make any kinds of comments or anything?
 DETECTIVE MOLLEEN: You can do anything you like, but I'm telling, I'm telling you like this. You have the freedom to do anything you want. You have the freedom to go to sleep right now if you want to do that. Okay? You have the freedom to sit here and talk to me. Okay? The point is and what I'm trying to tell you is, this is your opportunity; this is your time. There ain't tomorrow, there ain't later. Okay? There's not later. There is no later. And I'm trying, I'm trying to give you because you are a 24 year old man the opportunity to help yourself out a little bit. You got a lot of years to live. Okay. You got a lot of people probably around you who really care for you. A lot of people over in the area talked highly of you. A couple of detectives talked highly of you last night. Okay. And I don't think in my mind, and I can't really prove that you went over there with intentions of doing anything wrong. But sometimes bad things can happen.¹⁷⁹

Redmond then made incriminating statements to Detective Molleen.¹⁸⁰

When Redmond asked if he could speak to a lawyer, Detective Molleen diverted him from his immediate concern by telling him he could do anything he wanted and then mentioning possibilities that did not include talking to an attorney. Molleen's primary interrogation tactic, however, was to

178. 568 S.E.2d 695 (Va. 2002).

179. *Id.* at 697.

180. *See id.*

communicate to Redmond that this was his one “opportunity” to tell his story to the detective. He added, moreover, that he was trying to give Redmond “the opportunity to help [himself] out a little bit.” From the context, Detective Molleen clearly intended to communicate to Redmond that if he told his story at this time, he might be able to improve his legal position.

In this case, the detective’s interrogation tactics would have the effect of undermining the suspect’s understanding of the right to request an attorney. Through his comments to Redmond, Detective Molleen indicated that the one option that could possibly improve his legal position would be to tell his story to Molleen at that time. He also made it clear that requesting an attorney was inconsistent with that option. Molleen’s communications to Redmond would thus have the effect of distorting the latter’s understanding of the rule that anything he says to the police can be used against him. Instead of realizing that an attorney could advise him as to whether he should make statements to the police and thereby risk incriminating himself, a reasonable suspect in Redmond’s position would be led to believe that making statements to the police would improve his legal position. In view of the detective’s interrogation tactics, the suspect was not “adequately and effectively apprised” of his second *Miranda* right, and his subsequent waiver of the right to an attorney was invalid.

B. Responding to a Suspect’s Question Relating to Whether He Should Have an Attorney

*1. Soffar v. Cockrell [The Defendant’s First Question]*¹⁸¹

Officer Clawson responded to Soffar’s question concerning whether he should have an attorney by advising him that he should request one only if he was innocent; he told him that he should talk to the police without an attorney “if he was involved in the crime.”¹⁸² Since Clawson could infer from Soffar’s prior disclosures to other officers that Soffar did not deny that he had some involvement in the crime, Clawson essentially advised Soffar to talk to the police without an attorney.¹⁸³

When an officer responds to a suspect’s question of whether he *should* have an attorney in this way, the officer’s answer clearly undermines the

181. 300 F.3d 588 (5th Cir. 2002). For a summary of the facts that occurred prior to Soffar’s first question to Officer Clawson, see *supra* text accompanying notes 1-7.

182. *Id.* at 591.

183. *See id.*

suspect's understanding of the protection afforded by the right to request an attorney. The officer's answer is likely to lead the suspect to believe that, although he has the right to request an attorney, his legal position will be adversely affected if he requests one rather than talking to the police on his own. Such an answer will be likely to distort the suspect's understanding of the *Miranda* warnings by leading him to believe either that telling the police about his involvement in the crime will be to his advantage (thus distorting the meaning of the second *Miranda* warning) or that an attorney's advice as to whether he should talk to the police will be of no value (thus negating the right to request an attorney). Accordingly, Clawson's interrogation tactics should be held to invalidate Soffar's waiver of his right to an attorney.¹⁸⁴

2. *People v. Oaks*¹⁸⁵

Detective Hamilton advised Oaks of his *Miranda* rights and questioned him about the death of a three-year-old child.¹⁸⁶ After Oaks made several incriminating admissions, Detective Hamilton told him he was under arrest, again gave him *Miranda* warnings and asked him if he would be willing to make a written statement.¹⁸⁷ The following colloquy then occurred:

OAKS:	I don't know. Should I see a lawyer?
HAMILTON:	That's up to you. I've already read you your rights. You've already admitted it with three witnesses, okay, 'cause I told you before when you put it in writing or admit that you're, number one, you know if you're truthful we can corroborate things. You're only helping yourself. But you're also incriminating yourself.
	* * *
	So whether or not you need an attorney you have to tell me, all right?
OAKS:	Uh huh.
HAMILTON:	But that's up to you. If you want to give me a statement fine, I'll be happy to take it. If you don't then I won't. No problem. I'm not going to get pissed at you. No big deal. That's something you have

184. In this case, the officer's advice was apparently disingenuous; Clawson knew that it would not be to Soffar's advantage to talk to the detectives without an attorney. In applying the test, however, the officer's mental state at the time he answers a suspect's question or makes a statement should be irrelevant. Consistent with the proposed objective test, the sole focus should be on whether the officer's statement would be likely to mislead a reasonable person in the suspect's position as to the nature of the legal protection provided by any of the *Miranda* rights. See *supra* Part IV.D.

185. 662 N.E.2d 1328 (Ill. 1996).

186. *Id.* at 1333-35.

187. *Id.* at 1335.

to sort out for yourself, okay? I'm here to do my job. And I have to honestly tell you that I believe it's in your best interest, okay?¹⁸⁸

Oaks then agreed to make a written statement and briefly answered Hamilton's additional questions.¹⁸⁹

Detective Hamilton's answer to Oaks's question as to whether he should "see a lawyer" was only marginally different from Clawson's answer to Soffar. After responding, "[t]hat's up to you," Hamilton made it clear that Oaks would have to choose between invoking his right to counsel and giving a statement to the detective. Hamilton further explained that, if Oaks gave a statement, he would be incriminating himself. But he also stressed that he would be "helping" himself; and he ended by saying, "And I have to honestly tell you that I believe it's in your best interest."

The essence of Hamilton's response was thus that, even though talking to the police without an attorney might have some adverse legal consequences, his overall legal position would likely be improved if he talked to the police without an attorney. As in the *Soffar* case, Hamilton's answer would likely undermine the suspect's understanding of his *Miranda* warnings by leading him to believe that telling his story to the police without requesting advice from an attorney would be to his advantage.¹⁹⁰ As a result, Oaks's waiver of his right to an attorney should be invalid.

3. Clark v. Murphy¹⁹¹

Clark, who was suspected of harming his missing stepmother, was arrested for stealing her car. Detective Chambers informed Clark of his *Miranda* rights and asked him if he understood them. Later, at the police station, Clark said he did. In the ensuing interview, Clark attempted to provide an explanation for why he had taken his stepmother's car. When Detective Chambers responded that there were serious problems with his story, Clark said, "I think I would like to talk to a lawyer."¹⁹² Detective Chambers testified that he responded as follows:

I told him if you—if he wanted a lawyer I would call him one. I told him I expected, if in fact he wanted a lawyer and I called him one, our dialogue would be over. I told him

188. *Id.* at 1347.

189. *Id.* at 1335.

190. *See supra* text accompanying notes 181-84.

191. 317 F.3d 1038 (9th Cir. 2003).

192. *Id.* at 1041.

that [his sister] was there, I wanted to talk to her. That I was going to leave him alone for a few minutes to make a decision, and that when I returned to him I would expect his answer.¹⁹³

Chambers then left the interview room to talk to Clark's sister. When the detective returned to the interview room a half hour later, Clark spoke first. Clark told the detective that "he did not want a lawyer, and that he wanted to continue talking." After the interview continued for another twenty minutes, Clark said to Detective Chambers, "should I be telling you or should I talk to a lawyer?" Chambers replied, "Are you asking for my personal opinion or my professional opinion?" Clark reiterated that he wanted the detective's opinion as to whether he should be talking to a lawyer or the detective. After a long silence of around two minutes, Chambers told Clark that "in his personal opinion, should the case go to trial, a judge or a jury would be concerned with remorse." Using his hands as scales to illustrate the point, the detective told Clark that the judge or jury would weigh fear of punishment against any remorse over what happened, and that in his [the detective's] opinion, "remorse should outweigh fear of punishment." Clark responded, "well, let's talk about this then."¹⁹⁴

A short time later, Clark confessed to murdering his stepmother.¹⁹⁵

In *Clark*, Detective Chambers initially deflected the suspect from requesting an attorney by telling him that, if he wanted a lawyer, his "dialogue" with the detective would be over. Since the detective did not misrepresent the value of talking to the detective without an attorney, this tactic did not vitiate the suspect's *Miranda* waiver.

Chambers's answer to Clark's question is more problematic. When Clark asked whether he should talk to a lawyer, Chambers replied that, if the case went to trial, the judge or jury would be primarily "concerned with remorse." The defense could argue that this answer was intended to communicate to Clark that he should show his "remorse" by explaining his role in the killing of his stepmother to the detective. While the government might respond that Chambers could have been talking about what would happen after the case went to trial, this response seems weak. Since Clark was asking whether he should talk to the detective or talk to a lawyer at *that point in time*, the detective's answer should be understood as answering that inquiry. Upon hearing Chambers's answer, a reasonable person in Clark's position would

193. *Id.*

194. *Id.* at 1042.

195. *Id.*

think it would be in his best interest to talk to the detective without a lawyer. From Chambers's previous statement, moreover, Clark knew that he did not have the option of talking to the detective with a lawyer.

If this argument is accepted, the question arises whether the detective's interrogation tactic undermined Clark's understanding of the second *Miranda* warning. The government can argue that the detective's statement did not constitute affirmative misrepresentation because the judge or jury might actually be concerned with early evidence of Clark's "remorse." As in the *Eastman* and *Redmond* cases, however, the defense can argue that the detective's interrogation tactic undermined the second *Miranda* warning because, instead of being clearly informed that anything he said to the detective could be used against him, the suspect would be led to believe that talking to the police without an attorney would have the potential for improving his legal position. While this is another close case, on balance the defendant's argument should prevail. Detective Chambers's answer to Clark vitiated Clark's waiver of his right to an attorney because its likely effect would be to undermine Clark's understanding of his right not to incriminate himself.

C. Responding to a Suspect's Question Concerning the Circumstances Under Which an Attorney Will Be Provided

1. Soffar v. Cockrell [The Defendant's Second Question]

In answering Soffar's second question, Officer Clawson significantly exaggerated the time it would take for Soffar to have a court-appointed lawyer. Instead of assuring Soffar that he would have an attorney within 72 hours, Soffar told him it could "take . . . as long as a month."¹⁹⁶ Based on what Clawson knew of Soffar, it appears that, even if Clawson had accurately answered his question, Soffar might not have requested counsel. Since, according to Clawson, Soffar was only able to weigh the consequences of events that would take place in the very near future,¹⁹⁷ it seems quite likely that, even if Clawson had told Soffar he could have an attorney within 24 hours, Soffar would still have elected to talk to the police.

Nevertheless, Clawson's failure to provide Soffar with accurate information relating to when he would receive a court-appointed attorney if

196. *Soffar v. Cockrell*, 300 F.3d 588, 591 (5th Cir. 2002).

197. *Soffar v. Johnson*, 237 F.3d 411, 427 n.18 (5th Cir. 2000).

he requested one should vitiate Soffar's waiver of that right. Soffar's question indicated that he was seeking relevant information relating to the protection provided by the right to an attorney. Clawson's failure to provide that information vitiated Soffar's waiver because it prevented him from making an informed decision as to whether to invoke the right.

2. United States v. Branch¹⁹⁸

Police arrested Branch for assaulting his girlfriend. On the day after his arrest, Assistant D.A. Blazer questioned Branch. While Blazer was informing Branch of his *Miranda* rights, the following colloquy occurred:

MR. BRANCH: So I can get an attorney right now?
 YALE BLAZER: You have the right to speak to one before you speak to me, correct.
 MR. BRANCH: Right now? Or [do I] have to wait till he comes and then wait to come back?
 YALE BLAZER: Right now this second, you can't have an attorney. If you wanna wait to speak to an attorney before speaking to me, [you're] entitled to that right. But I can't get you an attorney right now, no. You won't get an attorney 'til you see the judge. Alright? You understand that? Alright. If you can't afford an attorney, one will be provided for you without cost. Do you understand that?
 MR. BRANCH: Yes.
 YALE BLAZER: And if you don't have an attorney available, this question is probably what [you're] looking for. If you don't have an attorney available, you have the right to remain silent until you have an opportunity to consult with an attorney. Do you understand that?
 MR. BRANCH: Yes.
 YALE BLAZER: Okay. Do you understand all the rights I read to you?
 MR. BRANCH: Yes.
 YALE BLAZER: Now that I read you your rights are you willing to answer some questions?
 MR. BRANCH: Yes.¹⁹⁹

In response to Blazer's questions, Branch made incriminating admissions.²⁰⁰

When Branch asked Assistant D.A. Blazer whether he could have an attorney "right now," Blazer told him he could not and further informed Branch that he would not see an attorney until he went before the judge, a statement that apparently accurately described the procedure followed in that county with respect to court-appointed attorneys. From the context, it

198. No. 01 Cr. 264 (LMM), 2001 U.S. Dist. LEXIS 15560 (S.D.N.Y. Sept. 28, 2001).

199. *Id.* at *2-3.

200. *See id.* at *5.

appeared that Branch was asking about the availability of a court-appointed attorney. Since Blazer thus provided essentially accurate information in response to Branch's question, Branch's waiver of his right to an attorney should be valid.

3. United States v. Bezanson-Perkins²⁰¹

Police arrested Bezanson-Perkins for a bank robbery. At the police station, the detectives informed Bezanson-Perkins of his *Miranda* rights, including his right to an attorney and his right to have one appointed if he could not afford one. The suspect and the detectives then engaged in the following colloquy:

BEZANSON-PERKINS: It's not going to happen right now[?]
DETECTIVE 1: No, we don't have [a lawyer] right now. We don't have one sitting there. If you [sic], you can refuse to answer any questions or stop giving this statement at any time you wish, which means that if you decide at some point you want to stop, you stop and we won't do it any further.
BEZANSON-PERKINS: Okay.
BEZANSON-PERKINS: *So if I requested a lawyer, there would be one that would come right now?*
DETECTIVE 1: *No.*
DETECTIVE 2: Well what we'd do is if you didn't want to answer a question, you don't answer the question.
DETECTIVE 1: Ah go ahead and explain it to him if you want, whatever um,
DETECTIVE 2: Yeah I mean, the bottom-line Josh, you already told me you know the system. You've been through the system. *You have a right to an attorney if you want. You'd have to hire your own lawyer.* We'd like to ask you some questions. And actually we just want to get your version of what happened. Your involvement, you, you're telling me, you mentioned something before Detective Gaskell got in here that you know, you[re] a convicted felon and you[re] in a white car and you're at the wrong place at the wrong time, well that's what we want to talk about. We want to get your version. *If we have a question that you don't want to answer, say I don't want to answer that. It's as simple as that.*
BEZANSON-PERKINS: Okay.²⁰²

201. 390 F.3d 34 (1st Cir. 2004).

202. *Id.* at 36-37.

The detectives then proceeded to question Bezanson-Perkins about the robbery and Bezanson-Perkins responded with incriminating statements.²⁰³

Like the defendant in *Branch*, Bezanson-Perkins wanted to know if he could have an attorney “right now.” As far as the availability of counsel for Bezanson-Perkins was concerned, the detectives’ answers were accurate. They told him that if he wanted to have an attorney there immediately, he would “have to hire [his] own lawyer.” In response to his first question, the first detective also told him that he could refuse to give a statement or stop giving one at any time. He did not say that, if the suspect requested an attorney, this would prevent the police from interrogating the suspect until an attorney was present. In response to the suspect’s second question, moreover, the detectives indicated that they were explaining Bezanson-Perkins’s options. The second detective then stated that, if the detectives asked him a question he didn’t want to answer, he could simply “say ‘I don’t want to answer that.’” The detectives did not explain that if the suspect requested an attorney, the detectives would cease asking questions until an attorney was appointed.

Under the circumstances, the detectives’ failure to supply this information should be critical. The detectives treated the suspect’s question relating to when he would have an attorney as a request for information relating to his options with respect to requesting an attorney or proceeding without one. While the detectives had no obligation to supply this information initially, once they chose to elaborate as to the protections provided by the suspect’s right to request an attorney, they had an obligation to supply complete and accurate information.²⁰⁴

The detectives’ response to the suspect indicated that, since the suspect could not afford to hire his own attorney who could be there immediately, he could listen to the detectives’ questions and make his own decision as to how to respond to them, electing not to answer those he did not want to answer. Since the detectives neglected to inform the suspect that he could also request an attorney and thereby ensure that the police would ask him *no* questions until an attorney was present, the suspect might easily be misled into believing that his only option was to submit to police questioning. The detectives’ failure to supply the suspect with vital information relating to the protection provided by the right to request an attorney should vitiate the suspect’s waiver of that right.

203. *Id.* at 37.

204. *Cf. supra* text accompanying notes 151-52.

VI. CONCLUSION

Both intuition and empirical data suggest that the suspect's right to request an attorney is the most powerful safeguard provided by *Miranda*. Nevertheless, the actual impact of that safeguard should not be overestimated. Richard Leo's observation of interrogation practices indicates that even when the police provide relatively straightforward explanations of suspects' *Miranda* rights, approximately 80% of suspects waive their rights.²⁰⁵ As George Thomas has pointed out,²⁰⁶ the most plausible explanation for this apparently counterintuitive result is that the typical suspect believes that the potential short-term benefits of telling a plausible story to the police will outweigh the potential long-term consequences of providing statements that can be used by the police to incriminate him. Since the typical suspect may also believe that "turn[ing] down that free lawyer" will assist in persuading the police of his candor,²⁰⁷ the great majority of these suspects are unlikely to even ask about or refer to the possibility of requesting an attorney. Rules relating to interrogation tactics designed to deflect suspects from invoking their right to an attorney are thus unlikely to have a dramatic effect on the extent to which suspects waive their *Miranda* rights. Even if stricter rules are applied, the great majority of suspects will continue to waive their rights.

As to those suspects who do refer to the possibility of requesting an attorney, however, the Court's decision in *Davis* has had a significant impact. Prior to *Davis*, most lower courts provided at least some protection for suspects who expressed an interest in requesting an attorney. If the suspect made an ambiguous reference to an attorney, the majority of lower courts held that the police were required to ascertain the suspect's wishes by asking clarifying questions before proceeding with the interrogation. In conjunction with this requirement, lower courts often closely scrutinized interrogation tactics designed to dissuade suspects from requesting attorneys.

Davis's holding that the police may ignore suspects' ambiguous references to counsel has had unanticipated consequences. As a result of *Davis*, lower courts have mostly abandoned restrictions on police interrogation

205. In the great majority of the 175 interrogations observed by Leo, "the detective(s) read each of the fourfold *Miranda* warnings verbatim from a standard form." Leo, *supra* note 35, at 276. Leo provides no indication that, either before or after reading the warnings, the detectives engaged in any conduct that would discourage suspects from invoking their rights. Nevertheless, 78.3 percent of the suspects waived their rights. *Id.*

206. George C. Thomas III, *Miranda's Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091, 1110 (2003) (reviewing WHITE, *supra* note 34).

207. Thomas, *supra* note 206.

tactics designed to deflect a suspect from requesting an attorney. So long as the police have informed the suspect of her right to request an attorney and have not coerced the suspect into waiving that right, post-*Davis* cases have generally held that interrogation tactics that deflect the suspect from requesting an attorney will not invalidate the suspect's waiver of her right to an attorney.

In *Miranda*, the Court expressly prohibited police "trickery" that induced a suspect's waiver of her *Miranda* rights. In post-*Miranda* cases, the Court distinguished between "affirmative misrepresentation," which might constitute such trickery, and a failure to disclose information relevant to the waiver decision, which would not. In *Missouri v. Seibert*, however, the Court indicated that the police would be barred from employing interrogation practices that intentionally undermined the suspect's understanding of the *Miranda* rights.

During the post-*Davis* era, police have employed a variety of interrogation tactics that have the effect of deflecting suspects from invoking their right to an attorney. In contrast to the interrogation tactic employed in *Seibert*, however, it is not clear that interrogation manuals or interrogation training²⁰⁸ advise the police to employ these tactics in order to undermine suspects' *Miranda* rights. The indisputable evidence of interrogators' intent—which was present in *Seibert*—is thus often lacking in these cases.

The practices which post-*Davis* interrogators employ to deflect suspects from requesting counsel indicate, however, that the police are not only aware of the looser restrictions imposed by post-*Davis* courts, but also that, to paraphrase Justice Jackson, they have interpreted those restrictions "for themselves and pushed them to the limit."²⁰⁹ While the post-*Miranda* Court has undoubtedly weakened *Miranda*'s prohibition against "trickery" designed to induce *Miranda* waivers, post-*Miranda* cases have been adamant in insisting that a suspect who wishes to deal with the police only with the aid of counsel has the right to do so.²¹⁰ In seeking to restrain the police from employing improper interrogation practices, moreover, the post-*Miranda* Court has opted for objective tests that focus on a police interrogation tactic's likely effect on a suspect rather than subjective ones that focus on the interrogator's state of mind at the time she employed the tactic.

208. See *supra* text accompanying notes 19-23.

209. *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

210. See *supra* text accompanying note 161.

In order to safeguard a custodial suspect's right to the assistance of an attorney, courts need to develop rules that prevent the police from employing at least some interrogation tactics that deflect suspects from requesting the assistance of counsel. In view of the post-*Miranda* Court's ambivalence towards *Miranda*, formulating such rules—while still adhering to the principles articulated in post-*Miranda* decisions—will be difficult. The Court that decided *Miranda* would almost certainly be willing to establish a rule that prohibited the police from discouraging a suspect from requesting an attorney or acting in such a way that a reasonable person in the suspect's position would believe they were communicating that message. This rule does have an advantage that has frequently been recognized as important by the post-*Miranda* Court. It provides a clear guideline for the police and courts. This rule or a similar one could be adopted by state courts as a matter of state constitutional law.²¹¹

Post-*Miranda* decisions such as *Moran* and *Davis* suggest that the Supreme Court would not be willing to adopt such a broad prohibition. In *Seibert*, however, the Court indicated that it is at least willing to prohibit the police from intentionally employing interrogation tactics that undermine a custodial suspect's understanding of the *Miranda* rights. In order to make *Seibert*'s prohibition meaningful, courts should prohibit the police from employing interrogation tactics that will have the effect of undermining the suspect's understanding of the right to request an attorney or the rights that the presence of an attorney during the interrogation is designed to protect.

As I explain in this article, this should mean that, in discussing the effect of a suspect's request for an attorney, the police should not be permitted to distort the meaning of the *Miranda* warnings so that the suspect will be likely to believe that requesting an attorney will result in adverse legal consequences or will be likely to misunderstand the nature of the protection that requesting an attorney will provide. In addition, in answering suspects' questions relating to the right to have an attorney, officers should not be permitted to provide inaccurate factual information relating to the circumstances under which an attorney will be provided. When the police engage in any of these tactics, it should vitiate the suspect's waiver of her right to request an attorney.

As the cases I discuss in Part V show, it will often be difficult for courts to determine whether an officer's interrogation tactic had the likely effect of undermining the suspect's understanding of the right to request an attorney or

211. See *supra* note 156.

one of the other *Miranda* rights. In addition, it will sometimes be difficult to determine whether officers' answers to suspects' questions relating to the right to request an attorney are so inaccurate as to undermine the suspects' understanding of any of the *Miranda* rights. In many cases, both the government and the defense will be able to present plausible arguments in support of their positions. While the tests I propose will not always produce clear results, they will focus courts on the factors that should be considered in determining whether police interrogation tactics have impermissibly deflected a suspect from invoking her right to request an attorney as guaranteed by *Miranda* and *Edwards*.

In *Davis*, the Court stated that the *Miranda* warnings provide the primary protection for suspects subjected to custodial interrogation. In order to ensure that the warnings provide meaningful protection, however, the police should not be allowed to employ interrogation tactics that undermine suspects' understanding of the warnings. Through applying the tests I have specified, courts should be able to come closer to realizing this goal.