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AEDPA'S RATCHET: INVOKING THE *MIRANDA* RIGHT TO COUNSEL AFTER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

David Rubenstein

Abstract: In *Davis v. United States*, the United States Supreme Court established a high standard to invoke the *Miranda* right to counsel, holding that a suspect must make a clear and unequivocal request for an attorney. Two years later, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA), which created a highly deferential standard of review for state court judgments challenged under federal habeas corpus jurisdiction. Generally, a state prisoner challenging the alleged deprivation of his *Miranda* right to counsel may obtain federal court relief under AEDPA only if his conviction in state court was based on an “objectively unreasonable” application of U.S. Supreme Court precedent. This Comment argues that the AEDPA standard of review effectively raises the bar for individuals to successfully invoke their right to counsel above what *Davis* requires, even outside the habeas context. This means that AEDPA’s procedural standard of review has effected a shift in substantive law, even if courts did not intend that shift. To remedy this skewing of substantive law, this Comment proposes that the Court should discourage trial and direct-review courts from basing their decisions on AEDPA cases.

INTRODUCTION

“I think I would like to talk to a lawyer.”¹ “Could I call my lawyer?”² “I think I need a lawyer.”³ “I think I might want an attorney.”⁴ “I think maybe I need to talk to a lawyer.”⁵ “I don’t think I want to say anything more until I talk to a lawyer.”⁶

A layperson hearing, reading, or speaking any of these phrases might reasonably understand them as requests for an attorney, which, in a police interrogation, would bar all further questioning without the presence of counsel.⁷ However, courts have determined each of these

1. *Clark v. Murphy*, 331 F.3d 1062, 1065 (9th Cir. 2003).

2. *Dormire v. Wilkinson*, 249 F.3d 801, 803 (8th Cir. 2001).

3. *Burket v. Angelone*, 208 F.3d 172, 195 (4th Cir. 2000).

4. *State v. Ellison*, 140 P.3d 899, 910 (Ariz. 2006).

5. *State v. Jennings*, 647 N.W.2d 142, 151 (Wis. 2002).

6. *United States v. Williams*, No. 5:08-CR-174-FL-1, 2009 WL 497143, at *1 (E.D.N.C. Feb. 28, 2009).

7. *See Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981) (holding that an in-custody criminal suspect, having invoked his right to counsel, “is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further

phrases to be inadequate to invoke the right to counsel, and they are part of a long list of similar phrases deemed insufficient.⁸

The rights of a criminal suspect established in *Miranda v. Arizona*⁹ are deeply ingrained in the American popular consciousness.¹⁰ Virtually anyone who has watched a contemporary police drama will know that suspects under arrest have a “right to remain silent,”¹¹ and that they have a right to a lawyer present during interrogation, whether or not they can afford one.¹² Most people likely do not know, however, how a suspect invokes his right to counsel. It turns out that doing so is fairly difficult.

The central reason for this difficulty arises from *Davis v. United States*.¹³ In *Davis*, the United States Supreme Court held that police are free to question a suspect until he “clearly requests an attorney.”¹⁴ Applying this “clear and unequivocal request” rule, courts have often interpreted the phrases uttered by suspects as questions or comments *about* counsel, even when a layperson might interpret them as requests *for* counsel.¹⁵ Phrases that employ tentative words, such as “might” or “could,” tend to fall short of the *Davis* “clear request” standard.¹⁶

Exacerbating this trend is the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),¹⁷ which imposes an extremely deferential standard for review of state court convictions by federal courts exercising habeas corpus jurisdiction.¹⁸ Under AEDPA, federal

communication, exchanges, or conversations with the police”).

8. See, e.g., 2 WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE 859 n.166 (3d ed. 2007) (listing dozens of phrases deemed insufficient to invoke); Jon M. Sands & Kim Smith-Stout, *Articulating Miranda*, in THE CHAMPION, Dec. 2005, at 24–25 (listing several more phrases).

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

10. See *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (stating that the *Miranda* warnings have “become part of our national culture”).

11. *Miranda*, 384 U.S. at 469.

12. *Id.* at 474. But see *Florida v. Powell*, 559 U.S. ___, 130 S. Ct. 1195, 1204–05 (2010) (holding that *Miranda* warnings need not expressly include notification that the suspect may have a lawyer present during interrogation) (quoting *Duckworth v. Eagan*, 492 U.S. 195, 198, 203–05 (1989)).

13. 512 U.S. 452 (1994).

14. *Id.* at 461.

15. See, e.g., *Dormire v. Wilkinson*, 249 F.3d 801, 805 (8th Cir. 2001) (“Could I call my lawyer?”); see also Marcy Strauss, *Understanding Davis v. United States*, 40 LOY. L.A. L. REV. 1011, 1034–47 (2007) (analyzing how courts have treated numerous questions and statements about counsel after *Davis*).

16. Strauss, *supra* note 15, at 1040–43 (extensively examining what causes a statement or question to be equivocal for the purposes of *Davis* and listing examples).

17. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of the U.S. Code).

18. See 28 U.S.C. § 2254(d)(1) (2006).

courts cannot overturn a state court's conviction unless the state court rendered "a decision that was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States."¹⁹ This entirely novel standard of review means that when a court decides a case under AEDPA, it is not saying what the law is; rather it is saying what the *limit* of the law is. That is, it is saying what constitutes a patent transgression of the law, and not how the law itself should be applied.

The distinction is crucial. As federal habeas courts have interpreted state *Miranda* rulings²⁰ through AEDPA's highly deferential prism, they have left undisturbed lower-court decisions holding phrases to be inadequate to invoke—phrases the habeas court might otherwise call a valid invocation. This process creates a body of invocation pseudo-precedent. That is, precedent that does not precisely state whether a phrase invokes the right to counsel, but instead explains that it was not an outright transgression of the law to hold that it did not invoke. That pseudo-precedent is then cited by state and federal courts reviewing purported invocations de novo, which are sometimes themselves cycled through the AEDPA filter. The final outcome of the interplay between *Davis* and AEDPA has been a shift in substantive law: a whittling away of the acceptable phrases for invoking the right to counsel to only the most obvious.²¹ That is, a suspect is effectively required to say nothing other than the magic words, "I want a lawyer."

This Comment analyzes what I will call AEDPA's "ratchet effect" on the standard for invoking the *Miranda* right to counsel. Part I examines the Court's approach to the right to counsel before 1994. Part II discusses the Court's decision in *Davis v. United States*, and Part III explains the Antiterrorism and Effective Death Penalty Act, its history, and its deferential standard of review. Part IV discusses in detail the effect AEDPA has had on invocation jurisprudence, and examines two

19. *Id.*

20. Those rulings cut strongly against defendants. According to a 2007 study, courts have determined that the suspect did not unambiguously invoke the right some eighty-one percent of the time. Strauss, *supra* note 15, at 1055 (examining 391 cases discussing *Davis* between 1994 and 2006). *But see id.* at 1034 (noting that clear and unambiguous invocations of the right to counsel may never reach appellate review). On habeas review, where only roughly one percent of petitions are successful, a lower rate of invocations deemed adequate is a statistical certainty. *See* John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 284 (2006) (analyzing the success rate of AEDPA petitions).

21. *See, e.g., infra* notes 192–207 and accompanying text (examining *Burket v. Angelone*, 208 F.3d 172 (4th Cir. 2000), in which the phrase, "I think I need a lawyer," has been cited in at least twenty-eight cases to reject similar claimed invocations).

illustrative cases with a quantitative analysis of their effects. Finally, Part V proposes that the Court should discourage lower courts from basing their decisions on AEDPA precedent except when they apply AEDPA themselves.

I. IN *MIRANDA V. ARIZONA*, THE U.S. SUPREME COURT
PLACED SPECIAL EMPHASIS ON THE RIGHT TO COUNSEL
WITHOUT STATING HOW IT IS INVOKED

Access to legal representation is a key value of American criminal law. The Sixth Amendment to the Constitution specifically requires that all criminal defendants have access to an attorney during trial.²² This was in part a reaction to English law of the mid-to-late 1700s, which barred assistance of counsel in most criminal cases.²³ Today, of course, the assistance of counsel is considered a fundamental part of any criminal proceeding in any American court. For its part, the U.S. Supreme Court has protected the Sixth Amendment right to counsel with a steadiness that is rare in constitutional criminal procedure.²⁴ Beginning in the 1930s, the Court began expanding the right to counsel by setting standards for counsel's performance²⁵ and strengthening waiver requirements.²⁶

The Court has since reached beyond the Sixth Amendment to hold that, as a Fifth Amendment matter, a criminal defendant is entitled to the assistance of counsel in an adversarial setting even outside the courtroom, namely police interrogations. In *Miranda v. Arizona*,²⁷ the Court applied to interrogations the Sixth Amendment notion that a

22. U.S. CONST. amend. VI.

23. See Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1637–41 (2003).

24. See, e.g., *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473, 1482–83 (2010) (holding that right to effective assistance of counsel applies where deportation is the potential penalty); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006) (Scalia, J.) (noting that right to counsel rises above right to a fair trial, incorporates right to choice of counsel); *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (Rehnquist, J.) (stating that right to effective counsel applies at plea stage); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (“[T]he right to counsel is the right to the effective assistance of counsel.”); *Johnson v. Zerbst*, 304 U.S. 458, 463–65 (1938) (holding that right to counsel may only be forfeited by a knowing and intelligent waiver); *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (holding that criminal defendants have a right to effective counsel in certain capital cases). *But see Strickland v. Washington*, 466 U.S. 668, 687 (1976) (setting a high standard for claims of ineffective assistance of counsel).

25. See *Powell*, 287 U.S. at 57 (holding that the right to counsel is the right to effective counsel in certain capital cases).

26. See *Johnson*, 304 U.S. at 463–65 (imposing a knowing-and-intelligent-waiver requirement).

27. 384 U.S. 436 (1966).

layperson would need an attorney to navigate a complicated and imposing legal system,²⁸ requiring that accused persons be afforded access to counsel, if requested.²⁹ It would be nearly thirty years, however, before the Court stated how a suspect should invoke the right to counsel that it articulated in *Miranda*.³⁰

A. *Miranda v. Arizona Established a Post-Arrest Right to Counsel for Criminal Suspects*

The ruling of *Miranda v. Arizona* is quite familiar.³¹ Barring certain key exceptions,³² a criminal suspect in police custody must be informed of his or her right to remain silent and to consult an attorney.³³ The Court designed the *Miranda* holdings to protect a criminal suspect's Fifth Amendment right against self-incrimination, the concern being that a suspect in police custody may feel coerced into incriminating himself.³⁴ Because of that concern, once a suspect invokes one of the *Miranda* rights, police questioning must cease.³⁵ After a suspect invokes his right to counsel, questioning may resume only when the suspect has a lawyer present,³⁶ when fourteen days pass after release from custody,³⁷ or when the suspect himself reinitiates communication.³⁸ Otherwise, the police may not ask the suspect any more questions, and any of the suspect's statements taken in contravention of the rule are inadmissible in court.³⁹

Miranda has come under fire from many angles. Legal commentators have attacked *Miranda* for years,⁴⁰ and politicians have long expressed

28. See *id.* at 510 (Harlan, J., dissenting) (“[The majority’s holdings] derive from quotation and analogy drawn from precedents under the Sixth Amendment, which should properly have no bearing on police interrogation.”)

29. *Id.* at 467, 469, 471, 473 (majority opinion).

30. See *Davis v. United States*, 512 U.S. 452, 459 (1994) (holding that a suspect must unambiguously and unequivocally request counsel).

31. *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“[*Miranda*] warnings have become part of our national culture.”).

32. See, e.g., *New York v. Quarles*, 467 U.S. 649, 657 (1984) (carving out an exception to *Miranda* warnings when public safety is threatened).

33. *Miranda*, 384 U.S. at 467–69, 471–72.

34. *Id.* at 469–70.

35. *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981); *Miranda*, 384 U.S. at 473–74.

36. *Edwards*, 451 U.S. at 484–85.

37. *Maryland v. Shatzer*, 559 U.S. ___, 130 S. Ct. 1213, 1223 (2010).

38. *Edwards*, 451 U.S. at 484–85.

39. *Id.* at 485–87.

40. See, e.g., Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1420 (1985) (proposing *Miranda* be overruled); see also Paul G. Cassell, *Protecting the Innocent from False*

discontent with the opinion.⁴¹ Congress reacted to the decision by passing the Crime Control Bill, which attempted to effectively overrule *Miranda* in federal courts.⁴² As early as 1974, the Court itself expressed concern that the *Miranda* ruling went beyond constitutional requirements.⁴³ By the mid-1980s, the Court, especially under Chief Justice William Rehnquist, had begun to scale back *Miranda*'s protections by making it more difficult for a suspect to invoke the right to counsel⁴⁴ and limiting the contexts in which the *Miranda* rights attach.⁴⁵ More recently, the Roberts Court has demonstrated its own antipathy to *Miranda* by siding with the government in three major cases concerning the definition of custody,⁴⁶ the standard for invocation of *Miranda* rights,⁴⁷ and the now-familiar warnings police must give to suspects.⁴⁸ Yet, *Miranda* and its progeny survive.⁴⁹

Confessions and Lost Confessions—And From Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497, 502–03 (1998) (arguing *Miranda* has created high social costs in the form of lost confessions); Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1126–32 (1998) (arguing that *Miranda* has had substantial social costs in its limitations on police and prosecutors).

41. See, e.g., Kit Kinports, *The Supreme Court's Love-Hate Relationship with Miranda*, 101 J. CRIM. L. & CRIMINOLOGY 375, 377 (2011) (quoting Richard Nixon describing *Miranda* as a “legal technicalit[y]” that had “very nearly rule[d] out the ‘confession’ as an effective . . . tool in . . . law enforcement”).

42. See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, title II, § 701(a), 82 Stat. 210 (1968) (codified as amended at 18 U.S.C. § 3501 (2006)). In 2000, the U.S. Supreme Court struck down the Act to the extent that it conflicted with *Miranda*. *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (determining that *Miranda* announced a constitutional rule, and that Congress had intended to impermissibly overturn that rule).

43. See *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (“[*Miranda*’s] procedural safeguards [are] not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.”).

44. *Connecticut v. Barrett*, 479 U.S. 523, 528–29 (1987) (holding that a suspect’s refusal to make a written statement without a lawyer did not prevent taking an oral statement).

45. *New York v. Quarles*, 467 U.S. 649, 659 (1984) (carving out a “public safety” exception to the *Miranda* warnings requirement).

46. See *Maryland v. Shatzer*, 559 U.S. ___, 130 S. Ct. 1213, 1223 (2010) (holding that after a break in custody of fourteen days, “coercive effect” dissolves); see also *Howes v. Fields*, No. 10-680 (U.S. argued Oct. 4, 2011) (considering, under AEDPA standard of review, whether prisoner is always in custody for purposes of *Miranda* when isolated from prison population); but see *J.D.B. v. North Carolina*, 564 U.S. ___, 131 S. Ct. 2394, 2402–03 (2011) (holding by a five to four majority that a child’s age may be taken into account when determining custody for purposes of *Miranda*).

47. *Berghuis v. Thompkins*, 560 U.S. ___, 130 S. Ct. 2250, 2256, 2259–60 (2010) (holding that a suspect’s three-hour silence did not invoke right to silence), *reh’g denied*, ___ U.S. ___, 131 S. Ct. 33, 177 (2010).

48. *Florida v. Powell*, 559 U.S. ___, 130 S. Ct. 1195, 1206 (2010) (holding that police need not use specific language in the warning, so long as they convey *Miranda*’s essential messages). For more on the current court’s outlook regarding *Miranda*, see generally Kinports, *supra* note 41.

49. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 443–44 (2000) (Rehnquist, C.J.) (refusing

B. *The Court Placed Greater Protections on the Right to Counsel than on the Right to Silence*

Miranda articulated two rights of criminal suspects subjected to police interrogation: the right to silence and the right to counsel.⁵⁰ These rights do not accrue automatically, however. Rather, a suspect must invoke his rights to silence and counsel by communicating his desire to invoke them to his interrogators.⁵¹ How a suspect invokes those rights is rarely clear, and it varies from jurisdiction to jurisdiction. Despite their common origin, the Court has treated the *Miranda* rights to silence and to counsel differently, arguably offering more protection to the right to counsel.

In invocation jurisprudence, there are two central questions: what constitutes an invocation, and how must police behave once a right is invoked?⁵² *Miranda* held that an individual effectively invokes his right to remain silent when he “indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent,” at which point “the interrogation must cease.”⁵³ After this, however, the Court did not clarify the meaning of the phrase “indicates in any manner” for close to thirty years.⁵⁴

In the meantime, the Court elaborated on “the interrogation must cease” in *Michigan v. Mosley*,⁵⁵ holding that police must “scrupulously honor[]” a suspect’s rights after he has indicated a desire to remain silent.⁵⁶ The Court identified six factors to determine whether the police had scrupulously honored the suspect’s rights: (1) how quickly police ceased questioning after the suspect invoked his right to silence; (2) the amount of time that elapsed before questioning resumed; (3) whether the suspect was advised of his *Miranda* rights again before questioning resumed; (4) whether the same or different officers conducted the second interrogation; (5) whether the topic of the second interrogation was the same as the first; and (6) the location of the second interrogation.⁵⁷

to overrule *Miranda*).

50. *Miranda v. Arizona*, 384 U.S. 436, 467–68, 473 (1966).

51. *Berghuis*, 130 S. Ct. at 2259–60 (invocations must be affirmative, verbal communication).

52. *See Davis v. United States*, 512 U.S. 452, 459, 461 (1994) (requiring suspects to invoke unambiguously, but declining to require police to clarify ambiguous requests).

53. *Miranda*, 384 U.S. at 473–74.

54. *See Davis*, 512 U.S. at 459 (holding that a suspect must unambiguously and unequivocally request counsel).

55. 423 U.S. 96 (1975).

56. *Id.* at 104 (quoting *Miranda*, 384 U.S. at 479) (internal quotation marks omitted).

57. *See id.* at 104–05.

The *Mosley* analysis was the Court's only significant guidance on the right to silence until 2010. In *Berghuis v. Thompkins*,⁵⁸ it held that a suspect's three-hour silence in the face of police questioning did not constitute an invocation.⁵⁹ In so holding, the Court answered the first invocation question: what constitutes an invocation? The Court imposed a "clear and unequivocal request" rule, holding that the suspect had not invoked the right, and therefore *Mosley* was inapplicable.⁶⁰

As for the right to counsel, the Court also offered little early guidance on the first question, which *Berghuis* had answered for the right to silence: what constitutes an invocation? *Miranda* was clear that "the interrogation must cease" when a suspect "states that he wants an attorney,"⁶¹ but it did not clarify how that request should be made, nor whether or when the interrogation may resume. The Court did not answer the first question until 1994 in *Davis v. United States*,⁶² which is examined in Part II.

In *Edwards v. Arizona*,⁶³ however, the Court directly answered the second question: how must police behave after a suspect invokes his right to counsel?⁶⁴ The Court articulated a bright-line rule barring further questioning after an invocation, until counsel is provided or the suspect reinitiates communication.⁶⁵ In *Edwards*, a suspect in police custody indicated that he wanted to "make a deal," but only with an attorney present, at which point the interrogation stopped.⁶⁶ The next morning, however, the police resumed interrogation without providing a lawyer, and the suspect implicated himself in the crime, leading to his conviction.⁶⁷

The facts in *Edwards* were similar to those in *Mosley*. As in *Mosley*, the officer initially cut off questioning immediately after Edwards invoked his *Miranda* rights (this time to counsel), there was a significant lapse of time before the second interrogation, the officers in the second

58. 560 U.S. ___, 130 S. Ct. 2250 (2010).

59. *Id.* at 2258, 2260.

60. *Id.* at 2260.

61. *Miranda*, 384 U.S. at 474. The *Miranda* decision also stated that questioning must cease when the suspect "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Id.* at 444-45.

62. 512 U.S. 452 (1994).

63. 451 U.S. 477 (1981).

64. *See id.* at 485.

65. *Id.* at 484-85.

66. *Id.* at 479 (internal quotation marks omitted).

67. *Id.* at 479.

interrogation were different from the original questioning officer, and they warned him of his *Miranda* rights before beginning the second interrogation.⁶⁸ Additionally, the second group of officers directly refused to honor Edwards' request to remain silent.⁶⁹ Yet, the Court did not apply *Mosley*'s flexible "scrupulously honored" rule. Rather, when Edwards challenged the use of his statements at trial, the Court held that "an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him."⁷⁰ The *Edwards* holding created a "rigid prophylactic rule,"⁷¹ barring all further questioning after a suspect invokes the *Miranda* right to counsel until an attorney is present.⁷² *Edwards* had no effect on the right to silence, however, which is still governed by *Mosley*'s more flexible "scrupulously honored" analysis, in which the passage of time and other factors mitigate the effect of an invocation of the right to silence.⁷³

Having established a "rigid prophylactic rule," the *Edwards* Court went on to strengthen it by answering a third question: what constitutes a waiver? The Court held that merely responding to police questioning after invoking the right to counsel does not establish a waiver, even if police re-advise the suspect of his rights.⁷⁴ Rather, questioning cannot continue without counsel present "unless the accused himself initiates further communication . . . with the police."⁷⁵ Thus, *Edwards* made clear that the right to counsel is well protected and that once invoked, it triggers a procedural safeguard more rigid than the one articulated in *Mosley* for the right to silence.⁷⁶

68. *Id.*

69. *Id.*

70. *Id.* at 484–85.

71. *Smith v. Illinois*, 469 U.S. 91, 95 (1984) (quoting *Fare v. Michael C.*, 442 U.S. 707, 719 (1979)) (internal quotation marks omitted).

72. *Edwards*, 451 U.S. at 484–85.

73. *See Michigan v. Mosley*, 423 U.S. 96, 104–05 (1975) (using six factors to determine whether police scrupulously honored a suspect's rights); *see also* Strauss, *supra* note 15, at 1020–21 (examining the more stringent effect of a right-to-counsel invocation, as compared to the right to silence under *Mosley*).

74. *Edwards*, 451 U.S. at 484.

75. *Id.* at 484–85.

76. *See Berghuis v. Thompkins*, 560 U.S. ___, 130 S. Ct. 2250, 2275 (2010) (Sotomayor, J., dissenting) (quoting *Davis v. United States*, 512 U.S. 452, 460 (1994)) ("To the extent *Mosley* contemplates a more flexible form of prophylaxis than *Edwards*—and, in particular, does not categorically bar police from reapproaching a suspect who has invoked his right to remain silent—*Davis*' concern about wholly irrational obstacles to police investigation applies with less force."). (internal quotation marks omitted)

C. *In Edwards, the Court Did Not Make Clear What a Suspect Must Say to Invoke the Right to Counsel nor What Police Should Do When Faced with an Unclear Invocation*

The *Edwards* ruling left unanswered the question *how* a suspect must “express[] his desire to deal with the police only through counsel.”⁷⁷ Neither did *Edwards* answer the question of how police should proceed when faced with a statement that *might* be an invocation.

In response, state and federal courts developed three main approaches to address unclear invocations in the thirteen years before the U.S. Supreme Court stepped in.⁷⁸ The first and broadest approach, embraced primarily by the Sixth Circuit, held that any statement that could be construed as a request for counsel validly invokes the right such that the interrogation must cease.⁷⁹ Other courts developed a narrow approach in which only very clear requests for counsel would require police officers to immediately cease questioning under *Edwards*, and the police were free to ignore any ambiguous requests.⁸⁰ Most federal courts, however, took a middle approach (or clarification approach) in which officers faced with an ambiguous request must ask only questions intended to

77. *Edwards*, 451 U.S. at 484–85; *see also* *Smith v. Illinois*, 469 U.S. 91, 95–96 (1984) (per curiam) (noting a division of the courts on the consequences of an ambiguous or equivocal invocation, but declining to resolve it). Before 1994, the Court decided numerous cases surrounding *Miranda* invocations, and right-to-counsel invocations in particular, but they were all intended to clarify the *Edwards* decision, rather than extend a ruling dictating what authorities must do when faced with an ambiguous waiver. *See, e.g.*, *Shea v. Louisiana*, 470 U.S. 51, 57–59 (1985) (deciding *Edwards*’ applicability to pending cases); *Smith*, 469 U.S. at 98–99 (holding that a suspect’s post-invocation statements cannot be used to impute ambiguity onto the invocation); *Solem v. Stumes*, 465 U.S. 638, 650 (1984) (holding *Edwards* not retroactively applicable); *Oregon v. Bradshaw*, 462 U.S. 1039, 1045–46 (1983) (explaining that a suspect initiates communication when he “evinces[] a willingness and a desire for a generalized discussion about the investigation”).

78. *See* *Davis*, 512 U.S. at 456 (noting the three approaches).

79. *See, e.g.*, *Bailey v. Hamby*, 744 F.2d 24, 26–27 (6th Cir. 1984) (holding that suspect’s statement “I’d like to talk to an attorney or something like that” was adequate to invoke) (emphasis omitted); *Maglio v. Jago*, 580 F.2d 202, 203, 205–06 (6th Cir. 1978) (statement, “Maybe I should have an attorney,” adequate to invoke; burden placed on state to establish waiver whenever statement taken without counsel present); *see also* *McCree v. Housewright*, 689 F.2d 797, 799–801 (8th Cir. 1982) (statement that suspect’s brother “told me he thought I needed a lawyer, an attorney, my brother did, and I didn’t really think I needed one, really and truly” a valid invocation).

80. *See, e.g.*, *People v. Krueger*, 412 N.E.2d 537, 540 (Ill. 1980) (holding that statements “Maybe I ought to have an attorney,” “Maybe I need a lawyer,” or “Maybe I ought to talk to an attorney” did not invoke); *State v. Moore*, 744 S.W.2d 479, 480–81 (Mo. Ct. App. 1988) (statement “[M]aybe [I] should have an attorney” did not invoke); *see also* Scott R. Goings, Comment, *Ambiguous or Equivocal Requests for Counsel in Custodial Interrogations After Davis v. United States*, 81 IOWA L. REV. 161, 161–63, 162 n.8 (1995) (discussing the “threshold of clarity approach”); Strauss, *supra* note 15, at 1022–23 (discussing the three approaches).

clarify whether or not the suspect actually desired counsel.⁸¹ Many state courts favored this approach as well.⁸²

While lower courts developed these three approaches, the U.S. Supreme Court remained deferential to suspects in other areas of *Miranda* law. In *Smith v. Illinois*,⁸³ for example, the Court held that police could not use a suspect's responses to questioning after invoking the right to counsel "to cast doubt on the adequacy of the initial request *itself*," saying such a practice is "intolerable."⁸⁴ The Court continued to strengthen *Edwards*' bright-line rule throughout the 1980s and into the early 1990s. In *Arizona v. Roberson*,⁸⁵ the Court held that a right-to-counsel invocation applies to all police questioning, not just to questions about a particular offense.⁸⁶ Two years later, in *Minnick v. Mississippi*,⁸⁷ the Court clarified that *Edwards* bars police from "reinitiat[ing] interrogation without counsel present, whether or not the accused has consulted with his attorney."⁸⁸ In each case before 1994, however, the Court declined to resolve the questions of how clearly a suspect must request counsel to validly invoke the right and what police should do in the face of an ambiguous request.⁸⁹

81. Strauss, *supra* note 15, at 1022–23, 1023 n.83 (citing numerous federal courts following the clarification approach, along with one state court); *see also* United States v. Fouche, 833 F.2d 1284, 1287 (9th Cir. 1987) (FBI agents required to clarify suspect's statement that he "might want to talk to a lawyer"). The Ninth Circuit retained this approach even after *Davis* insofar as the ambiguous statement was made before a *Miranda* waiver. United States v. Rodriguez, 518 F.3d 1072, 1078–79 n.6 (9th Cir. 2008). It reasoned that because the express elimination in *Davis* of any clarification requirement for police came in a case specifically limited to post-waiver scenarios, its clarification rule was only partially abrogated. *Id.*; *see also infra* note 238 (discussing AEDPA's effect on the *Fouche* rule).

82. *See Davis*, 512 U.S. at 466–67 n.1 (1994) (Souter, J., concurring in the judgment) (citing state courts following the clarification approach); *see also* State v. Moulds, 673 P.2d 1074, 1082 (Idaho Ct. App. 1983) (adopting the clarification approach).

83. 469 U.S. 91 (1984).

84. *Id.* at 98–99 (emphasis in original).

85. 486 U.S. 675 (1988).

86. *Id.* at 677–78.

87. 498 U.S. 146 (1990).

88. *Id.* at 153.

89. *See Connecticut v. Barrett*, 479 U.S. 523, 529 n.3 (1987) (declining to resolve the question of how courts should treat ambiguous or equivocal invocations); *see also Smith v. Illinois*, 469 U.S. 91, 95–96 n.3 (1984) (per curiam) (noting a division of courts on the consequences of an ambiguous or equivocal invocation, but declining to resolve it).

II. IN *DAVIS V. UNITED STATES*, THE U.S. SUPREME COURT
ADOPTED A NARROW APPROACH TO RIGHT-TO-
COUNSEL INVOCATIONS

The Court resolved both questions in 1994 when it decided *Davis v. United States*,⁹⁰ which signaled a shift toward placing the burden of clarity in *Miranda* invocations onto suspects.⁹¹

A. *The Davis Decision Articulated a High Standard for How Clearly
Suspects Must Invoke the Miranda Right to Counsel.*

In *Davis v. United States*, Davis, a member of the United States Navy, was arrested in connection with the murder of a fellow sailor.⁹² Upon learning of his involvement, Naval Investigative Service agents advised Davis that he was a suspect in the killing, gave him warnings consistent with both *Miranda* and the Uniform Code of Military Justice, and proceeded to interview him.⁹³ Davis waived his rights to silence and to counsel, both orally and in writing.⁹⁴ About ninety minutes into the interview, Davis stated, “Maybe I should talk to a lawyer.”⁹⁵ At that point, the agents re-advised Davis of his rights and told him the interview would stop if he did indeed want a lawyer.⁹⁶ Davis responded, “No, I’m not asking for a lawyer . . . I don’t want a lawyer,” and the interview continued.⁹⁷ After another hour of interrogation, Davis said “I think I want a lawyer before I say anything else,” at which point the interview ceased.⁹⁸ At his general court martial, the Military Judge denied Davis’ motion to suppress the statements he had made after he said, “Maybe I should talk to a lawyer.”⁹⁹

90. 512 U.S. 452 (1994).

91. *See id.* at 469–70 (Souter, J., concurring) (quoting *Michigan v. Jackson*, 475 U.S. 625, 633 n.6 (1986) and *Miranda v. Arizona*, 384 U.S. 436, 457 (1966)) (internal quotation marks and brackets omitted) (noting that a concern about linguistic capacities of suspects “thrust” into interrogation “has, in the past, dissuaded the Court from placing any burden of clarity upon individuals in custody, but has led it instead to require that requests for counsel be given a broad, rather than a narrow, interpretation”).

92. *Id.* at 454 (majority opinion).

93. *Id.*

94. *Id.* at 455.

95. *Id.*

96. *Id.*

97. *Id.* (internal quotation marks omitted).

98. *Id.*

99. *Id.*

The U.S. Supreme Court affirmed.¹⁰⁰ The Court held that “after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.”¹⁰¹ The Court held that trial judges should assess the clarity of the request under an objective inquiry “to avoid difficulties of proof and to provide guidance to officers conducting interrogations.”¹⁰²

Davis answered the first question left open in *Edwards*: how must a suspect “state[] that he wants an attorney?”¹⁰³ In her majority opinion, Justice Sandra Day O’Connor began by clarifying that the *Miranda* right to counsel is not itself a constitutional right, but rather a procedural safeguard designed to protect the constitutional right against self-incrimination.¹⁰⁴ She recognized, however, that despite its protective purpose, the Court had not yet made clear what sort of statement “can reasonably be construed to be an expression of a desire for the assistance of an attorney.”¹⁰⁵ With that in mind, she set a new standard of clarity: a “suspect must unambiguously request counsel [H]e 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.”¹⁰⁶

The majority recognized that the new rule would disadvantage some

100. *Id.* at 462.

101. *Id.* at 461.

102. *Id.* at 458–59 (citing *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987)). Some scholars have noted that eliminating the intent element from an inquiry into linguistic meaning is a self-contradiction. David Aram Kaiser & Paul Lufkin, *Deconstructing Davis v. United States: Intention and Meaning in Ambiguous Requests for Counsel*, 32 HASTINGS CONST. L.Q. 737, 755–56 (2005). That is, it is impossible for there to be a truly objective inquiry into a request because that inquiry is designed to discover the speaker’s subjective intent, and “every interpreter implicitly provides a context and a hypothetical speaker’s intent.” *Id.* at 756–58. Moreover, it is absurd, they argue, to require objective clarity of language when a speaker’s intent is plain. *Id.* at 747 (quoting Steven Knapp & Walter Benn Michaels, *Reply to John Searle*, 25 NEW LITERARY HIST. 669, 671 (1994)).

103. *Miranda v. Arizona*, 384 U.S. 436, 474 (1966).

104. *Davis*, 512 U.S. at 457 (quoting *Michigan v. Tucker*, 417 U.S. 433, 443–44 (1974)).

105. *Id.* at 459 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991)) (internal quotation marks omitted).

106. *Id.* The Court limited the applicability of its new “clear and unequivocal request” rule, as it has come to be called, to invocations made *after* the suspect had waived his *Miranda* rights. The Court made this explicit in its holding: “We therefore hold that, after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.” *Id.* at 461. The Court’s rationale also reflected this logic. It reasoned that a suspect who had waived his rights “has indicated his willingness to deal with the police unassisted.” *Id.* at 460–61. If the suspect later wants a lawyer present, the Court stated, it is his burden to “affirmatively invoke[]” that right. *Id.* at 461.

suspects “because of fear, intimidation, lack of linguistic skills, or a variety of other reasons.”¹⁰⁷ However, the Court explained, the *Miranda* warnings themselves are the primary protection, and “full comprehension of the rights” suffices to counterbalance the coercive effect of police interrogation.¹⁰⁸ Thus, the Court held that it is the warnings themselves—rather than facile invocation of the rights—that constitute the substance of *Miranda*’s protection.¹⁰⁹

Having answered the first question left open in *Edwards*, the Court went on to answer the second: what must police do after an unclear invocation? Justice O’Connor observed that a rule requiring police to stop questioning whenever a suspect utters a statement that “*might* be a request for an attorney” would soften the *Edwards* bright-line rule requiring police to immediately cease questioning.¹¹⁰ It would, she wrote, cloud its “clarity and ease of application” and undermine effective law enforcement by introducing uncertainty into interrogations.¹¹¹ As such, the Court held that “after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may

107. *Id.* at 460. In his concurrence, Justice Souter took particular umbrage at this likelihood, using it to argue for a clarification rule. *See id.* at 469–70 (Souter, J., concurring in the judgment) (“A substantial percentage of [suspects] lack anything like a confident command of the English language, many are ‘woefully ignorant,’ and many more will be sufficiently intimidated by the interrogation process or overwhelmed by the uncertainty of their predicament that the ability to speak assertively will abandon them.”) (quoting *Miranda*, 384 U.S. at 468) (citations omitted). A number of scholars have also seized on this as an injustice in *Davis*. *E.g.*, Strauss, *supra* note 15, at 1030–31; Yale Kamisar, *Constitutional Law Conference Addresses Supreme Court’s 1993-94 Term*, 56 CRIM. L. REP. 1068–69 (1994); Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogations*, 103 YALE L.J. 259, 261 (1993). Certain subsequent cases have borne out Justice Souter’s fears. *See, e.g.*, Valdez v. Ward, 219 F.3d 1222, 1231–33, 1235 (10th Cir. 2000) (upholding that Mexican immigrant’s statement, “Yes, I understand it a little bit and I sign it because I understand it something about a lawyer and he want to ask me questions and that’s what I’m looking for a lawyer,” after signing *Miranda* waiver form and confessing, was ambiguous on AEDPA review).

108. *Davis*, 512 U.S. at 460 (quoting *Moran v. Burbine*, 475 U.S. 412, 427 (1986)) (internal quotation marks omitted).

109. *See id.*

110. *Id.* at 461.

111. *Id.* (“The *Edwards* rule—questioning must cease if the suspect asks for a lawyer—provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information. But if we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney, this clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong.”) (emphasis in original). Some have pointed out that this is backwards logic. *E.g.*, Strauss, *supra* note 15, at 1028–29. It introduces far more uncertainty to require a clarity analysis, rather than simply imposing an across-the-board cutoff at all requests for counsel, however ambiguous. *Id.*

continue questioning until and unless the suspect clearly requests an attorney.”¹¹² The Court expressly declined to adopt a rule requiring police to ask only clarifying questions after an ambiguous invocation.¹¹³

B. Davis Became the Standard for Right-to-Counsel Invocations

Legal commentators widely attacked *Davis*. Some criticized the decision for introducing into interrogations the very uncertainty that the Court sought to avoid.¹¹⁴ Others argued that the rule would create a disproportionate disadvantage for certain groups who, “by virtue of their education, socio-economic background, gender or national origin are virtually incapable of meeting such a standard of linguistic clarity.”¹¹⁵

Despite the scholarly criticism, most courts have followed *Davis* at least to some extent, including the vast majority of state courts.¹¹⁶ Although federal courts are bound by the U.S. Supreme Court’s rulings, some have limited *Davis*’ application to statements made after a suspect has waived his *Miranda* rights.¹¹⁷ Certain state courts have declined to follow *Davis* on state constitutional grounds. The highest courts in Minnesota,¹¹⁸ Hawaii,¹¹⁹ New Jersey,¹²⁰ and West Virginia¹²¹ have each interpreted their own state constitutions as providing greater protection to suspects than *Davis* would.¹²² Other state courts have established their own limits to the *Davis* rule, such as rules allowing the consideration of contextual factors in interpreting a purported invocation of the *Miranda*

112. *Davis*, 512 U.S. at 461. Courts have often misinterpreted this express holding. See *infra* note 238

113. *Davis*, 512 U.S. at 461–63. Four justices, led by Justice David Souter, advocated for the clarification rule, arguing that it would have put the Court in line with the majority of federal appellate courts. *Id.* at 466–67 (Souter, J., concurring in the judgment).

114. See *supra* note 111.

115. Strauss, *supra* note 15, at 1027 (quoting Kaiser & Lufkin, *supra* note 102, at 756) (internal quotation marks and brackets omitted); see also *id.* at 1012 nn.10 & 11 (listing several articles examining the possibility of disadvantages to certain groups); *supra* note 107 (discussing Justice Souter’s prediction of this likelihood).

116. Strauss, *supra* note 15, at 1032.

117. E.g., *United States v. Rodriguez*, 518 F.3d 1072, 1078–79 n.6 (9th Cir. 2008).

118. *State v. Risk*, 598 N.W.2d 642, 648–49 (Minn. 1999).

119. *State v. Hoey*, 881 P.2d 504, 523 (Haw. 1994).

120. *State v. Chew*, 695 A.2d 1301, 1318 (N.J. 1997).

121. See *State v. Farley*, 452 S.E.2d 50, 59 n.12 (W. Va. 1994) (reserving the question of whether to apply *Davis* and expressing support for the clarification approach); see also *State v. Bradshaw*, 457 S.E.2d 456, 466 n.7 (W. Va. 1995) (same).

122. Strauss, *supra* note 15, at 1032.

right to counsel.¹²³

Two years after the Court decided *Davis*, which narrowed criminal suspects' rights prior to conviction, Congress passed a statute that limited the relief available to state prisoners after conviction.

III. THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT CREATED A HIGHLY DEFERENTIAL STANDARD FOR FEDERAL REVIEW OF STATE COURT CONVICTIONS

AEDPA, enacted by Congress in 1996,¹²⁴ drastically altered the relief available to state prisoners under the federal writ of habeas corpus. The statute made it significantly more difficult for a federal court to overturn a state court conviction.¹²⁵ It did not produce this effect on its own, however. Since the 1970s, the U.S. Supreme Court had been creating procedural obstructions to the writ, making it increasingly "difficult for state court inmates to thread the habeas needle."¹²⁶

A. *Before AEDPA, Federal Courts Reviewed Constitutional Challenges to State Convictions De Novo*

The writ of habeas corpus allows a person subject to confinement to petition a court for a determination that the confinement is unjust.¹²⁷ Prior to 1867, the Great Writ, as the federal writ of habeas corpus is sometimes called,¹²⁸ was only available to prisoners convicted in a

123. In *State v. Dumas*, 750 A.2d 420, 425 (R.I. 2000), for example, the Supreme Court of Rhode Island considered whether the question "Can I get a lawyer?" was a clear and unambiguous request for counsel under *Davis*. In its analysis, the court noted that, depending on context, sometimes questions are understood as requests ("Can I get some service over here?" said to a sales clerk) and sometimes as simple questions ("Can I get a slice of pepperoni pizza?" said in a pizza parlor not clearly selling pizza by the slice, or, for that matter, pepperoni pizza). *Id.* at 425 n.5. The court remanded the case so that the trial court could consider the context of the question, including responses from the interrogating officers. *Id.* at 425–26.

124. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of the U.S. Code).

125. See 28 U.S.C. § 2254 (2006); see also Blume, *supra* note 20, at 284.

126. Blume, *supra* note 20, at 297; see also *id.* at 265–70 (explaining Chief Justice Rehnquist's antipathy to federal review of state convictions and listing cases restricting that review during his time on the Court).

127. Margery I. Miller, Note, *A Different View of Habeas: Interpreting AEDPA's "Adjudicated on the Merits" Clause When Habeas Corpus Is Understood As an Appellate Function of the Federal Courts*, 72 *FORDHAM L. REV.* 2593, 2606 (2004).

128. See, e.g., Lynn Adelman, *The Great Writ Diminished*, 35 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 3, 3 (2009).

federal court.¹²⁹ The federal government arrogated to itself the power to grant the writ to state prisoners in its post-Civil War backlash against state power.¹³⁰ Congress lodged that power in the federal courts with the passage of the Habeas Corpus Act of 1867.¹³¹ The modern history of habeas corpus law, however, begins with *Brown v. Allen*,¹³² which established that federal habeas corpus review of state court convictions was de novo for pure and mixed questions of federal constitutional law.¹³³

The next watershed moment in the evolution of the habeas standard of review came in 1989. In *Teague v. Lane*,¹³⁴ the Court held that federal courts could not entertain habeas claims that ask the court to expand federal constitutional rights.¹³⁵ The result was that federal habeas corpus cases could not contribute to the development of criminal law, except in the rarest of cases.¹³⁶ In one sense, *Teague* can be seen as a precursor to AEDPA insofar as it required that habeas courts not announce constitutional rules “not dictated by precedent.”¹³⁷ This admonition was later clarified to mean that not even a modest extension of existing precedent was allowed, but, unlike AEDPA, there was no restriction to U.S. Supreme Court precedent.¹³⁸ Still, even in its moments of antipathy toward federal habeas review of state court convictions,¹³⁹ the Court left untouched the de novo standard for reviewing state courts’ application of established federal constitutional law.¹⁴⁰

129. Miller, *supra* note 127, at 2606.

130. *See id.* at 2606–07.

131. *Id.*

132. 344 U.S. 443 (1953).

133. *Brown*, 344 U.S. at 467–74 (giving de novo review to a question of federal constitutional law); *id.* at 507 (Frankfurter, J.) (“[S]o-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.”); Miller, *supra* note 127, at 2607–08; *see also* Wright v. West, 505 U.S. 277, 299–301 (1992) (O’Connor, J., concurring) (discussing the “certainty with which *Brown v. Allen* rejected a deferential standard of review of issues of law”).

134. 489 U.S. 288 (1989).

135. *Id.* at 310; Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 HARV. L. REV. 1868, 1870 (1997).

136. Note, *supra* note 135, at 1870.

137. *Teague*, 489 U.S. at 301.

138. Stephen I. Vladeck, *AEDPA, Saucier, and the Stronger Case for Rights-First Constitutional Adjudication*, 32 SEATTLE U. L. REV. 595, 604 (2009).

139. *See* Blume, *supra* note 20, at 265–70 (listing cases restricting habeas review during Rehnquist’s time on the Court).

140. *See, e.g.,* Schiro v. Farley, 510 U.S. 222, 232 (1994) (stating that the preclusive effect of a jury verdict is a question of federal law reviewed de novo).

B. *Congress Intended AEDPA's Standard of Review to Minimize Federal Involvement in State Court Convictions*

AEDPA imposed an entirely novel standard of review on federal courts exercising habeas jurisdiction. Among many other provisions,¹⁴¹ AEDPA's habeas section—part of a much larger bill—includes what became 28 U.S.C. § 2254(d)(1), which provides that a federal court sitting in habeas jurisdiction may not overturn a state decision merely because that decision is incorrect.¹⁴² Rather, AEDPA requires that a federal habeas court ask whether the state court's opinion is “contrary to, or involved an unreasonable application of,” U.S. Supreme Court precedent.¹⁴³ Where there is no U.S. Supreme Court decision on point, there can be no precedent to unreasonably apply, and the conviction must stand.¹⁴⁴ Congressional proponents intended this highly deferential standard of review to expedite justice and minimize federal involvement in settled state court convictions.¹⁴⁵

Senate Majority Leader Bob Dole introduced the Antiterrorism and Effective Death Penalty Act on April 27, 1995, eight days after the Oklahoma City bombing and roughly two weeks after he announced he would seek the presidency.¹⁴⁶ Referring to the bombing, Senator Dole told Congress that the bill would ensure “that those who committed this evil deed will get what they deserve—punishment that is swift, certain, and severe.”¹⁴⁷ Title VII of Senator Dole's bill addressed the federal writ of habeas corpus as applied to state prisoners, while its other sections

141. See Blume, *supra* note 20, at 270–74 (discussing AEDPA's sections creating a statute of limitations, barring successive petitions, exhaustion requirements, etc.).

142. Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong with It and How to Fix It*, 33 CONN. L. REV. 919, 926 (2001); Krystal M. Moore, Comment, *Is Saving an Innocent Man a "Fool's Errand"? The Limitations of the Antiterrorism and Effective Death Penalty Act on an Original Writ of Habeas Corpus Petition*, 36 U. DAYTON L. REV. 197, 206–07 (2011).

143. 28 U.S.C. § 2254(d)(1) (2006).

144. See *id.*; *Alberni v. McDaniel*, 458 F.3d 860, 866 (9th Cir. 2006) (holding that where the U.S. Supreme Court has expressly left a question open, it cannot be “clearly established” and courts applying AEDPA must affirm).

145. See 141 CONG. REC. S7808 (daily ed. June 7, 1995) (statement of Sen. Hatch) (AEDPA would prevent “incessant, frivolous appeals ad [infinitum]”); *id.* at S7839 (statement of Sen. Cohen) (“So let us not fool ourselves. The substantive changes to the habeas bill being proposed are not designed just to eliminate frivolous cases. They are designed to weaken the [f]ederal courts' role in scrutinizing [s]tate court verdicts for constitutional error.”).

146. 141 CONG. REC. S5841 (daily ed. Apr. 27, 1995) (statement of Sen. Dole); David Johnston, *At Least 31 Are Dead, Scores Are Missing After Car Bomb Attack in Oklahoma City Wrecks 9-Story Federal Office Building*, N.Y. TIMES, Apr. 20, 1995, at A1; Dan Balz, *Dole Begins 3rd Bid for White House*, WASH. POST, Apr. 11, 1995, at A1.

147. 141 CONG. REC. S5841 (daily ed. Apr. 27, 1995) (statement of Sen. Dole).

related to strengthening law enforcement and combating terrorism.¹⁴⁸

President Bill Clinton signed the final version of the bill on April 24, 1996, the effective date of the law.¹⁴⁹ The Conference Committee report accompanying the final version focuses primarily on the procedural elements of the habeas provision.¹⁵⁰ It only briefly mentions the new standard of review, saying, “[The bill] requires deference to the determinations of state courts that are neither ‘contrary to,’ nor an ‘unreasonable application of,’ clearly established federal law.”¹⁵¹ This is the report’s only mention of the new standard of review,¹⁵² although the provision has had a profound effect on the adjudication of federal habeas petitions.¹⁵³

148. Comprehensive Terrorism Prevention Act of 1995, S. 735, 104th Cong. §§ 701–08 (as introduced, Apr. 27, 1995). Dole’s bill, S. 735, incorporated verbatim the language of the latest iteration of a twenty-seven-page bill introduced a month earlier by Sen. Arlen Specter, which, like its previous versions, had languished in committee. *Compare* Habeas Corpus Reform Act of 1995, S. 623, 104th Cong. (as introduced, Mar. 24, 1995), *with* S. 735. Dole’s bill, however, included an additional 126 pages, mostly geared at fighting terrorism, and a new title. S.735, §§ 101–601, §§ 721–901. The bill passed the Senate six weeks later by a vote of 91 to 8, the habeas corpus section largely untouched. 141 CONG. REC. S7857, S7868–71 (daily ed. June 7, 1995); Comprehensive Terrorism Prevention Act of 1995, S. 735, 104th Cong. §§ 601–08 (as passed by Senate June 7, 1995).

Notably, then-Senator Joe Biden was vocally opposed to the bill, including its novel standard of review, which he called “a heck of a standard to have to apply.” 141 CONG. REC. S7841 (daily ed. June 7, 1995) (statement of Sen. Biden). Senator Biden, who had lost his chairmanship of the Senate Judiciary Committee a few months prior, was especially concerned about the elimination of the right to counsel in habeas proceedings and the fact that the bill would “make[] sweeping changes in the rules of the game.” *Id.* at S7812–13. Others were concerned that the “deference provision” would effectively “repeal the habeas corpus statute.” *Id.* at S7839 (statement of Sen. Cohen) (quoting Professor Henry Monaghan). Perhaps hoping Dole’s bill would suffer the same fate as Specter’s, Senator Biden first proposed amending the bill to remove the “95 percent of [it]” that was “not germane” to habeas corpus reform, leaving only those provisions dealing with federal prisoners. *Id.* at S7806. Biden later went so far as to introduce an amendment to eliminate the “deference rule.” *Id.* at S7840. He was joined in his opposition by Senator Daniel Patrick Moynihan, who stated outright, “This legislation will eviscerate the writ of habeas corpus” *Id.* at S7878–9 (statement of Sen. Moynihan). Ultimately, Senator Biden voted for the bill, while Moynihan did not. *Id.* at S7857.

149. Presidential Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 PUB. PAPERS 630 (Apr. 24, 1996). When he signed the bill, President Clinton noted the concern of its detractors and suggested that he would not have signed it if he thought courts would “interpret [it] in a manner that would undercut meaningful [f]ederal habeas corpus review.” *Id.* at 631. He also raised the same constitutional concerns that have come up since. *Id.*; *see also infra* notes 171–174 and accompanying text.

150. *See generally* H.R. REP. NO. 104-518 (1996) (Conf. rep.).

151. *Id.* at 111.

152. *See id.*

153. *See* Adelman, *supra* note 128, at 15–20 (Judge Adelman discussing the effect that AEDPA’s deference provisions have had both in his court in the Eastern District of Wisconsin and in the federal judiciary generally). *But see* Blume, *supra* note 20, at 261 (arguing that AEDPA has not had

For all of its import, § 2254, generally considered the “centerpiece of AEDPA,”¹⁵⁴ is often described as “vague.”¹⁵⁵ The U.S. Supreme Court has made some effort to clarify it. Referring to the much-discussed § 2254, it offered this formulation in *Brown v. Payton*¹⁵⁶:

A state-court decision is contrary to this Court’s clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result. A state-court decision involves an unreasonable application of this Court’s clearly established precedents if the state court applies this Court’s precedents to the facts in an objectively unreasonable manner.¹⁵⁷

The Court has made several other attempts to clarify how courts should apply § 2254.¹⁵⁸ In *Williams v. Taylor*,¹⁵⁹ for example, the Court interpreted the phrases “contrary to” and “unreasonable application of” found in the statute.¹⁶⁰ The Court suggested that AEDPA created an entirely novel standard of review.¹⁶¹ Justice Stevens explained that the statutory text does not identify a familiar standard of review such as “de novo” or “plain error.”¹⁶² “Rather, the text is fairly read simply as a command that a federal court not issue the habeas writ unless the state

the profound effect that its proponents and detractors expected).

154. Blume, *supra* note 20, at 272.

155. *E.g.* LARRY W. YACKLE, FEDERAL COURTS: HABEAS CORPUS 57 (2003) (“AEDPA is notorious for its poor drafting. The Act is replete with vague and ambiguous language, apparent inconsistency, and plain bad grammar.”); James S. Liebman, *An “Effective Death Penalty”? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 426 (2001) (“AEDPA complicates review . . . because of its poor drafting.”). The Court itself has expressed dismay at the vagueness of the statute’s drafting. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (“All we can say is that in a world of silk purses and pigs’ ears, the Act is not a silk purse of the art of statutory drafting.”).

156. 544 U.S. 133 (2005).

157. *Id.* at 141 (citations omitted).

158. *See, e.g.*, *Harrington v. Richter*, 562 U.S. ___, 131 S. Ct. 770, 783–87 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)) (analyzing the phrases “contrary to” and “unreasonable application of”); *Williams v. Taylor*, 529 U.S. 362, 402–13 (2000) (same); *see also* Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677, 699 (2003) (pointing out that *Williams*’ value is undermined by a split in the decision in discussions surrounding the rule articulated and its proper application).

159. 529 U.S. 362.

160. *Id.* at 402–13.

161. *Id.* at 385 (opinion of Stevens, J.).

162. *Id.* Stevens was not writing for a majority in that section of his opinion. *Id.* at 367. The majority, however, echoed his logic. *Id.* at 404 (majority opinion).

court was wrong as a matter of law or unreasonable in its application of law in a given case.”¹⁶³ Stevens wrote that in so commanding, Congress expressed a “mood” that state court decisions must be reviewed with the utmost care and deference.¹⁶⁴

The Court recently strengthened the instruction in *Williams v. Taylor* that federal habeas courts should give substantial deference to state decisions. In *Harrington v. Richter*,¹⁶⁵ the Court emphasized that habeas corpus review is only “a guard against extreme malfunctions in the state criminal justice systems,”¹⁶⁶ stating:

If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court’s decision conflicts with this Court’s precedents. It goes no farther.¹⁶⁷

Justice O’Connor warned in *Williams* that defining the “unreasonable application” provision with reference to a “reasonable jurist” does not mean a decision is valid merely because “at least one of the [n]ation’s jurists has applied the relevant federal law in the same manner the state court did.”¹⁶⁸ This admonition is not always followed, however.¹⁶⁹

Federal courts have sometimes strained against the strictness of the § 2254 standard, especially where the outcome seems unjust. For example, in *Irons v. Carey*,¹⁷⁰ the U.S. Court of Appeals for the Ninth Circuit reversed the district court’s granting of a writ of habeas corpus to a prisoner denied release by a state parole board.¹⁷¹ The court reluctantly adhered to AEDPA’s standard and held that the parole board’s ruling was reasonable, despite the district court’s ruling to the contrary.¹⁷² All

163. *Id.* at 385 (opinion of Stevens, J.).

164. *Id.* at 386 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951)).

165. 562 U.S. ___, 131 S. Ct. 770 (2011).

166. *Id.* at 786 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring)) (internal quotation marks omitted).

167. *Id.* (citations omitted)

168. *Williams*, 529 U.S. at 410.

169. Adelman, *supra* note 128, at 16–17 (lamenting the fact that this “unfortunate side effect[]” of AEDPA “drives constitutional protections for criminal defendants down to the lowest common denominator”).

170. 505 F.3d 846 (9th Cir. 2007), *overruled on other grounds by* *Hayward v. Marshall*, 603 F.3d 546, 555 (9th Cir. 2010).

171. *Id.* at 854.

172. *Id.* at 852 (“Although we agree with the district court that the other bases for the Board’s

three members of the panel wrote separate concurrences.¹⁷³ Two decried AEDPA as nearly unconstitutional insofar as Congress was “determin[ing] how a federal court shall decide a case.”¹⁷⁴ The Fifth Circuit has also expressed its frustration with AEDPA:

It is beyond regrettable that a possibly innocent man will not receive a new trial in the face of the preposterously unreliable testimony of the victim and sole eyewitness to the crime for which he was convicted. But, our hands are tied by AEDPA . . . , so we dutifully dismiss his claim.¹⁷⁵

Additionally, the U.S. Supreme Court has reversed at least a dozen circuit court decisions granting habeas writs in spite of what the Court viewed as “clearly established [f]ederal law.”¹⁷⁶ Finally, until 2003 the Ninth Circuit had applied its own approach to AEDPA, requiring federal courts in that circuit to review the state court’s decision *de novo* prior to applying AEDPA’s deferential standard of review.¹⁷⁷ The Court expressly overturned this approach.¹⁷⁸

IV. AEDPA’S STANDARD OF REVIEW CREATES A ONE-WAY RATCHET AGAINST SUSPECTS’ *MIRANDA* RIGHTS

The AEDPA standard of review directs federal courts to state whether another court’s application of the *Davis* “clear and unequivocal request” rule was reasonable, rather than apply the *Davis* rule itself. This creates a kind of pseudo-precedent that does not really state the law, but instead states what is not an “unreasonable application of the law,” a distinction

unsuitability determination . . . were wholly unsupported by ‘some evidence,’ . . . we are unable to conclude that the Board’s findings regarding the nature of the commitment offense were without some evidentiary support.”)

173. *Id.* at 854–59 (Noonan, J., concurring); *id.* at 859 (Reinhardt, J., concurring specially); *id.* at 859–60 (Fernandez, J., concurring).

174. *Id.* at 854 (Noonan, J., concurring); *id.* at 859 (Reinhardt, J., concurring specially).

175. *Kinsel v. Cain*, 647 F.3d 265, 273–74 (5th Cir. 2011).

176. Stephen I. Vladeck, *supra* note 138, at 595.

177. *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). The Ninth Circuit had been following the rule in *Van Tran v. Lindsey*, 212 F.3d 1143, 1155 (9th Cir. 2000), which required that courts first decide whether or not the decision under review was in error, and then proceed to the question of whether the decision was “reasonable.” In so holding, it alluded to problems of obscuring constitutional jurisprudence and its role in providing guidance to state courts. *Id.* (“Requiring federal courts to first determine whether the state court’s decision was erroneous, prior to considering whether it was contrary to or involved an unreasonable application of controlling law under AEDPA, promotes clarity in our own constitutional jurisprudence and also provides guidance for state courts, which can look to our decisions for their persuasive value.”).

178. *Id.*

trial and direct-review courts often fail to note. That pseudo-precedent, extremely deferential to state courts, will almost always favor the prosecution, holding state-court rejections of right to counsel invocations were “reasonable.” As illustrated by a quantitative analysis of two cases below, other courts not applying AEDPA then rely on that pseudo-precedent over and over again to reject purported invocations. Ultimately, what was originally a statement of what was not an unreasonable application of *Davis* becomes a substantive definition of a clear and unequivocal request. These phenomena, working in tandem, create a one-way ratchet, narrowing the phrases that can invoke the right to counsel.

A. *AEDPA Has Led Federal Courts to Narrow the Davis Rule for Invoking the Miranda Right to Counsel*

Under AEDPA, as interpreted by the U.S. Supreme Court, federal courts reviewing state court convictions do not directly apply the relevant law.¹⁷⁹ Rather, AEDPA directs them to ascertain what the law is, as determined by the Court, and then decide whether the state court’s interpretation falls within the reasonable limits of the law’s application.¹⁸⁰ Therefore, in the right-to-counsel context, federal courts applying AEDPA to state prisoners’ habeas petitions must ask whether an invocation could *possibly* be construed as ambiguous or equivocal. Framing the question this way begs an affirmative answer.

It is important to understand the magnitude of deference that AEDPA requires, as compared to a de novo standard, and it bears repeating here. Courts applying AEDPA are powerless to identify rights and limitations on their own and to use glosses on the law established by lower courts. Under an ordinary de novo standard of review, a federal court could ask, “What is the law as this circuit sees it, and how should it apply here?” Under AEDPA’s “unreasonable application” standard, the court may only ask, “Is this interpretation of law an absolutely impermissible interpretation of Supreme Court precedent?”¹⁸¹ If the state court decision at issue is not absolutely impermissible, the court applying AEDPA must affirm.¹⁸² This subtlety is often lost on courts not applying AEDPA.¹⁸³

179. *Id.*

180. *Id.* at 73.

181. *See id.* at 75 (“The ‘unreasonable application’ clause requires the state court decision to be more than incorrect or erroneous. The state court’s application of clearly established law must be objectively unreasonable.” (citing *Williams v. Taylor*, 529 U.S. 362, 409, 410 (2000))).

182. *See id.* In making that analysis, courts applying AEDPA look to other interpretations to determine what is reasonable. *Duhaime v. Ducharme*, 200 F.3d 597, 600–01 (2000). If they look to

For that reason, the difference between the de novo standard (defining the law) and the AEDPA standard (defining the limits of the law) sets the stage for shift in substantive law.

The AEDPA standard poses a significant risk of narrowing the *Miranda* right to counsel in its interplay with *Davis v. United States*.¹⁸⁴ AEDPA creates a one-way ratchet effect, narrowing the set of phrases considered effective to invoke a suspect's right to counsel to only the most obvious. This occurs as follows: first, a federal court is presented with a case in which a constitutionally questionable (but not "objectively unreasonable") invocation decision resulted in a conviction, and affirms it under the § 2254(d)(1) standard of review, although it might not have under a de novo standard. Then, when that case is published, it becomes precedent that is cited by lower courts to reach similar conclusions on the merits of invocation cases.

To illustrate these two steps, we can look to an individual phrase. In the first step, a state court rejects a given phrase as a right-to-counsel invocation, and a federal habeas court gives deference to that rejection. A criminal suspect taken into custody makes a reference to counsel during or prior to his interrogation (for example, "Could I get a lawyer?"). Police, hoping to get a confession, do not interpret the reference as a request and continue questioning. When the interrogation continues, the suspect makes incriminating statements. Those statements are admitted at trial, with the state court determining that the suspect's reference to counsel was not "clear and unequivocal" under *Davis*,¹⁸⁵ and the defendant is convicted. After exhausting state court remedies,¹⁸⁶ the convict petitions in federal court for a writ of habeas corpus, pursuant to AEDPA. The federal court, despite its reluctance to support the state court's interpretation of *Davis*, is constrained by § 2254. The federal habeas court is bound to deny the petition if it determines that the state court's application of *Davis* was not objectively unreasonable.¹⁸⁷

The second step effectuates the substantive change in law, and turns

other AEDPA cases affirming something at the outside edges of "reasonableness," there is a strong risk that the edge could be pushed even further.

183. See, e.g., *People v. Kamyab*, No. B187608, 2007 WL 1492257, at *7 (Cal. Ct. App. May 23, 2007) (citing AEDPA cases but ignoring the AEDPA dimension of the holdings).

184. 512 U.S. 452 (1994).

185. See *id.* at 461 ("[L]aw enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.").

186. Exhaustion is a required element of an AEDPA habeas petition. 28 U.S.C. § 2254(b)(1)(A) (2006).

187. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003).

the ratchet. Here, the federal court's *Davis* holding becomes precedent—or, more precisely, pseudo-precedent—that state courts cite without reference to the standard of review. When a new and perhaps clearer phrase (such as, “Can I get my lawyer?”) enters the cycle at the state court level, prosecutors seeking a conviction find and point to the earlier AEDPA case that deemed insufficient the phrase, “Could I get a lawyer?” The state court, without parsing the standard of review, looks to that earlier AEDPA decision as persuasive authority to deny the new defendant's motion to suppress his incriminating statements, and the defendant is convicted. The new phrase (“Can I get my lawyer?”) then enters federal court in an AEDPA habeas petition, becoming its own pseudo-precedent, and the process begins anew.

AEDPA's ratchet effect only goes one way. A federal court applying AEDPA is deciding not what the law is, but what the limits are for a reasonable application of the law. When it decides those limits in the context of right-to-counsel invocations, it will always be considering phrases that were not clear enough to halt the interrogation in the first place.¹⁸⁸ Because only convicts can seek habeas corpus review, federal courts applying AEDPA will never be asked, “Was this statement, interpreted as clear below, actually ambiguous?” Therefore, those courts will always be in a position to apply deference to the police, rather than the defendant. This effect pushes invocation jurisprudence to the outer limit of what constitutes a “reasonable” interpretation of *Davis*. Once that limit is reached, the law will not stray far from it. As soon as one court, whether applying AEDPA or not, interprets the law in a certain way, it is more likely that a subsequent court will view that interpretation as a reasonable one taken by “fairminded jurists.”¹⁸⁹

Through the two-step process described above, a federal court creates AEDPA pseudo-precedent deeming a phrase inadequate to invoke the right to counsel, even if it might have interpreted it on de novo review as a clear and unequivocal request. The net result is a more restrictive standard for valid invocations than was perhaps originally intended.

188. See Strauss, *supra* note 15, at 1034 (noting that clear and unambiguous invocations of the right to counsel might never make it into published opinions).

189. See *Harrington v. Richter*, 562 U.S. ___, 131 S. Ct. 770, 786 (2011) (holding that a federal habeas writ may only be granted if “there is no possibility fairminded jurists could disagree”). This is despite the Court's earlier warning that a decision is not reasonable merely because “at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did.” *Williams v. Taylor*, 529 U.S. 362, 409–10 (2000).

B. *AEDPA Cases Set a High Clarity Burden that is Then Cited in Non-AEDPA Decisions*

The narrowing process begins when a federal habeas court applies to a given phrase a standard of clarity that goes beyond what that court might have decided on de novo review. One can most easily observe AEDPA's effect with reference to individual cases.¹⁹⁰ The following two cases illustrate this phenomenon by a quantitative measurement of their effects.¹⁹¹

1. *Twenty-Eight Cases Have Cited the Phrase "I Think I Need a Lawyer" to Reject Purported Invocations*

On the night of January 13, 1993, Russel Burket brutally murdered Katherine and Ashley Tafelski in their Virginia home.¹⁹² Seven days later, when police questioned him as a suspect, Burket made two statements about counsel, roughly twelve minutes apart.¹⁹³ After the first statement, "I'm gonna need a lawyer," the police detectives advised Burket that he was not under arrest and was free to go, after which the interview resumed and Burket admitted to killing the victims.¹⁹⁴ He then said, "I think I need a lawyer," at which point the detectives frisked him, Mirandized him, and placed him in custody.¹⁹⁵ The trial court denied Burket's motion to suppress his videotaped confession.¹⁹⁶ Burket pled guilty to the murders, as well as three other crimes associated with them, "reserving the right to challenge on appeal the admissibility of his confession."¹⁹⁷ The court sentenced Burket to death.¹⁹⁸

190. It is difficult to say empirically whether AEDPA is responsible for narrowing the *Miranda* right to counsel because of the varied nature of invocation phrases and the Court's demonstrated antipathy to *Miranda* in other areas. *See, e.g.*, *Berghuis v. Thompkins*, 560 U.S. ___, 130 S. Ct. 2250, 2260 (2010) (extending the *Davis* reasoning to the right to silence and requiring affirmative, verbal invocation); *see also* Strauss, *supra* note 15, at 1033–34 (explaining the challenges of a comprehensive analysis of *Davis*).

191. I chose these two examples not because they definitively show that a phrase that would pass muster on de novo review fails on AEDPA review. That is almost impossible to demonstrate as courts issuing published opinions are loath to undermine their own decisions by stating that they disagree with the outcome. Rather, the examples used demonstrate how a phrase that might reasonably be interpreted as a valid invocation under *Davis* could be affected by AEDPA.

192. *Burket v. Angelone*, 208 F.3d 172, 177–80 (4th Cir. 2000), *cert. denied*, 530 U.S. 1283.

193. *Id.* at 195.

194. *Id.*

195. *Id.*

196. *Id.* at 180.

197. *Id.*

198. *Id.*

Although Burket raised numerous issues in his subsequent federal habeas petition, the only one relevant to this analysis was Burket's assertion that police violated his *Miranda* right to counsel.¹⁹⁹ The Fourth Circuit panel, reviewing the case under AEDPA, determined that it was not unreasonable for the Virginia Supreme Court to conclude that Burket's first statement, "I'm gonna need a lawyer," had not effectively invoked Burket's right to counsel because it was made prior to arrest.²⁰⁰ The Fourth Circuit then held that his second statement, "I think I need a lawyer," was inadequate as a request for counsel.²⁰¹ The court dismissed Burket's appeal.²⁰²

To date, *Burket* has been cited in some 386 state and federal cases.²⁰³ Of those, thirty-two were non-AEDPA cases citing *Burket* on the right-to-counsel issue. In twenty-eight of those cases, Burket's phrase, "I think I need a lawyer," was cited analogically to demonstrate that another similar phrase was insufficient to invoke the right to counsel.²⁰⁴ None of the twenty-eight cases discussed *Burket's* AEDPA standard of review,²⁰⁵ and none expressly acknowledged that the Fourth Circuit might have decided otherwise had it been reviewing the issue de novo.

Of the twenty-eight cases citing *Burket* to reject a suspect's claimed invocation of the right to counsel, eleven were state cases possibly subject to future AEDPA review.²⁰⁶ Additionally, many state trial courts

199. *See id.* at 196.

200. *Id.* at 197.

201. *Id.* at 197–98.

202. *Id.* at 201.

203. Search of WESTLAW, KeyCite service (Nov. 10, 2011) (search for state and federal cases citing *Burket*).

204. *See, e.g.*, United States v. Smith, 281 F. App'x. 198, 199–200 (4th Cir. 2008) ("I think I might need to talk to a lawyer."); United States v. Williams, No. 5:08-CR-174-FL-1, 2009 WL 497143, at *1–2 (E.D.N.C. Feb. 28, 2009) ("I don't think I want to say anything more until I talk to a lawyer."); *aff'd*, No. 09-4812, 2011 WL 4361556 (4th Cir. Sept. 20, 2011); United States v. Brown, Crim No. 06-148(01) (JMR/RLE), 2006 WL 2314057, at *14–15 (D. Minn. Aug. 9, 2006) ("Can I call my lawyer?"); United States v. Sprouse, No. CRIM 5:01CR30051, 2002 WL 15866, at *4 (W.D. Va. Jan. 8, 2002) (noting that suspect told police "that his counsel had advised him not to speak with police"); People v. Donahee, No. 296050, 2011 WL 923501, at *2 (Mich. Ct. App. Mar. 17, 2011) ("I think this is where I need an attorney."); People v. Kamyab, No. B187608, 2007 WL 1492257, at *7 (Cal. Ct. App. May 23, 2007) ("I think it's time I called my attorney."). One court citing *Burket's* alleged right-to-silence invocations as justification for holding invalid a right-to-counsel invocation. United States v. Peters, 435 F.3d 746, 751 (7th Cir. 2006).

205. *But see* United States v. DeGourette, No. 05-CR-45S, 2007 WL 607234, at *2 (W.D.N.Y. Feb. 22, 2007) (noting *Burket's* standard of review in a right-to-silence context); *see also* United States v. Jourdain, Criminal No. 06-313 (01-02) (RHK/RLE), 2007 WL 269827, at *21–22 (D. Minn. Jan. 26, 2007) (discussing *Burket* and *Dormire v. Wilkinson*, 249 F.3d 801, 805 (8th Cir. 2001), and noting *Dormire's* AEDPA standard of review, but not *Burket's*).

206. Some of them did reach AEDPA review. For example, *People v. Kamyab*, 2007 WL

have likely cited *Burket* in denials of motions to suppress based on the *Miranda* right to counsel, and there are appellate opinions citing to *Burket* in at least five states.²⁰⁷ These opinions have almost certainly influenced trial court decisions.

2. *Twenty-Five Cases Have Cited the Phrase “I Think I Would Like to Talk to a Lawyer” to Reject Purported Invocations*

In a more recent case, habeas petitioner Billy Russell Clark challenged his conviction in an Arizona court for the murder of his stepmother, Anita Clark.²⁰⁸ After police arrested and Mirandized him, two police detectives interviewed Clark after he waived his *Miranda* rights.²⁰⁹ During the interview, a Detective Chambers informed Clark that “there were serious problems with [his] story.”²¹⁰ Clark replied by saying, “I think I would like to talk to a lawyer.”²¹¹ Rather than halting the interview, the detective told Clark that “if he wanted a lawyer [Chambers] would call him one,” and left him alone “for a few minutes to make a decision,” saying that when he returned “[he] would expect [Clark’s] answer.”²¹² When Detective Chambers returned some thirty minutes later, Clark indicated that he did not want a lawyer and would continue talking.²¹³ After another twenty minutes of questioning, Clark

1492257, led to a federal habeas petition, which the district court denied. *Kamyab v. Uribe*, No. CV 08-5557GAF (FMO), 2009 WL 1520022, at *1 (C.D. Cal. May 29, 2009).

207. See *People v. Kamyab*, 2007 WL 1492257, at *7 (statement “I think it’s time I called my attorney” invalid); *Donahee*, 2011 WL 923501, at *2 (statement “I think this is where I need an attorney” invalid as invocation); *People v. Powell*, 304 A.D.2d 410, 410–11 (N.Y. App. Div. 2003) (statement that he “thought he would wait for a lawyer” invalid); *Com. v. Epps*, No. 2271-09-1, 2010 WL 1439390, at *3 (Va. Ct. App. Apr. 13, 2010) (holding that question “Can I have my lawyer present? . . . for now” invalid). In another case, *In re H.V.*, 252 S.W.3d 319 (Tex. 2008), the majority cited *Burket* in upholding the validity of the suspect’s statement that he “wanted his mother to ask for an attorney,” *id.* at 325–26 (internal quotation marks omitted), while the dissent also cited it to argue against the statement’s adequacy as an invocation, *id.* at 330 (Jefferson, J., dissenting).

208. *Clark v. Murphy*, 331 F.3d 1062, 1066–67 (9th Cir. 2003), *cert. denied*, 540 U.S. 968.

209. *Id.* at 1064–65.

210. *Id.* at 1065.

211. *Id.* The court noted that the record was inconsistent as to whether Clark said “I think I would like to talk to a lawyer,” or “I think I’d like to talk to a lawyer.” *Id.* at 1065 n.2. Like the Arizona court, the Ninth Circuit opted for the first phrase, but suggested that there was not any difference between the two for the purposes of its analysis. *Id.* This is noteworthy because it demonstrates the exacting precision with which courts examine everyday phraseology when they apply the *Davis* “clear and unequivocal request” rule. That precision lies at the core of the AEDPA ratchet effect because courts closely examining a possible invocation will look to other courts’ interpretations, some of them made through AEDPA’s deferential prism.

212. *Id.* at 1065.

213. *Id.*

asked the detective, “should I be telling you or should I talk to a lawyer?”²¹⁴ Detective Chambers responded by saying that, in his opinion, a judge or jury would consider remorse as more important than fear of punishment, and the interview continued.²¹⁵ Soon after that, Clark confessed to the murder.²¹⁶ Before trial, he moved to suppress his confession, but the trial court denied his motion, and a jury ultimately convicted Clark of second degree murder and theft.²¹⁷

Clark’s federal habeas petition, filed under AEDPA, rested primarily on his assertion that the state trial court erred by admitting his confession, which he contended was taken in violation of *Edwards v. Arizona*.²¹⁸ A magistrate judge determined that Clark had made an unambiguous request for counsel and that the Arizona Court of Appeals was unreasonable in holding otherwise.²¹⁹ The district court, however, rejected this conclusion and denied Clark’s habeas petition.²²⁰ The Ninth Circuit affirmed.²²¹ In reaching its conclusion, the court spent several sentences discussing *Burket v. Angelone*,²²² and comparing the statement in that case (“I think I need a lawyer”²²³), with Clark’s (“I think I would like to talk to a lawyer”).²²⁴ The court also discussed at length the presence of the phrase, “I think,” in the statement.²²⁵ The Ninth Circuit denied Clark’s appeal.²²⁶

It is noteworthy that the Ninth Circuit issued an opinion in this case some five months before amending and superseding it with a second opinion.²²⁷ The amended opinion was published three months after the U.S. Supreme Court’s excoriation of the Ninth Circuit’s AEDPA approach in *Lockyer v. Andrade*.²²⁸ In its original opinion, the court

214. *Id.*

215. *Id.* at 1065–66.

216. *Id.* at 1066.

217. *Id.*

218. *Id.* at 1069 (citing *Edwards v. Arizona*, 451 U.S. 477 (1981)).

219. *Id.* at 1066.

220. *Id.*

221. *Id.* at 1071.

222. 208 F.3d 172 (4th Cir. 2000).

223. *Id.* at 197.

224. *Clark*, 331 F.3d at 1071.

225. *Id.* at 1070–71.

226. *Id.* at 1072.

227. *Id.* at 1064; see also *Clark v. Murphy*, 317 F.3d 1038, *opinion amended and superseded on denial of reh’g*, 331 F.3d 1062 (9th Cir. 2003).

228. 538 U.S. 63, 75–77 (2003).

stated, “While the issue is a close one, we conclude that Clark’s statement that he thought he would like to talk to a lawyer did not constitute an unambiguous and unequivocal request for counsel within the meaning of *Davis*.”²²⁹ The court removed this language from the amended opinion, stating instead that “the Arizona court’s determination that Clark’s statement did not constitute an unambiguous and unequivocal request for counsel within the meaning of *Davis* was not contrary to clearly established [f]ederal law, nor was it an objectively unreasonable application of such law.”²³⁰

The change in the superseding opinion is significant for two reasons. First, the court originally expressed some reluctance to reject the purported invocation before clarifying that what was “reasonable” was the actual issue in the case. Second, it makes clear that the court recognized the subtle, but important, difference between the two holdings (helped along by *Lockyer*) and saw the need to state it directly in its revised opinion. The fact that the court’s expression of reluctance is absent from the post-*Lockyer* ruling shows how AEDPA obscures a court’s underlying outlook on the constitutional issue at play. This masking of the court’s underlying logic makes it difficult for subsequent courts to determine the law as described in AEDPA’s pseudo-precedent. *Clark* would be more useful as accurate guidance on invocation law if AEDPA had not masked the court’s reluctance.

Clark has been cited in some 2298 state and federal cases.²³¹ Of those, 113 cited *Clark* on the right-to-counsel issue, of which twenty-nine were non-AEDPA cases. In all but four of those twenty-nine cases, Clark’s statement, “I think I want to talk to a lawyer,” was cited as persuasive precedent to hold on de novo review that a similar phrase was insufficient to invoke the right to counsel.²³² Of the twenty-five cases

229. *Clark*, 317 F.3d at 1046–47.

230. *Clark*, 331 F.3d at 1071.

231. Search of WESTLAW, KeyCite service (Nov. 10, 2011) (search for state and federal cases citing *Clark*).

232. See, e.g., *People v. Gaeta*, No. F048162, 2006 WL 3233830, at *6 (Cal. Ct. App. Nov. 9, 2006) (holding that phrase, “I need an attorney then cause . . . I don’t know what’s going on with this,” equivocal under the circumstances); *People v. Roquemore*, 31 Cal. Rptr. 3d 214, 224–25 (Cal. Ct. App. 2005) (question, “[C]an I call a lawyer or my mom to talk to you?” ambiguous); *Davis v. State*, 313 S.W.3d 317, 339 n.53, 339–41 (Tex. Crim. App. 2010) (phrase, “I should have an attorney,” not a request for counsel). In one case, *United States v. Fry*, No. CR-09-44-N-JLQ, 2009 WL 1687958, at *4, *11–14 (D. Idaho June 16, 2009), the court determined that the defendant’s question, “Do I get to have a lawyer to sit in?” was ambiguous, *id.* at 11, but police had failed to clarify as required under *United States v. Rodriguez*, 518 F.3d 1072, 1080 (9th Cir. 2008) (requiring police to clarify ambiguous pre-waiver requests). *Fry*, 2009 WL 1687958, at *12–14. In another, *People v. Sims*, No. 285475, 2009 WL 1693722 (Mich. Ct. App. June 16, 2009), the court applied

citing *Clark* to hold an invocation invalid, eleven were state cases, themselves subject to possible federal AEDPA review. In the four cases in which Clark's phrase was not used to hold invalid a right-to-counsel invocation, it was cited twice in dissent,²³³ once as contrary precedent in a holding of validity,²³⁴ and once against an invocation of the right to silence.²³⁵ Only one decision noted that *Clark* was decided under the AEDPA standard of review.²³⁶

Both *Burket* and *Clark* demonstrate the risk that the AEDPA standard of review poses to the integrity of substantive law.²³⁷ State and federal trial courts are prone to treat precedent like *Burket* and *Clark* as determinative of what constitutes a valid request for counsel, rather than what is not an "objectively unreasonable" interpretation of *Davis*. When federal courts appear to reject phrases as clear to the layperson as "I think I would like to talk to a lawyer" or "I think I want a lawyer," they become powerfully persuasive to judges analyzing similar statements or questions in courts of the first instance.²³⁸

Clark in considering the phrase, "I think I should have an attorney here, you know," but used a "clear error" rather than de novo standard of review. *Id.* at *2.

233. *People v. Nelson*, No. G040151, 2010 WL 673215, at *25–26 (Cal. Ct. App. Feb. 25, 2010) (Aronson, J., dissenting) (rejecting majority's holding that suspect's requests to speak to his mother constituted an invocation of his *Miranda* rights); *In re H.V.*, 252 S.W.3d 319, 331 n.2 (Tex. 2008) (Jefferson, J., dissenting) (with reference to *Clark*'s habeas posture, rejecting majority's holding that suspect's statement that he "wanted his mother to ask an attorney" was valid as invocation).

234. *People v. Jones*, No. 273193, 2007 WL 292532, at *2–3 (Mich. Ct. App. Feb. 1, 2007) (holding "[C]an I have one now while we talk?" is a valid invocation).

235. *State v. Payne*, 199 P.3d 123, 134 (Idaho 2008).

236. *Kaczmarek v. State*, 91 P.3d 16, 27 n.31 (Nev. 2004).

237. *Burket* and *Clark* are not alone in the realm of the *Miranda* right to counsel. *See, e.g.*, *Dormire v. Wilkinson*, 249 F.3d 801, 805 (8th Cir. 2001) (phrase, "Could I call my lawyer?" cited in twenty-eight non-AEDPA federal cases and eight state cases, mostly to deny motions to suppress founded on *Miranda* right to counsel).

238. In addition to narrowing the invocation standard, AEDPA may have also expanded the situations in which *Davis* applies. As many scholars have noted, the *Davis* "clear and unequivocal request" rule originally applied only to phrases uttered *after* the suspect had waived his *Miranda* rights. *See* Harvey Gee, *Essay: When Do You Have to Be Clear?: Reconsidering Davis v. United States*, 30 SW. U. L. REV. 381, 399–414 (2001); *supra* note 106. However, many courts have erroneously applied *Davis* to statements made before a suspect has waived his right to counsel. *See* 2 LAFAVE ET. AL., *supra* note 8, at 866 n.185 (listing numerous cases applying *Davis* pre-waiver).

AEDPA has exacerbated this broadening of the *Davis* rule into pre-waiver invocations in the same way as it narrowed suspects' invocation options. When courts have applied *Davis* pre-waiver, they have made its application pre-waiver not "objectively unreasonable." This made it easier for courts to apply the "clear and unequivocal request" rule pre-waiver on AEDPA review. *See* *Harrington v. Richter*, 562 U.S. ___, 131 S. Ct. 770, 786 (2011) (holding that a federal habeas writ may only be granted if "there is no possibility fairminded jurists could disagree"). Additionally, because the U.S. Supreme Court left open the question of what rule applies to statements made before a suspect has waived his *Miranda* rights, it cannot be "clearly established [f]ederal law." 28

V. THE U.S. SUPREME COURT SHOULD DISCOURAGE
COURTS NOT APPLYING AEDPA FROM RELYING ON
AEDPA CASES

AEDPA presents a substantial risk of weakening substantive constitutional protections, both in the case of the *Miranda* right to counsel and in other areas of criminal law. Typically, this shift will narrow defendants' rights because AEDPA is only applied in cases in which defendants are convicted, and it requires a high degree of deference to those convictions.²³⁹

As described above,²⁴⁰ this ratchet effect will perpetuate itself as state courts cite federal AEDPA decisions to reject defendants' constitutional challenges, and those defendants then challenge their convictions in federal habeas petitions governed by AEDPA. The net result will be that the rights that the Court articulated will be whittled away to their bare minimum. In the case of invoking the *Miranda* right to counsel, this ratchet effect could pare down the phrases acceptable to satisfy the *Davis* clear and unequivocal request rule to only the most crystal clear. As Justice Souter put it, courts and police will expect "suspects to speak with the discrimination of an Oxford don."²⁴¹

For these reasons, courts rendering a decision on anything other than the AEDPA standard of review should refrain from relying on cases

U.S.C. § 2254(d)(1) (2006); see *Albemi v. McDaniel*, 458 F.3d 860, 866 (9th Cir. 2006) (holding that where the U.S. Supreme Court has expressly left a question open, it cannot be "clearly established" and courts applying AEDPA must affirm).

This problem is particularly pointed in the Ninth Circuit, which requires police to clarify ambiguous pre-waiver invocations, but not those made after a waiver. *United States v. Rodriguez*, 518 F.3d 1072, 1074, 1078–79 n.6 (9th Cir. 2008). So, where a court in the Ninth Circuit is reviewing a case de novo, it will apply *Rodriguez* and may grant a motion to suppress, e.g., *United States v. Nejbauer*, No. CR09-0670-PHX-NVW, 2009 WL 3710713, at *2–3 (D. Ariz. Nov. 2, 2009); but on AEDPA review, it will disregard *Rodriguez* and the motion's denial will stand, e.g., *Sessoms v. Runnels*, 650 F.3d 1276, 1283–84, 1289–90 (9th Cir. 2011). This phenomenon amounts to an internal circuit split.

The Court recently mooted this issue in *Berghuis v. Thompkins*, 560 U.S. ___, 130 S. Ct. 2250, 2260 (2010), by implicitly extending the *Davis* "clear and unequivocal request" rule to pre-waiver situations. In dissent, Justice Sotomayor vigorously disputed the Court's ruling, saying that the *Davis* holding is "explicitly predicated" on the existence of the suspect's prior valid waiver. *Id.* at 2275 (Sotomayor, J., dissenting).

239. See *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 409–12 (2000)) ("The unreasonable application clause requires the state court decision to be more than incorrect or erroneous. . . . [it] must be objectively unreasonable.") (internal quotation marks omitted).

240. See *supra* Part IV.

241. *Davis v. United States*, 512 U.S. 452, 476 (Souter, J., concurring).

decided under AEDPA. Both state and federal courts should exercise this restraint, although federal courts are at a somewhat lower risk of ratcheting down defendants' rights because their decisions will not be subject to subsequent review under 28 U.S.C. § 2254. This precaution would arrest the AEDPA ratchet effect and confine the scope of the legislation to what Congress originally intended.²⁴² In other words, the restrictive shift AEDPA created will halt where it stands. In order to put this halt into effect, the U.S. Supreme Court should discourage courts from basing their decisions on AEDPA cases unless the citing court is also applying AEDPA.²⁴³

While it is true that this precaution would limit the range of citable opinions, there would be ample precedent available to trial courts and direct-review appeals courts. First, any non-AEDPA decision (both state and federal) would be available. Additionally, there are at least six years of habeas decisions applying *Davis* untainted by AEDPA. *Davis* was decided in 1994, two years before AEDPA's enactment, and AEDPA's standard of review did not control most of the habeas cases decided by federal appeals courts from 1996 to 2000.²⁴⁴ Almost all of these cases decided *Davis* issues on a de novo standard of review, and courts continue to apply that standard in non-AEDPA cases.²⁴⁵

Even if they persist in citing AEDPA cases, courts not applying AEDPA should acknowledge the statute's highly deferential standard of review. They should also account for the standard's effect on the substantive constitutional analysis in the case they are citing. This approach may be wise. Federal decisions rendered under AEDPA could conceivably have legitimate precedential or persuasive value to trial or direct review courts. For example, a trial court might face an unclear area of federal law and cite an AEDPA case to say what the law is, regardless of how it should be applied or what interpretations of it are

242. See *supra* text accompanying notes 141–153.

243. The Court is not the only entity that can act in this space. Some have argued that Congress should eliminate *all* federal habeas corpus review of state court convictions except for rare “cases where the remedial benefits of the Great Writ will be worth the costs.” Joseph L. Hoffman & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 818–23 (2009). This solution, while extreme and not endorsed here, would also tend to eliminate AEDPA's ratchet effect by halting the practice of federal courts decreeing what is and is not contrary to, or an unreasonable application of, U.S. Supreme Court precedent.

244. See Blume, *supra* note 20, at 284.

245. See, e.g., *United States v. Montes*, 602 F.3d 381, 384–85 (5th Cir. 2010) (holding that “Maybe I should get an attorney” or “Do I need an attorney?” are not valid invocations on de novo review), *cert. denied sub nom.*, *Armijo v. United States*, 131 S. Ct. 177.

reasonable.²⁴⁶ In other words, a court may need an AEDPA case with similar facts to “correctly identif[y] the governing legal rule,”²⁴⁷ even if it does not look to that case as guidance for application of the rule. Even if it uses the interpretation deemed reasonable by the AEDPA decision, the non-AEDPA court in this scenario should be careful to note the confining and deferential nature of the AEDPA standard of review.

In addition, federal courts deciding habeas petitions under § 2254(d)(1) should clearly state the standard of review applied in their holdings. If a federal court of appeals, deciding a case under AEDPA, states clearly in its holding that it is only determining that the decision on review was not “objectively unreasonable,”²⁴⁸ a non-AEDPA court would likely find the holding less persuasive than if that caveat were absent.²⁴⁹ By inserting such a warning, federal courts applying AEDPA would help mitigate AEDPA’s effect on substantive constitutional law. However, the approach of adding an explicit reference to the standard of review is merely a precautionary supplement to, and cannot replace, the U.S. Supreme Court admonition proposed above.

CONCLUSION

AEDPA’s ratchet effect has narrowed the substantive constitutional protections afforded by the *Miranda* right to counsel by making the *Davis* “clear and unequivocal request” rule harder to satisfy. However, this effect is not restricted to the *Miranda* right to counsel. Any number of other substantive areas of criminal law could be affected in the same way. Because a federal court reviewing a state court ruling under AEDPA must ask only if the state ruling is an “objectively unreasonable” application of federal law, any potentially “reasonable” interpretation of substantive law will stand, even if it is “incorrect or erroneous.”²⁵⁰ That federal decision upholding as reasonable the state

246. Indeed, § 2254 requires a federal court to first determine what is the federal law “as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1) (2006).

247. *See Williams v. Taylor*, 529 U.S. 362, 407–08 (2000).

248. *See, e.g., Sessoms v. Runnels*, 650 F.3d 1276, 1288, 1289 (9th Cir. 2011) (stating its AEDPA holdings clearly).

249. *But compare Burket v. Angelone*, 208 F.3d 172, 198 (4th Cir. 2000) (expressly holding that the Virginia Supreme Court’s rejection of defendant’s *Miranda* right-to-counsel claim “was not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States”), and *Clark v. Murphy*, 331 F.3d 1062, 1071 (9th Cir. 2003) (same with regard to Arizona court ruling), with *People v. Kamyab*, No. B187608, 2007 WL 1492257, *7 (Cal. Ct. App. May 23, 2007) (citing both *Burket* and *Clark*, but ignoring the AEDPA dimension of the holdings).

250. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (quoting *Williams*, 529 U.S. at 409–12).

court's interpretation can then be cited by any lower court, even though it does not represent the federal court's own interpretation of federal law, as would be the case in the pre-AEDPA de novo standard of review. In the case of the *Miranda* right to counsel, this means that as more and more AEDPA precedent is created, state-court interpretations of federal rights will supplant those of lower federal courts, resulting in the strictest invocation standard *Davis* will allow. That is, thanks in part to AEDPA, suspects wishing to invoke their right to counsel may ultimately be required to say nothing less clear than, "I want a lawyer."