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June 4, 2012

A SUMMARY OF NUMEROUS *MIRANDA* CASES AND SELECTED ISSUES

THIS IS VERSION 2A OF THIS OUTLINE

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This outline consists of the following topics:

INTRODUCTION

This outline has been prepared for educational, training, and informational purposes only. It is intended for use by prosecutors, judges, and defense attorneys alike. It is (in my opinion) an objective summary of numerous *Miranda* related cases, intended to be used by all parties in their mutual goal of searching for the truth and assuring that justice is served. The opinions, conclusions, and observations in this outline are mine and mine alone and they do not represent the viewpoint of any other person or entity including the Milwaukee County District Attorney's

office. Material from this outline can be used by anyone with or without attribution to this outline as the source of the material with one exception-published material for profit.

Many areas of the criminal law, including *Miranda*, are consistently evolving and changing. Thus, the probability that one or more items in this outline will be outdated increases in proportion to the greater the length of time between the date of this outline and when it is used. Therefore, persons who use this outline should consider the information in this outline as a legal research starting point, especially as the time between the date of the outline and its use increases.

One or more Wisconsin Court of Appeals cases in this outline may contain an incomplete Wisconsin citation such as 2012 WI App ___ Such a citation indicates that, on the date of this outline, the case had been recommended for publication in the official reports but it had not yet been ordered published.

I would appreciate any comments or suggestions concerning the format of this outline and its contents (including any incorrect citation numbers, misspellings, and the citation to a case that does not appear to be related to the topic under which it appears). My work e-mail address is robert.donohoo@da.wi.gov and my home e-mail address is diane.bob@att.net.

HOW TO USE THIS OUTLILNE

The best way to use this outline is: (1) determine the *Miranda* issue(s) that you are researching and, if necessary, the general category of *Miranda* issues that you specific issue falls under; (2) proceed to the **MIRANDA ISSUES/TOPICS** section of this outline, locate the issue or issues and the cases or discussion (at the end of this outline) that have addressed the issue or issues, and review the case or cases or the discussion to determine if they are applicable to your exact issue(s).

MIRANDA ISSUES/TOPICS

The cases in each topic below are arranged in the following order: (1) Wisconsin published cases and cases pending before the Wisconsin Supreme Court cases from latest to earliest-italicized; (2) Wisconsin RULE 809 cases from latest to earliest-italicized, bold, and underlined; (3) United States Supreme Court cases from latest to earliest-bold and italicized; (4) Seventh Circuit Court of Appeals cases (if any cases are applicable) from latest to earliest-underlined and italicized.

Cases which have addressed or are expected to address issues related to whether interrogation for *Miranda* purposes occurred in a particular case/situation include *Martin, Davis, Banks, Reynolds, Hambly, Torkelson,*

Cases which have addressed whether a statement was a volunteered statement (and therefore not subject to the *Miranda* requirements) include *Banks.*

Cases which have addressed *Miranda* custody related issues include *Dionicia, Schloegel, Torkelson, **Richer**, **Fields, J.D.B**, **Shatzer.***

Cases which have addressed issues related to the adequacy of the advisal of the *Miranda* warnings/rights, including readvisal of the warnings/rights, include *Berggren, Grady, Backstrom, Rockette, **Thompkins, Powell**.*

Cases which have addressed issues related to the understanding and/or waiver of the *Miranda* rights include *Hampton, Reynolds, Ward, Rockette, **Allen**, **Thompkins**, Brown, Aleman. See also* my outline entitled **AN ANALYSIS OF THE *MIRANDA* CASE OF *BERGHIUS V. THOMPLINS* AND RELATED ISSUES.**

Cases which have addressed the situation, within the context of waiver, where an attorney is not allowed to speak with the defendant/the defendant is not told that an attorney is in the police department to see the defendant include *Stevens* and *Ward.*

Cases which have addressed issues related to whether the defendant's invocation of the right to counsel or the right to remain silent were ineffective because they were not timely invoked include *Hambly, Kramer, Hassel, **Dixon**. See also* the discussion below under **THE REQUIREMENT OF A TIMELY INVOCATION OF A *MIRANDA* RIGHT.**

Cases which have addressed issues related to whether the defendant's words and/or actions were an effective invocation of the *Miranda* right to counsel include *Hampton, Linton, Ward, Berggren, **Montejo**, Martin, Aleman. See also* the discussion below under **THE APPLICABILITY OF THE *DAVIS* CLEAR ARTICULATION AND NO CLARIFICATION RULES IN A PREWAIVER SITUATION.**

Cases which have addressed or are expected to address issues related to valid police actions after an effective invocation of the *Miranda* right to counsel by the defendant, including under what conditions can the police reinterrogate the defendant (the defendant reinitiates the discussion, the 14 day break-in-custody rule, etc.), include *Stevens, Davis, Hampton, Hambly, **Allen**, **Shatzer**, Aleman. See also* the discussion below under **THE INITIATION OF QUESTIONING BY THE DEFENDANT AFTER THE POLICE DID NOT CEASE QUESTIONING OF THE DEFENANT AFTER THE DEFENDANT INVOKED THE *MIRANDA* RIGHT TO COUNSEL.**

Cases which have addressed issues related to whether the defendant's or someone else' words an/or actions were an effective invocation of the *Miranda* right to remain silent include *Hampton, Markwardt, Jerrell C.J., Hassel, **Wiegand**, **Saeger, Thompkins**, Aleman. See also* the discussion below under **THE APPLICABILITY OF THE *DAVIS* CLEAR ARTICULATION AND NO CLARIFICATION RULES IN A PREWAIVER SITUATION**

Cases which have addressed issues related to valid police actions after an effective invocation of the *Miranda* right to remain silent including under what conditions can the police reinterrogate the defendant include *Bean, Hassel, **Wiegand, Allen**.*

Cases which have addressed the effect of a *Miranda* violation on one or more subsequent statements of the defendant include *Knapp* and ***Seibert.***

Cases which have addressed the effect of a *Miranda* violation on other than the actual statement taken in violation of *Miranda* include *Schloegel, Knapp, **Dixon**, **Seibert**, **Patane**.*

Cases which addressed a *Miranda* hearing related issues include *Cole, Young.*

Cases which have addressed specific situations in the context of whether it was a *Miranda* situation include *Lombard* (a Chapter 980 pre-petition evaluation with the state's examinrer), *Jimmie R.R.* (a court ordered presentence investigation interview).

Cases which have addressed postconviction and appellate related issues include *Rockette.*

Cases which have addressed the effects of a *Miranda* violation include *Aleman* (a filing of a civil federal sec. 1983 action).

WISCONSIN SUPREME COURT AND COURT OF APPEALS--PUBLISHED CASES

In *State v. Davis*, 2011 WI App 147, 337 Wis.2d 688, 808 N.W.2d 130, one of the issues (in the context of an ineffective assistance of counsel claim) was whether certain actions of the police, after the defendant had effectively invoked his *Miranda* right to counsel, were valid. The relevant facts were:

> Detective Domagalski testified that Davis was interviewed three times while in custody, with only the third interview resulting in Davis's admissions that he was present at the robbery and felt guilty about Matthews's death. When police declined Davis's request to speak "off the record" or "hypothetically," Davis stated that he wanted to speak with an attorney. Detective Domagalski testified that he and his partner stopped questioning Davis at that point, however, his partner wrote a written summary of the interview with Davis. Police showed Davis this statement, asked him whether it was recorded accurately and whether he wished to make any changes. Detective Domagalski told the jury that Davis replied that the statement was accurate, but refused to sign it

2011 WI App at ¶ 32, 337 Wis.2d at 706. The Court ultimately reversed the defendant's conviction in the interest of justice and, in so doing, discussed how certain testimony at the defendant's trial, including the erroneously admitted testimony of Detective Domagalski, combined to undermine the Court's confidence in the outcome of the defendant's trial. 2011 WI App at ¶ 15, 337 Wis.2d at 694. In so holding the Court held that evidence of the defendant's confirmation of the accuracy of his prior statement/admission to the police and his refusal to sign the statement were improperly admitted into evidence at his trial in violation of *Edwards v. Arizona*-the defendant was improperly interrogated/reinterrogated for *Miranda* purposes after he invoked his *Miranda* right to counsel. The Court further found that the error, although harmless error in the context of the case as tried, was not harmless error in the interest of justice context. Judge Fine, in his concurring opinion, stated:

> I agree that we should reverse in the interest of justice. In my view, however, we do not have to, and should not, decide whether the detective's asking Kenneth Davis to confirm the accuracy of what he told the officers before invoking his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), violated the rule in *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), because Davis's confirmation of the accuracy of what he told the officers was *de minimis*—the jury would have still heard what he told the officers even if the trial court had suppressed the detective's confirmation testimony.

2011 WI App at ¶ 36, 337 Wis.2d at 708-09.

In *State v. Bean*, 2011 WI App 129, ¶¶ 1-11, 26-33, 337 Wis.2d 406, 411-15, 420 804 N.W.2d 696, one of the issues was whether the reinterrogation of the defendant, after he had effecetively invoked his *Miranda* right to remain silent, was valid/in compliance with the *Miranda* law. The relevant facts were: (1) Detective Borman, after the defendant invoked his *Miranda* right to silence during the third interrogation of the defendant after his arrest, promptly terminated the interrogation; (2) Detective Spano, approximately nineteen and one-half hours later, obtained a confession from the defendant concerning the same crime that was the subject of the earlier interrogations after the defendant was administered and waived the *Miranda* warnings. The Court held that the reinterrogation of the defendant, after he had invoked the *Miranda* right to remain silent, was valid under *Miranda* and *Mosley.* In its opinion the Court discussed the applicable law, when there is a reinterrogation of a person after that person has asserted the *Miranda* right to remain silent, and applied that law to the facts of this case. The Court also stated that in reinterrogation after invocation of the right to remain silent situations *Mosley*, and not *Shatzer*, is the controlling law.

In *State v. Hampton*, 2010 WI App 169, 330 Wis.2d 531, 793 N.W.2d 901, the Court addressed numerous *Miranda* related topics/issues including the effective invocation of the *Miranda* right to counsel (MRTC) and silence, understanding and waiver of the *Miranda* rights by the defendant, and the allowed/required police actions after a defendant invokes the right to counsel including reinitiation of interrogation when the defendant initiates a discussion or conversation with the police. In relation to the issue of the effective invocation of the right to counsel and the police actions after an effective invocation of it, the Court: (1) held that the defendant did not effectively invoke the MRTC at one point and in so holding discussed/set forth numerous general principles including the *Davis* clear articulation rule; (2) held that at another point the defendant effectively invoked the MRTC but that the defendant then initiated a discussion with the police and subsequently waived his *Miranda* rights; (3) discussed/set forth numerous general principles/the law relating to what the police can do when a person effectively invokes the MRTC and the person then initiates a discussion/conversation with the police. The Court also held that the defendant understood and validly waived his *Miranda* rights. Finally, the Court held that the defendant did not effectively invoke his *Miranda* right to remain silent and discussed/set forth numerous general principles including the *Davis* clear articulation rule.

In *State v. Dionicia*, 2010 WI App 134, 329 Wis.2d 524, 791 N.W.2d 236, the Court held that a juvenile, when she was questioned by a police officer in the back seat of his police car while she was being transported to her school because she was truant, was in custody for purposes of Wisconsin's juvenile *Jerrell C. J.* recording law. In so holding the Court did <u>not</u> address whether the defendant was in custody for *Miranda* purposes. However, an argument can be made that the Court interpreted the custody requirement of/for the *Jerrell C. J.* recording law differently/in a more restrictive manner than the *Miranda* custody requirement-the Court appeared to use the "free to leave" test, which is not the test that is used to determine custody for *Miranda* purposes.

In *State v. Linton*, 2010 WI App 129, 329 Wis.2d 687, 791 N.W.2d 222, the Court, in a situation where the defendant made an ambiguous request for counsel, the police stated that if the defendant was asking for an attorney they would have to stop talking with him, and the

defendant then agreed to talk with the police, held that the defendant's statement was not an effective assertion of the *Miranda* right to counsel. In so holding the Court set forth/discussed some basic general principles and rejected the defendant's contention that his age and limited education effected his ability to assert his MRTC.

In *State v. Banks*, 2010 WI App 107, ¶¶ 7-9, 30-36, 328 Wis.2d 766, 774-75, 777, 785-89, 790 N.W.2d 526, the Court, in the context of the defendant's claim that his attorney was ineffective because the defendant's statement was obtained in violation of Wisconsin's adult statement recording law and the attorney failed to request that the appropriate jury instruction be given because of the noncompliance with the law, addressed whether the defendant's statement was the result of interrogation. In this case the defendant, after he had invoked his *Miranda* rights and the officer prepared to leave the interview room, asked the officer a question about the allegations against the defendant (the reason for his detention). The officer, in response to the defendant's question, then told the defendant the reasons for his detention. The defendant the made a brief statement in response to the officer's statement. The Court held that there was no violation of the recording law because the officer's statement was not interrogation for *Miranda* pruposes-the defendant's statement was a volunteered statement.

In *State v. Reynolds,* 2010 WI App 56, ¶¶ 45, 51, 324 Wis.2d 385, 403-04, 406-07, 781 N.W.2d 739, the Court found that the defendant's waiver of the *Miranda* rights was valid. The Court also did not decide whether an officer's "appeal to the defendant's conscience" speech to the defendant was interrogation for *Miranda* pruposes.

In *State v. Ward*, 2009 WI 60, 318 Wis.2d 301, 767 N.W.2d 236, the Court addressed numerous voluntariness of a confession issues and two *Miranda* issues: waiver of the *Miranda* rights and invocation of the *Miranda* right to counsel. Addressing waiver of the *Miranda* rights, the Court: (1) extensively discussed numerous general principles; (2) held that the defendant knowingly, voluntarily, and intelligently waived her *Miranda* rights on two occasions when she was interrogated while in custody; (3) held that the fact that the police did not inform the defendant that an attorney (who had been retained by the defendant's husband to represent the defendant) was at the police station and wanted to speak with the defendant and the fact that the attorney was not allowed to speak with the defendant did not affect the validity of the defendant's waiver of her *Miranda* rights; (4) held that the fact that the defendant, after having asked several times about her husband, was not informed that he was outside of the interrogation room did not affect the validity of her waiver of her *Miranda* rights. Addressing the invocation of the *Miranda* right to counsel, the Court: (1) discussed/reiterated numerous general principles including that the *Davis* clear articulation rule and the *Davis* no clarification rule are the law in the state of Wisconsin; (2) held that the defendant's "should I call an attorney" was not an invocation of the right to counsel; (3) addressed the situation where the officer gives the defendant information in response to a "should I call an attorney" question. The Court also reiterated that Article I, Section 8 of the Wisconsin Constitution provides the same (but not more/higher) *Miranda* protections as the United States Constitution. Justice Crooks, in a dissent joined by Chief Justice Abrahamson and Justice Bradley, disagreed with numerous of the positions taken by the majority. The dissent would interpret the Wisconsin Constitution to give a person "greater" *Miranda* rights in some situations.

In *State v. Schloegel*, 2009 WI App 85, 319 Wis.2d 741, 769 N.W.2d 130, the Court addressed the issue of what is *Miranda* custody in the context of statements given by a student after drugs were found in his car. The Court agreed with the State's position that the defendant was not free to leave but was not in *Miranda* custody. The Court, 2009 WI App at ¶ 12 n.2, 319 Wis.2d at 749-50 n. 2, also briefly addressed the Court's decision in *Missouri v. Seibert*, 542 U.S. 600 (2004).

In *State v. Berggren*, 2009 WI App 82, 320 Wis.2d 209, 769 N.W.2d 110, the Court held: (1) that the failure of the police to re-advise the defendant of the *Miranda* warnings prior to a second questioning/statement did not violate *Miranda* and (2) that the defendant did not invoke his right to counsel.

In *State v. Grady*, 2009 WI 47, 317 Wis.2d 344, 766 N.W.2d 729, the Court addressed the general issue of whether precustodial, rather than postcustodial, *Miranda* warnings can satisfy the requirements of *Miranda* in some circumstances and the specific issue of whether *Miranda* was complied with in this case when: (1) the defendant was advised of and waived the *Miranda* warnings before the start of his noncustodial interview and (2) the defendant was not again given the *Miranda* warnings after his interrogation became custodial during the same interview two-and-one-half hours later. The defendant advocated a bright-line rule/approach answer to the specific issue before the court—*Miranda* requires the administration of *Miranda* warnings after a person is placed in *Miranda* custody and therefore all and any *Miranda* warnings prior to custody are ipso facto ineffective. Stated another way, the defendant's contention was that because *Miranda* warnings are required before a custodial interrogation commences and are not required for noncustodial interrogations, *Miranda* warnings are effective only after a person has been placed in *Miranda* custody. The Court did not adopt the defendant's position—the Court rejected the defendant's proposed bright-line approach. Instead, the Court, as to the general issue, held that precustodial administration of *Miranda* warnings can under certain circumstances be sufficient to satisfy the requirements of *Miranda*. As to the specific issue, the Court held that in light of the facts of this case the noncustodial advisement of the *Miranda* warnings was sufficient to comply with the *Miranda* advisal requirements—the police were not required to readminister those warnings once the defendant's interrogation became custodial two-and-one-half hours later. In so holding, the Court: (1) noted that numerous other jurisdictions have considered this issue and all but one have rejected the defendant's position; (2) stated that the proper framework for analyzing the sufficiency of the timing of *Miranda* warnings/whether a suspect has effectively received his *Miranda* warnings is a flexible approach that examines the totality of the circumstances; (3) stated that the main thrust of the inquiry is whether the suspect being questioned was sufficiently aware of his or her rights during the custodial interrogation. The Court also listed numerous factors that other courts have used/applied in deciding the general issue and then stated: "We do not here adopt any formulaic test. The above factors are helpful, but not individually or collectively determinative or exhaustive. We prefer a flexible approach that examines all relevant facts in an effort to determine whether a suspect was sufficiently aware of his or her constitutional rights."

In *State v. Young*, 2009 WI App 22, 316 Wis.2d 114, 762 N.W.2d 736, the Court, in the context of a *Miranda* hearing where the issue was whether the defendant invoked his *Miranda* right to counsel, stated that there is no precedent in Wisconsin which supports the position that a

trial court must specifically state its reasons for finding one witness is more credible than another.

In *State v. Cole*, 2008 WI App 178, 315 Wis.2d 75, 762 N.W.2d 711, the Court held that when a defendant gives the State timely notice that he or she claims that a custodial statement is inadmissible because of a prior invocation of the *Miranda* right to counsel by the defendant, the State has the burden of proving at the suppression hearing that the defendant previously waived that right.

In *State v. Hambly*, 2008 WI 10, 307 Wis.2d 98, 745 N.W.2d 48, the fact situation was the defendant invoked his right to counsel, the police ceased questioning, the defendant initiated further dialogue with the police, the defendant was advised of the *Miranda* warnings, and the defendant give a statement. Only six justices participated in the case. The Court addressed three *Miranda* issues: (1) whether the defendant's request for counsel constituted an effective invocation of the *Miranda* right to counsel from a "when/timeliness" perspective; (2) whether the officer's statement to the defendant after the defendant invoked his right to counsel constituted interrogation; (3) were the statements given by the defendant after he invoked his right to counsel admissible into evidence because the defendant initiated communication with the officer. As to the first issue, three justices adopted the standard that a suspect may effectively invoke the *Miranda* right to counsel when the suspect is in custody even before interrogation is imminent or pending—the earliest point that an invocation is possible is *Miranda* custody. Three other justices concluded that they need not, and did not, address whether the appropriate standard is the "anytime in custody" standard or the "imminent or impending interrogation" standard since under either standard (under the unusual facts of the case) the defendant invoked his *Miranda* right to counsel. As to the second issue, using the *Innis* test of what constitutes interrogation for *Miranda* purposes, the Court held that the officer's explanation (in response to the defendant's statement that he did not understand why he was under arrest) to the defendant why he was being arrested was not *Miranda* interrogation. In so finding, the Court extensively discussed the applicable law and prior "what is" interrogation cases. As to the third issue, the Court held that the defendant initiated communications with the officer and then voluntarily, knowingly, and intelligently waived his *Miranda* right to counsel. In so holding, the Court: (1) reiterated that a person may waive his or her right to counsel after invoking this right; (2) the state must show that the person initiated further communication, exchanges, or conversations with the police and that the defendant waived the right to counsel.

In *State v. Torkelson*, 2007 WI App 272, 306 Wis.2d 654, 743 N.W.2d 511, the relevant facts were:

> Torkelson, accompanied by his wife Carrie, arrived at the sheriff's department while Walrath was on patrol. Walrath returned to the sheriff's department and found Torkelson and Carrie seated in the lobby.
>
> Walrath testified he passed through the lobby to collect the office supplies he needed to take statements. When he returned, Carrie was alone in the lobby. Carrie said Torkelson was in the bathroom taking 'all of' his medication. Walrath knocked on the bathroom door and heard the sounds of water running and vomiting coming from inside. Walrath and another deputy opened the door with a key and found Torkelson drinking water from the sink.

> Walrath testified he asked Torkelson to back away from the sink, and observed an empty pill bottle fall to the ground when Torkelson did so. Walrath then asked Torkelson to remove his jacket, step out of the bathroom, and sit down in the lobby. Torkelson complied.
>
> The deputies examined the pill bottle and determined that Torkelson could possibly have taken a large dose of a prescription narcotic. The deputies summoned an ambulance. Before the ambulance arrived, Walrath sat down in the lobby next to Torkelson and said he wanted to talk about the reason Torkelson had come to the sheriff's department. Torkelson said it was difficult to talk about. Walrath asked Carrie to step outside, which she did. After some additional questions, Torkelson admitted performing oral sex on his daughter. Walrath testified that while Torkelson was at the sheriff's office, Torkelson was not told he had to wait for the ambulance, was not told he was under arrest, was not handcuffed, and was not physically restrained in any way. Walrath said the lobby where the conversation took place was unlocked and open to the public.
>
> When the ambulance arrived, Torkelson was taken to a local hospital. It does not appear from the record that any officer accompanied Torkelson to the hospital. The deputies did, however, ask the hospital to call them when it was ready to release Torkelson so he could be placed in protective custody.

2007 WI App at ¶¶ 3-6, 306 Wis.2d at 677-78. The state conceded that the defendant's statement was the result of questioning. The Court concluded that the defendant was not in Miranda custody when he gave his statement. In its decision the Court: (1) referenced the Berkemer traffic stop situation; (2) noted that none of the concerns that the Miranda warnings are/were intended to address were present; (3) the questioning of the defendant was presumptively temporary and brief, the deputy was not in a position to coerce or trick the defendant, the defendant was not in a coercive or police dominated atmosphere; (4) any control exercised by the officer was similar to the control in a traffic stop situation**.**

In *State v. Markwardt*, 2007 WI App 242, 306 Wis.2d 420, 742 N.W.2d 546, the Court addressed the issue of whether the defendant unequivocally invoked her right to remain silent. The Court, after an extensive discussion of the applicable law, held that the defendant did not invoke her right to silence since more than one reasonable inference could be drawn from the defendant's statement.

In *State v. Backstrom*, 2006 WI App 114, 293 Wis.2d 809, 718 N.W.2d 246, the Court addressed the issue of when must a defendant be re-advised of the *Miranda* warnings when he is requestioned during a continuous period of custody. The Court, after an extensive discussion of prior cases, held that the record demonstrated that the defendant recalled and understood his *Miranda* rights from a full and proper recitation twenty-one hours earlier and therefore, the defendant need not have been re-advised of the *Miranda* warnings.

In *State v. Kramer*, 2006 WI App 133, ¶¶ 1-15, 294 Wis.2d 780, 783-89, 720 N.W.2d 459, the Court addressed the non-custodial anticipatory invocation of the *Miranda* right to counsel. The Court concluded that pretrial statements made by the defendant were properly

admitted because the non-custodial anticipatory invocation of the right to counsel need not be honored.

In *State v. Rockette*, 2005 WI App 205, 287 Wis.2d 257, 704 N.W.2d 382, the relevant facts were the defendant's attorney was present during a custodial interrogation of the defendant by the police, the attorney told the defendant that if he did not receive the *Miranda* warnings anything he said could not be used against the defendant, the attorney requested that the police not *Mirandize* the defendant, the police abided by that request, and the defendant then gavve an incriminating statement. The Court held that the defendant did not waive his right to remain silent-the defendant's attorney could not waive them by simply arranging a meeting with the police and the attorney's advice was incorrect in that the defendant's statement could be used to impeach him. The Court however, in the context of a no contest plea, found that the error was harmless.

In *State v. Knapp,* 2005 WI 127, 285 Wis.2d 86, 700 N.W.2d 899, the Court held, contrary to the opinion in *United States v. Patane*, 542 U.S. 630 (2004), that physical evidence (in this case the sweatshirt) that is obtained as a direct result of an intentional *Miranda* violation must be suppressed pursuant to Article I, Section 8 of the Wisconsin Constitution and the fruit of the poisonous tree doctrine. The relevant facts were: after the defendant's arrest the defendant and officer Roets went to the defendant's bedroom so the defendant could put some shoes on, Roets asked the defendant what he had been wearing the prior evening, the defendant pointed to a pile of clothing on the floor, Roets seized the pile of clothing and in that pile was a blue sweatshirt that had the victim's blood on one sleeve. In so holding the Court: (1) relied on the loss of deterrence, the discouragement of police misconduct, and the need to preserve judicial integrity in deciding to reject the holding of the Court in *Patane*; (2) extensively discussed the exclusionary rules and the fruit of the poisonous tree doctrine; (3) extensively discussed the opinions of the Court in *Patane*; (4) extensively discussed the opinions of the Court in *Missouri v. Seibert,* 542 U.S. 600 (2004). Justice Wilcox in his dissent would not have interpreted the Wisconsin Constitution in a manner different than the United States Constitution.

In *State v. Jerrell C.J.*, 2005 WI 105, ¶¶ 121-130, 283 Wis.2d 145, 203-07, 699 N.W.2d 110, Justice Butler, in his concurring opinion, stated that he believed that the juvenile defendant invoked his *Miranda* right to remain silent during the his interrogation.

In *State v. Hassel*, 2005 WI App 80, 280 Wis.2d 637, 696 N.W.2d 270, the Court addressed numerous issues including what is an invocation of the right to remain silent, requestioning after an invocation of the right to remain silent, and the doctrine of anticipatory invocation of the right to remain silent.

In *State v. Lombard*, 2004 WI 95, 273 Wis.2d 538, 684 N.W.2d 103, the Court held that a defendant is not entitled to *Miranda* warnings prior to his/her pre-petition evaluation with the State's examiner in regard to whether a Chapter 980 petition should be filed.

In *State v. Jimmie R.R.*, 2004 WI App 168, ¶¶ 28-34, 276 Wis.2d 447, 464-67, 688 N.W.2d 1, the Court rejected the defendant's contention that he was entitled to *Miranda* warnings prior to the court-ordered presentence investigation interview.

WISCONSIN SUPREME COURT--PENDING CASES

In *State v. Stevens*, 2009AP2057-CR, filed November 17, 2010, 2010 WL 4630323, *an unpublished opinion*, the relevant facts were: (1) a detective (Haines) ceased the defendant after the defendant effectively invoked the *Miranda* right to counsel; (2) the defendant a short time later told Haines that he had changed his mind and now wanted to continue speaking with Haines; (3) between the defendant's change of heart and the eventual reinterrogation of the defendant, an attorney-at the request of the defendant's mother-went to the police station and asked to speak to the defendant; (4) the attorney was not allowed to see the defendant and the defendant was not told of the attorney's presence and the attorney's request to see the defendant; (5) Haines eventually reinterrogated the defendant after obtaining a waiver of the *Miranda* rights from the defendant and the defendant confessed. The Court of Appeals, based on *State v. Ward*, 2009 WI 60, 318 Wis.2d 301, 767 N.W.2d 236, held that the defendant's waiver of the *Miranda* rights prior to the reinterrogation was valid. On May 24, 2011, the Wisconsin Supreme Court accepted the defendant's petition for review. One of the issues is "If a suspect in custody initiates communication with the police after previously invoking his *Miranda* right to consult with an attorney but has yet to again waive his *Miranda* rights, do the police violate the demands of *Miranda* by denying an attorney access to the suspect prior to the second waiver of his *Miranda* rights?" The case was argued on October 7, 2011.

In *State v. Martin*, 2010AP505-CR, filed May 3, 2011, 2011 WL 1648590, the Court, in the context of a conversation/discussion between the defendant and an officer that was initiated by the defendant, addressed the issue of whether the officer interrogated the defendant for *Miranda* purposes during the conversation/discussion. The relevant facts were a gun was found in the defendant's car, as an officer (Smith) was handcuffing the car passenger (Henry) the defendant asked why the officer was arresting Henry, Smith stated that he was arresting Henry for CCW, the defendant asked Smith if Smith would let Henry go if the defendant said the gun was his, Smith replied "I don't want you to say its yours if its not. I just want the truth, is the gun yours", the defendant responded "yeah, it's mine if you let my uncle go.", Smith then asked the defendant to describe the weapon to prevent the defendant from falsely confessing, and the defendant then correctly described the gun. The Court, after a discussion of some basic interrogation law, held that the above discussion/conversation was not interrogation for *Miranda* purposes. On December 13, 2011, the Wisconsin Supreme Court accepted the defendant's petition for review. The issues are: (1) Whether a conversation with an officer while a suspect was in custody was an "interrogation" under *Miranda*; (2) Whether *Miranda* warnings are not required if a police officer's questions are designed to prevent a false confession. The case is set for oral arguments on April 18, 2012.

WISCONSIN RULE 809 CASES

Wisconsin Supreme Court Order 08-02, effective July 1, 2009, amended sec. 809.23 to allow some unpublished opinions to be cited for their persuasive value-the case can be cited for its persuasive value but it is not binding on any court, a court need not distinguish or otherwise discuss it, and a party has no duty to research or cite it. I refer to these cases as "*a RULE 809 case"* or "*a RULE 809 persuasive value case."*

In *State v. Wiegand*, 2011AP939-CR, filed February 7, 2012, 2012 WL 371972, the Court held that the police did not scrupulously honor the defendant's unequivocal invocation of his right to remain silent. The Court first held that the defendant's statement "I don't want to say anything more" was an unequivocal invocation of the *Miranda* right to remain silent. The Court then held that the interrogating officer did not immediately terminate the interrogation after the defendant's effective invocation of the *Miranda* right to remain silent-the officer pressed on with the interrogation, stating he was just trying to help the defendant and then applying further pressure by referring again to the defendant's police officer father. Based on these *Miranda* violations the Court suppressed the statement that the defendant gave when the police continued to interrogate him and two search warrants that were obtained using the statement.

In *State v. Richer*, 2011AP1197-CR, filed December 20, 2011, 2011 WL 6355305, the Court, using the *Gruen* factors, held that the defendant was not in custody for *Miranda* purposes when he was asked several questions during a *Terry* stop.

In *State v. Allen*, 2009AP2596-CR, filed September 14, 2010, 2010 WL 3547217, the defendant while in custody was interrogated by several police officers on several occasions (the defendant's only inculpatory statement was made during the last interrogation session). The Court, in finding that the statement of the defendant that was obtained during the last interrogation session was admissible into evidence, discussed several *Miranda* issues. First, the Court held that the defendant, after he invoked the *Miranda* right to counsel, reinitiated communications with the police when the defendant stated "Come back. I want to talk to you. I want to know what's going on." Second, the defendant freely and knowingly waived his right to counsel and silence. Third, the reinterrogation of the defendant after he invoked his right to silence complied with *Miranda* requirements.

In *State v. Saeger*, 2009AP2133-CR, filed August 11, 2010, 2010 WL 3155264, one of the issues was whether the statements/actions of the defendant during an interrogation were an effective invocation of the *Miranda* right to remain silent. During his interrogation the defendant, during an outburst, stated "You…ain't listening to what I'm telling you. You don't want to hear what I'm saying. You want me to admit to something I didn't …do…and I got nothing more to say to you. I'm done. This is over." The Court found, using the *Davis/Ross/Thompkins* clear articulation rule, that the defendant's statement was equivocal/ambiguous and therefore was not an invocation of the *Miranda* right to remain silent-one interpretation of it was that the statement was merely a fencing mechanism to get a better deal.

UNITED STATES SUPREME COURT—PENDING CASES

There are no cases presently pending before the United States Supreme Court that involve a *Miranda* related issue.

UNITED STATES SUPREME COURT CASES---DECIDED

In *Howes v. Fields*, 565 U.S. ____, 132 S.Ct. 1181 (2012), the United States Supreme Court, in an opinion by Justice Alito and a concurring and dissenting opinion by Justice Ginsburg (the Court was unanimous in finding that the defendant should not have been granted relief because he did not meet the clearly established test of the AEDPA), held that the defendant was not in custody for purposes of *Miranda* when he was interrogated by two law enforcement officers in a room in a jail while he was serving a sentence in the jail for disorderly conduct. This case came to the Court in the context of the defendant's federal writ of habeas corpus action under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)-the Sixth Circuit Court of Appeals had granted the defendant's writ based on it holding that the precedents of the United States Supreme Court [*Mathis v. United States*, 391 U.S.1, 88 S.Ct. 1503 (1968)] clearly established the categorical rule that the questioning of a prisoner is always custodial when the prisoner is removed from the general prison population and questioned about events that occurred outside the prison. 565 U.S. at ____, 132 S.Ct. at 1185-87. The Court, in reversing the decision of the Sixth Circuit/holding that the defendant was not in *Miranda* custody, went beyond a minimum finding that its prior precedents did not clearly establish the categorical rule on which the Sixth Circuit relied-the Court further held that the decision of the Sixth Circuit was wrong/unsound since the defendant was not in custody under *Miranda*. 565 U.S. at ____, 132 S.Ct. at 1186-89, 1192, 1194.

> Given this Court's controlling decisions on what counts as "custody" for *Miranda* purposes, I agree that the law is not "clearly established" in respondent Fields's favor. See, *e.g.*, *Maryland v. Shatzer*, 559 U.S. ––––, ––––, 130 S.Ct. 1213, 1223–1226, 175 L.Ed.2d 1045 (2010); *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). But I disagree with the Court's further determination that Fields was not in custody under *Miranda*. Were the case here on direct review, I would vote to hold that *Miranda* precludes the State's introduction of Fields's confession as evidence against him.

565 U.S. at ____, 132 S.Ct. at 1194 (Justice Ginsburg concurring and dissenting). The relevant facts in *Fields* were:

> While serving a sentence in a Michigan jail, Randall Fields was escorted by a corrections officer to a conference room where two sheriff's deputies questioned him about allegations that, before he came to prison, he had engaged in sexual conduct with a 12–year–old boy. In order to get to the conference room, Fields had to go down one floor and pass through a locked door that separated two sections of the facility. See App. to Pet. for Cert. 66a, 69a. Fields arrived at the conference room between 7 p.m. and 9 p.m.and was questioned for between five and seven hours.
>
> At the beginning of the interview, Fields was told that he was free to leave and return to his cell. See *id.,* at 70a. Later, he was again told that he could leave whenever he wanted. See *id.,* at 90a. The two interviewing deputies were armed during the interview, but Fields remained free of handcuffs and other restraints. The door to the conference room was sometimes open and sometimes shut. See *id.,* at 70a–75a.
>
> About halfway through the interview, after Fields had been confronted with the allegations of abuse, he became agitated and began to yell. See *id.,* at 80a, 125a. Fields testified that one of the deputies, using an expletive, told him to sit down and said that "if [he] didn't want to cooperate, [he] could leave." *Id.,* at 89a; see also *id.,* at 70a–71a.

> Fields eventually confessed to engaging in sex acts with the boy. According to Fields' testimony at a suppression hearing, he said several times during the interview that he no longer wanted to talk to the deputies, but he did not ask to go back to his cell prior to the end of the interview. See *id.,* at 92a–93a.
>
> When he was eventually ready to leave, he had to wait an additional 20 minutes or so because a corrections officer had to be summoned to escort him back to his cell, and he did not return to his cell until well after the hour when he generally retired. At no time was Fields given *Miranda* warnings or advised that he did not have to speak with the deputies.

565 U.S. at ____, 132 S.Ct. at 1185-86 (footnotes omitted) [There was a dispute about the length of the interview. *See* footnotes 1 and 2.] [In the discussion that follows I use the terms "prisoner,' "prison,' and "prison inmate." It is my opinion, based on the fact that the defendant in *Fields* was serving his sentence in a county jail, that the holding of the Court in *Fields* is applicable to persons who are serving a sentence in either a prison or a jail.] The Court held that the defendant was not custody for *Miranda* purposes when he was questioned under the facts and circumstances in that case as set forth above. 565 U.S. at ____, 132 S.Ct. at 1192-94. In so holding the Court: (1) set forth/summarized some basic *Miranda* custody law; (2) reiterated that custody in a physical/legal sense is only a necessary and not a sufficient condition for *Miranda* custody-for *Miranda* custody purposes there is custody with custody. 565 U.S.at ____, 132 S.Ct. at 1187, 1189-90, 1192, 1194. The Court, after noting that in the past it had declined to adopt any categorical rule with regard to whether questioning of a prison inmate in prison is custodial for *Miranda* purposes-565 U.S. at ___, 132 S.Ct. at 1187-88, did not adopt a categorical rule that questioning of a prison inmate in prison is or is not a *Miranda* custody situation-questioning by outside law enforcement officers of a prison inmate in prison in private about events that occurred outside of the prison/in the outside world could or could not be a *Miranda* custody situation/questioning. 565 U.S. at ___, 132 S.Ct. at 1189-92. The Court explained that three situations, either by themselves or in combination with each other, do not make questioning of a prisoner in private about events that took place outside the prison a *per se* custody situation for purpose of *Miranda.* First, imprisonment alone does not create a *Miranda* custodial situation. 565 U.S.at ____, 132 S.Ct. at 1190-91. Second, questioning a prisoner in private/taking a prisoner aside for questioning-as opposed to questioning the prisoner in the presence of fellow inmates-does not create a *Miranda* custodial situation even when this may necessitate some additional limitations on the defendant's freedom of movement. 565 U.S. at ____, 132 S.Ct. at 1191-92. Third, questioning a prisoner about events that took place outside of the prison-as opposed to questioning about criminal activity within the prison walls-does not create a *Miranda* custody situation. 565 U.S. at ___, 132 S.Ct. at 1191-92. Since there is no categorical rule, what test or factors are to be used when determining whether the interrogation of a prison inmate in prison in private by outside law enforcement officers about events that occurred outside of the prison is or is not a custodial setting for *Miranda* purposes/was the defendant in custody for *Miranda* purposes? First, it is my opinion that the ultimate test, in determining whether a person already in physical custody is in custody for *Miranda* purposes, is whether a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave. 565 U.S. at ____, 132 S.Ct. at 1189. In *Fields* the Court stated that:

> .... An inmate who is removed from the general prison population for questioning and is "thereafter ... subjected to treatment" in connection with the interrogation "that renders him 'in custody' for practical purposes ... will be entitled to the full panoply of protections prescribed by *Miranda*." *Berkemer,* 468 U.S., at 440, 104 S.Ct. 3138.

565 U.S. at ____, 132 S.Ct. at 1192. Second, a totality of the circumstances/all of the features of the interrogation/all the circumstances surrounding the interrogation standard/test is to be used. 565 U.S. at ____, 132 S.Ct. at 1189, 1192, 1194. Third, was the defendant told that he was free to end the questioning and could go back to his cell whenever he wanted to-in *Fields* the defendant was told at the outset of the interrogation and was reminded again thereafter of this fact and the Court found this to be a significant factor in finding no *Miranda* custody. 565 U.S.at ___, 132 S.Ct. at 1186, 1193-95. Fourth, the manner in which the interrogation was conducted. 565 U.S. at ____, 132 S.Ct. at 1192. Fifth, did the defendant invite the interview or consent to it in advance. 565 U.S. at ____, 132 S.Ct. at 1192-93, 1195. Sixth, was the defendant told that he was free to decline to talk with the law enforcement officers. 565 U.S. at ____, 132 S.Ct. at 1192-93, 1195. Seventh, the length of the interview and its relationship to the general prison routine. 565 U.S.at ____, 132 S.Ct. at 1193. Eighth, were the officers armed. 565 U.S. at ____, 132 S.Ct.at 1193. Ninth, the tone of voice/words used by the officers including any threats. 565 U.S. at ____, 132 S.Ct. at 1193. Tenth, the type of room including its size, lighting conditions, was it locked/the position of the door, etc. 565 U.S. at ____, 132 S.Ct. at 1193. Eleventh, the language used to summon the defendant to the interview. 565 U.S.at ____, 132 S.Ct. at 1192. Twelfth, was the defendant physically restrained during the interview. 565 U.S. at ____, 132 S.Ct. at 1193. Thirteenth, how did the defendant get back to his cell after the interview was completed. 565 U.S. at ____, 132 S.Ct. at 1193-94. Justice Ginsburg, joined by Justice Breyer and Justice Sotomayor, concurred in part and dissented in part. *See* the quote above from that opinion.

In *Bobby v. Dixon*, 565 U.S. ____, 132 S.Ct. 26 (2011) (*per curiam*), the Court, after the defendant was convicted of several crimes in Ohio, addressed two *Miranda* and one voluntariness related issues in the context of the defendant's federal writ of habeas corpus action under the Antiterrorism and Effective Death Penalty Act of 1996. In such actions a federal court has the authority to issue the writ only if the State Court's decision was contrary to, or involved an unreasonable application of, clearly established Federal law as set forth in the holdings of the United States Supreme Court, or it was based on an unreasonable determination of the facts in light of the state court record. 565 U.S. at ____, 132 S.Ct. at 29. The Sixth Circuit Court of Appeals had granted the writ in this case. 627 F.3d 553 (2010).The relevant facts were: (1) the police on November 4, while the defendant was present at a police station, advised the defendant of the *Miranda* warnings and asked to talk to him about a person's (Hammer) disappearance; the defendant declined to answer questions without his lawyer present and left the station; the defendant was not in *Miranda* custody at the time this occurred; (2) on November 9 the defendant was arrested; after his arrest the police interrogated the defendant intermittently over several hours; the police did not advise the defendant of the *Miranda* warnings because they feared that the defendant would again refuse to speak to them; the defendant gave a statement confessing to a forgery but he did not confess to murdering Hammer; the police then terminated the interrogation of the defendant; (3) during this statement the police, in the process of challenging the plausibility of the defendant's statement, told the defendant that an accomplice-Hoffner-was providing them more useful information that the defendant; at this point the police told the defendant that now is the time to say whether he has any involvement in Hammer's disappearance because if Hoffner starts cutting a deal this is kinda like a bus leaving, the first one that gets on it is the only one that's gonna get on; (4) approximately four hours later the police once again had contact with the defendant to interrogate him while the defendant was still in

custody for *Miranda* purposes; the defendant upon contact made an unsolicited declaration that he has spoken with his attorney and wanted to tell the police what had happened to Hammer; the defendant was given the *Miranda* rights twice and waived them; the defendant then confessed. I will refer to this as the second November 9 statement. The first *Miranda* issue was the correctness of the Sixth Circuit's ruling that the police could not interrogate the defendant on November 9 because he had invoked his *Miranda* right to counsel on November 4. The Court found that this was plainly wrong-the defendant was not in *Miranda* custody on November 4 and the Court has never held that a person can invoke his *Miranda* rights anticipatorily in a context other than custodial interrogation. 565 U.S. at ____, 132 S.Ct. at 29. The second *Miranda* issue was the legality of the second November 9 statement which was given after the earlier November 9 statement was obtained in violation of *Miranda*-the police intentionally did not advise the defendant of the *Miranda* warnings. The Sixth Circuit had held that the second November 9 statement was illegally obtained based on *Missouri v. Seibert*, 542 U.S. 600 (2004). The Supreme Court, after a review of the facts and holdings of the Court in *Seibert* and after applying *Seibert* to the facts of this case, held that the second November 9 statement was admissible into evidence. 565 U.S. at ____, 132 S.Ct. at 30-32. Some of the factors/circumstances in this case that differed from *Seibert* were: (1) the defendant did not confess during the first interrogation and thus, unlike *Seibert*, the defendant did not repeat an earlier confession-in fact his second statement contradicted his prior unwarned statement; (2) the police did not use the defendant's earlier admission to the forgery to induce the defendant to waive his right to remain silent; (3) unlike *Seibert*, the unwarned and warned interrogations did not blend into one continuum-there was a significant break in time and circumstances. 565 U.S. at ____, 132 S.Ct. at 31, 32. The voluntariness issue involved the police urging the defendant to "cut a deal" before his accomplice did so during the defendant's first interrogation on November 9. The Court stated:

> Second, the Sixth Circuit held that police violated the Fifth Amendment by urging Dixon to "cut a deal" before his accomplice Hoffner did so. The Sixth Circuit cited no precedent of this Court—or any court—holding that this common police tactic is unconstitutional. Cf., *e.g.*, *Elstad, supra,* at 317, 105 S.Ct. 1285 ("[T]he Court has refused to find that a defendant who confesses, after being falsely told that his codefendant has turned State's evidence, does so involuntarily"). Because no holding of this Court suggests, much less clearly establishes, that police may not urge a suspect to confess before another suspect does so, the Sixth Circuit had no authority to issue the writ on this ground.

565 U.S. at ____, 132 S.Ct. at 29, 30 (footnotes omitted).

In *J.D.B. v. North Carolina*, 564 U.S. ____, 131 S.Ct. 2394 (2011), the issue was whether the *Miranda* custody analysis includes consideration of a child's age-is the age of a child subjected to police questioning relevant to the *Miranda* custody analysis. Prior to *J.D.B.*, the standard to determine custody for *Miranda* purposes did not account for/take into consideration any of the personal characteristics of the person being interrogated. 564 U.S. at ___, 131 S.Ct. at 2413-14 (Alito, J., dissenting). Consistent with that law, the North Carolina courts had refused to consider the defendant's age when determining that the defendant was not in *Miranda* custody when he was questioned in this case. The Court's opinion consisted of a 5 person majority opinion authored by Justice Sotomayor and a 4 person dissenting opinion authored by Justice Alito. The relevant facts were: (1) the defendant was a 13 year old seventh- grade student (2) the defendant was removed from his middle school classroom and escorted by a uniformed police officer-a school resource officer-to a closed door conference room; (3) in the conference room

with the defendant during the questioning were the school resource officer, another police officer, the assistant principal, and an administrative intern; (4) the defendant was questioned for 30 to 45 minutes without being given the *Miranda* warnings nor was he told that he was free to leave the room; (5) during the questioning the defendant confessed to several crimes; (6) the defendant was allowed to leave to catch the bus home when the bell rang indicating the end of the schoolday. The Supreme Court held that when the police interrogate/interview a child, the age of the child is relevant to the determination of whether the child was in custody for *Miranda* purposes during the interrogation/interview (the *Miranda* custody analysis includes consideration of a child's age) (a child's age properly informs the *Miranda* custody analysis) so long as the child's age was known to the officer at the time of the interrogation/interview, or would have been objectively apparent to any reasonable officer.564 U.S.at ____, 131 S. Ct. at 2398-99, 2401, 2404, 2406-07, n. 8. The Court's holding was based on numerous reasons including: (1) the Court saw no reason for police officers or courts to blind themselves to the commonsense reality that children will often bound to submit to police questioning when an adult in the same circumstances would feel free to leave. 564 U.S. at _____, 131 S.Ct. at 2398-99, 2402-03; (2) a child's age differs from other personal characteristics. 564 U.S. at ____, 131 S.Ct. at 2404-05; (3) numerous prior cases and laws have recognized the unique status of children in the law-children cannot be viewed simply as miniature adults. 564 U.S. at ____, 131 S.Ct. at 2403-04; (4) a court can account for the fact that a reasonable child, subjected to police questioning, will sometimes feel pressured to submit when a reasonable adult will feel free to go without doing any damage to the objective nature of the custody analysis-inclusion of a child's age in the custody analysis is consistent with the objective nature of that test. 564 U.S. at ____, 131 S.Ct. at 2402-03, 06; (5) there are other areas of the law in which an objective reasonable person standard is used where the reality that children are not adults is taken into account. 564 U.S. at ____, 131 S.Ct. at 2404; (6) in many cases involving juvenile suspects the custody analysis would be nonsensical absent some consideration of the suspects age. 564 U.S. at ____, 131 S.Ct. at 2405; (7) police officers and judges are competent to evaluate the effect of a suspect's relative age in determining if the suspect was in *Miranda* custody, even in situations where there childhoods have long since passed. 564 U.S. at ____, 131 S.Ct. at 2407. In so holding the Court: (1) used both "child/children" and "juvenile" to describe the type/category of persons it was referring to in its opinion; (2) set forth/discussed numerous items/general principles that are used in determination of whether a person is in custody for *Miranda* purposes; (3) set forth/discussed numerous general *Miranda* items. It is clear that the Court's opinion is applicable to persons 17 years of age and younger. However, the Court made it clear that age will not be determinative or even a significant factor in every case.

> …..This is not to say that a child's age will be a determinative, or even a significant, factor in every case. Cf. *ibid.* (O'Connor, J., concurring) (explaining that a state-court decision omitting any mention of the defendant's age was not unreasonable under AEDPA's deferential standard of review where the defendant "was almost 18 years old at the time of his interview"); *post,* at –––– (suggesting that "teenagers nearing the age of majority" are likely to react to an interrogation as would a "typical 18–year–old in similar circumstances").

564 U.S. at ____, 131 S.Ct. at 2406. The majority, addressing the scope of its opinion in relation to other personal characteristics of the suspect, stated:

> Thus, contrary to the dissent's protestations, today's holding neither invites consideration of whether a particular suspect is "unusually meek or compliant," *post,* at 2413 (opinion of ALITO, J.), nor "expan[ds]" the *Miranda* custody analysis, *post,* at 2412 – 2413, into a test that requires officers to anticipate and account for a suspect's every personal characteristic, see *post,* at 2414 – 2415.

564 U.S. at ____ n. 7, 131 S.Ct. at 2405 n. 7. The Court noted that its holding was not inconsistent with its prior decision/language in *Yarborough v. Alvarado*, 541 U.S. 652, 124 S.Ct. 1240 (2004):

> Our prior decision in *Alvarado* in no way undermines these conclusions. In that case, we held that a state-court decision that failed to mention a 17–year–old's age as part of the *Miranda* custody analysis was not objectively unreasonable under the deferential standard of review set forth by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214. Like the North Carolina Supreme Court here, see 363 N.C., at 672, 686 S.E.2d, at 140, we observed that accounting for a juvenile's age in the *Miranda* custody analysis "could be viewed as creating a subjective inquiry," 541 U.S., at 668, 124 S.Ct. 2140. We said nothing, however, of whether such a view would be correct under the law. Cf. *Renico v. Lett,* 559 U.S. ––––, ––––, n. 3, 130 S.Ct. 1855, 1865 n. 3, 176 L.Ed.2d 678 (2010) ("[W]hether the [state court] was right or wrong is not the pertinent question under AEDPA"). To the contrary, Justice O'Connor's concurring opinion explained that a suspect's age may indeed "be relevant to the 'custody' inquiry." *Alvarado,* 541 U.S., at 669, 124 S.Ct. 2140.

564 U.S. at ____, 131 S.Ct. at 2405. The Court:(1) did not decide whether the defendant was in *Miranda* custody when he was interviewed-the case was remanded to the state courts for a determination of this issue. 564 U.S. at ____, 131 S.Ct. at 2408; (2) did not address the issue of the voluntariness of the defendant's statements. 564 U.S. at ____, n.3, 131 S.Ct. at 2400 n. 3; (3) rejected a one-size-fits-all reasonable person standard. Judge Alito, in his dissent stated: (1) that the majority opinion does not contain a word of actual guidance as to how judges are suppose to go about applying the Court's decision to actual fact situations. 564 U.S. at ____, 131 S.Ct. at 2416; (2) that he believes that the majority opinion will generate time-consuming litigation in situations where the perceptions of a reasonable officer are an issue because age must be taken into account when it would have been objectively apparent to a reasonable officer. 564 U.S. at ____, 131 S.Ct. at 2415-16; (3) that he believes that the Court's decision greatly diminishes the clarity and administrability that have long been recognized as principal advantages of *Miranda's* prophylactic requirements. 564 U.S. at _____, 131 S.Ct. at 2417.

In *Berghius v. Thompkins*, 560 U.S. ____, 130 S.Ct. 2250 (2010), the Court addressed several *Miranda* related areas/issues including the effective invocation of the *Miranda* right to remain silent and the waiver of the *Miranda* rights. In relation to the issue of waiver of the *Miranda* rights, the Court extensively changed the law, especially as to when the prosecution can use an implied waiver rather than an express waiver to show a waiver of the *Miranda* rights. The Court also stated/reiterated that the waiver inquiry has two distinct dimensions: (1) waiver must be voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception; (2) a waiver must be made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. The Court further addressed the issue of when/at what point during the interrogation process a *Miranda* waiver can be obtained by the police/given by the defendant. The Court held that there is no requirement that the police obtain a defendant's waiver of the *Miranda* rights at the onset of

the interrogation/before proceeding with or commencing the interrogation—a *Miranda* waiver can be obtained during an interrogation—the police may question/interrogate a person before obtaining a waiver from the person. In relation to the issue of the effective invocation of the right to remain silent, the Court (1) directly held that the *Davis* clear articulation rule is to be used to determine if a person has effectively invoked his/her *Miranda* right to remain silent in a post waiver situation—this already was the law in Wisconsin; (2) indirectly held that the *Davis* clear articulation rule is to be used to determine if a person has effectively invoked his/her *Miranda* right to remain silent in a pre-waiver situation since the situation in *Thompkins* was a pre-waiver situation; (3) directly held, using the *Davis* clear articulation rule, that the defendant did not invoke his *Miranda* right to remain silent during the interview when he remained almost completely silent and unresponsive during the first 2 hours and 45 minutes of the interview; (4) indirectly held that the *Davis* no clarification rule is applicable when a person makes a reference to silence that is ambiguous or equivocal. Finally, addressing the issue of the need for a readvisal of the *Miranda* rights during an interrogation, the Court, in the context of its discussion of whether the defendant waived his *Miranda* rights during a continuous three hour interview, stated that the police are not required to rewarn/readvise suspects of the *Miranda* rights from time to time during an interview. This case is extensively discussed in my outline entitled **A SUMMARY AND ANALYSIS OF THE *MIRANDA* CASE OF *BERGHIUS V. THOMPKINS.***

In *Maryland v. Shatzer*, 559 U.S. ____, 130 S.Ct.1213 (2010), the Court discussed two *Miranda* issues: the *Miranda* right to counsel and *Miranda* custody. The Court specifically addressed the issue of when can the police reinitiate questioning of a defendant after she/he has invoked the *Miranda* right to counsel. The Court created a 14-day break-in-custody rule which allows the police to reinitiate questioning under some circumstances. In its opinion the Court extensively discussed the *Edwards* rule. The Court also held that a defendant who is in a general prison population is not in *Miranda* custody. This case is discussed in my outline entitled **REINTERROGATION AFTER INVOCATION OF THE MIRANDA RIGHT TO COUNSEL.**

In *Florida v. Powell*, 559 U.S. ____, 130 S.Ct.1195 (2010), the Court held that the warning "You have the right to talk to a lawyer before answering any of our questions . . . You have the right to use any of these rights at any time you want during this interview," satisfied/adequately conveyed the third *Miranda* right-to-counsel advisement/warning that a person be advised the he has the right to have an attorney during questioning. The Court found that the two warnings, in combination, reasonably conveyed the defendant's right to have an attorney present, not only at the outset of the interrogation, but at all times during the interrogation. In its decision the Court extensively stated/discussed the relevant law and prior cases when the issue is whether a particular warning/words of an officer adequately conveyed a particular *Miranda* warning.

In *Montejo v. Louisiana*, 556 U.S. ____, 129 S.Ct. 2079 (2009), the Court, in addressing a person's Sixth Amendment right to counsel in the context of police interrogation, commented on numerous *Miranda* topics/issues including the *Miranda* right to counsel and issues related to its invocation.

In *United States v. Patane*, 542 U.S.630, 124 S.Ct. 2620 (2004), a splintered majority of the United States Supreme Court ruled that the failure of the police to provide the defendant with *Miranda* warnings does not require suppression of reliable physical evidence derived from the defendant's unwarned but voluntary statements. *Patane* involved an arrest of a convicted felon for violating an abuse prevention order. Without completing *Miranda* warnings, the arresting officer asked the defendant whether he had a gun because gun possession was illegal for a felon and there was a report that the defendant had a gun. Under persistent questioning, the defendant told the officer that he had a gun in his bedroom and gave permission to retrieve it. The decision included a plurality opinion written by Justice Thomas (joined by Chief Justice Rehnquist and Justice Scalia), a concurrence by Justice Kennedy (joined by Justice O'Connor), a dissent by Justice Souter (joined by Justices Stevens and Ginsburg), and a dissent by Justice Breyer. In the plurality opinion the Court held/stated:

> As we explain below, the *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause. The Self/Incrimination Clause, however, is not implicated by the admission into evidence of the physical fruit of a voluntary statement. Accordingly, there is no justification for extending the *Miranda* rule to this context. And just as the Self-Incrimination Clause primarily focuses on the criminal trial, so too does the *Miranda* rule. The *Miranda* rule is not a code of police conduct, and police do not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failures to warn. For this reason, the exclusionary rule articulated in cases such as *Wong Sun* does not apply . . . .
>
> . . .
>
> Finally, nothing in *Dickerson*, including its characterization of *Miranda* as announcing a constitutional rule, 530 U.S., at 444, 120 S.Ct. 2326, changes any of these observations. Indeed, in *Dickerson*, the Court specifically noted that the Court's 'subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming [*Miranda*]'s core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief.' *Id.*, at 443-444, 86 S.Ct. 1602. This description of *Miranda*, especially the emphasis on the use of 'unwarned statements . . . in the prosecution's case in chief,' makes clear our continued focus on the protections of the Self-Incrimination Clause. The Court's reliance on our *Miranda* precedents, including both *Tucker* and *Elstad*, *see, e.g., Dickerson, supra*, at 438, 441, 120 S.Ct. 2326, further demonstrates the continuing validity of those decisions. In short, nothing in *Dickerson* calls into question our continued insistence that the closest possible fit be maintained between the Self-Incrimination Clause and any rule designed to protect it.
>
> . . .
>
> It follows that police do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with

> the full panoply of warnings prescribed y *Miranda*. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial. And, at that point, '[t]he exclusion of unwarned statements . . . is a complete and sufficient remedy' for any perceived *Miranda* violation. *Chavez, supra*, at 790, 123 S.Ct. 1994.

542 U.S. at 637, 640-42, 124 S.Ct. at 2626, 2628-29. The concurring opinion of Justices Kennedy and O'Connor accepted part of the plurality's rationale. Justice Kennedy stated that he agreed with the plurality that *Dickerson* did not undermine precedents such at *Tucker* and *Elstad*, which were premised on the Court's recognition that the concerns underlying the *Miranda* rule must be accommodated to other objectives of the criminal justice system. He stated that the propriety of introducing the evidence obtained here is particularly strong, given the important probative value of reliable physical evidence. He found it unnecessary, however, to decide whether the detective's failure to give the defendant the full *Miranda* warnings should be characterized as a violation of the *Miranda* rule itself, or whether there is anything to deter so long as the unwarned statements are not later introduced at trial. Justice Souter in his dissent argued that whether the admission of nontestimonial evidence implicates the Fifth Amendment is beside the point—this case was not about the scope of the Fifth Amendment. Rather, the case concerned whether exclusion of derivative physical evidence was necessary in order to deter questioning outside *Miranda*. Permitting the admission of the evidence undercuts *Miranda's* protective function and, thereby, harms the Fifth Amendment itself. He predicted that the rule announced today would encourage officers to flout *Miranda*. Justice Breyer in his dissent stated that he would apply the fruit of the poisonous tree doctrine and require that courts exclude physical evidence derived from unwarned questioning unless the failure to provide warnings was in good faith. In *State v. Knapp*, 2005 WI 127, ¶¶ 32-43, 285 Wis.2d 86, 101-06, 700 N.W.2d 899, the Court extensively discussed the various opinions in *Patane*.

In *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601 (2004), the Court, in the context of a question first, warn later interrogation (the two-stage interrogation technique of *Miranda* unwarned and *Miranda* warned questioning), addressed the admissibility into evidence of a statement obtained from a defendant after a prior statement is obtained in violation of *Miranda.* By a 5-4 vote, the Court found inadmissible statements provided to a police officer when the officer intentionally conducted an interrogation without providing *Miranda* warnings and then, after obtaining a confession, provided *Miranda* warnings and obtained the same confession. Justice Souter wrote the plurality opinion (joined by Justices Stevens, Ginsburg, and Breyer). Justice Kennedy wrote a concurring opinion. Justice Breyer wrote a separate concurring opinion. Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, dissented. In *State v. Knapp*, 2005 WI 127, ¶¶ 44-54, 285 Wis.2d 86, 106-11, 700 N.W.2d 899, the Court extensively discussed the various opinions in *Seibert*.

In *Yarborough v. Alvarado,* 541 U.S. 652, 124 S.Ct. 1240 (2004), the Court, in the context of a federal habeas corpus proceeding under the Antiterrorism and Effective Death Penalty Act of 1996 where the issue was whether the state court decision was objectively unreasonable under the deferential standard of that law, addressed the issue of whether the defendant, who was 17 years old, was in *Miranda* custody when he was interviewed at a police station after being brought to the station by his parents. The Court, after reviewing and applying

numerous *Miranda* custody factors, held that the defendant was not in custody for *Miranda* purposes during the interview. In its opinion the Court reviewed its prior *Miranda* custody cases and discussed numerous *Miranda* custody issues.

SEVENTH CIRCUIT COURT OF APPEALS CASES

In *United States v. Brown*, 664 F.3d 1115 (7th Cir. 2011), the facts, the defendant's contention, the issue, and the holding of the Court were:

> This case concerns the ways in which a defendant may acknowledge that he has understood and has waived his *Miranda* rights. Officer Turner Goodwin arrested Jimmy Brown for illegally possessing a firearm. While Brown was in the back of a squad car, Goodwin informed Brown of his *Miranda* rights. Goodwin asked if Brown understood those rights. Brown slightly nodded his head and responded "pshh." Brown proceeded to answer several of Goodwin's questions and requested a deal. Brown argues that a mere head bob or dismissive noise is insufficient to show understanding of *Miranda* rights. Brown was later informed of his *Miranda* rights and interrogated at the station house. Brown moved to suppress his post-arrest statements. The district court denied his motion after an evidentiary hearing. Brown was convicted after a jury trial. On appeal, Brown raises two issues: (1) whether the court erred in denying his motion to suppress and (2) whether there was sufficient evidence to convict. While Brown's immediate responses to his *Miranda* warnings may have been ambiguous, defendant's attempts to negotiate a deal and his selective answering of questions are evidence that he understood his rights and voluntarily waived them. For the reasons that follow, we affirm on both issues.

664 F.3d at 1117. In finding that the defendant understood and validly waived the *Miranda* rights, the Court: (1) found that the defendant's actions after being advised of this rights-he did not request a lawyer or that questioning cease, he wanted to give information in return for a deal, and he did not answer all of the questions-constituted an implied waiver; (2) it was immaterial under the facts of this case that the defendant did not sign a waiver form or even utter a clear yes in response to the first recitation of *Miranda*; (3) used the defendant's past criminal history in making its decision.

In *United States v. Martin*, 664 F.3d 84 (7th Cir. 2011), the defendant, while being interrogated by officers from jurisdiction A about crime A, replied "I'd rather talk to an attorney first before I do that" when an officer asked the defendant if he would be interested in providing a written statement. The officers then ceased questioning of the defendant. Several hours later officers from jurisdiction B interrogated the defendant concerning crime B-the officers were not told that the defendant had invoked his *Miranda* right to counsel. During this questioning: (1) the defendant confessed to crime B; (2) the officers did not ask the defendant to give a written statement. The Court held that the questioning of the defendant by officers from jurisdiction B did not violate *Miranda* because the defendant's earlier invocation of the *Miranda* right to counsel was a limited/selective invocation of that right-it was only applicable to the defendant providing a written statement. In so holding the Court used the context of the questioning in deciding the issue. Judge Wood dissented.

In *Aleman v. Village of Hanover Park*, 662 F.3d 897 (7th Cir. 2011), the Court, in the context of a federal 42 U.S.C. sec. 1983 civil suit, addressed numerous issues including several *Miranda* related issues. As to the *Miranda* right to counsel, the Court: (1) held that the defendant invoked his *Miranda* right to counsel when he stated "I gotta call my guy-his lawyer" and after speaking to him reported that the lawyer had told him not to speak to the police; (2) held that the defendant invoked his *Miranda* right to counsel a second time when the defendant asked to call his lawyer again; (3) held that the officers badgered the defendant to waive his *Miranda* rights; (4) addressed when a *Miranda* violation is actionable in a federal civil suit under sec. 1983. The Court also held that the defendant's right to remain silent was not invoked when his attorney told the police that the defendant was invoking his right to remain silent-only the defendant can do so.

SPECIFIC *MIRANDA* RELATED ISSUES

THE REQUIREMENT OF A TIMELY INVOCATION OF A *MIRANDA* RIGHT

Many encounters between law enforcement officers and a suspect, for interrogation purposes, can be placed into one of the following categories: (1) the suspect is not seized; (2) the suspect is seized for Fourth Amendment purposes but is not in custody for *Miranda* purposes-a normal *Terry* stop, a traffic stop, etc.; (3) the suspect has just been arrested/taken into custody for *Miranda* purposes but there are no indicia/indications of interrogation or future interrogation; (4) the suspect, after being arrested/taken into custody for *Miranda* purposes, is being transported to a law enforcement facility; (5) the suspect is in an interview room at a law enforcement facility but there are no indicia/indications of interrogation; (6) the suspect is in an interview room at a law enforcement facility and one or more law enforcement officers are present but interrogation has not started; (7) the suspect is in an interview room at a law enforcement facility and one or more law enforcement officers have started the interrogation of the suspect; (8)) the suspect is in an interview room at a law enforcement facility and one or more law enforcement officers are interrogating the suspect.

In *State v. Hambly*, 2008 WI 10, ¶20, 307 Wis.2d 98, 111, 745 N.W.2d 48, the Court noted that the United States Supreme Court has not resolved the effect of a suspect's request for an attorney while in custody but prior to interrogation.

In *Hambly*, six members of the Wisconsin Supreme Court (Justice Ziegler did not participate) addressed the issue of when can a person effectively invoke the Miranda right to counsel. The decision consisted of a lead opinion by Chief Justice Abrahamson (joined by Justices Bradley and Crooks) and a concurring opinion by Justice Roggensack (joined by Justice Prosser and Justice Butler except as to one insignificant part*).*

The Court in *Hambly* repeatedly referred to an invocation that is timely made (and therefore an actual invocation of the Miranda right to counsel) as either an "effective" invocation or that the defendant "effectively" invoked his Miranda right to counsel. *See* 2007 WI at ¶¶ 2-4, 16, 117, 307 Wis.2d at 104, 105, 109, 153.

The concurring opinion in *Hambly* adopted a standard that a suspect may effectively invoke the *Miranda* right to counsel when a suspect is in custody and has made an unequivocal request to speak with an attorney, even before interrogation is imminent or impending. The lead opinion concluded that they need not, and did not, address whether the appropriate standard is the anytime in custody standard (the concurring opinion) or the imminent or impending interrogation standard, since the defendant's request for an attorney (in the context of the somewhat unique facts in that case) was an effective invocation of his *Miranda* right to counsel under either standard. 2008 WI at ¶¶ 4, 5, 32, 33, 307 Wis.2d at 105, 106, 119, 120.

Several jurisdictions have adopted a "custody and actual interrogation or custody and imminent interrogation" test to determine if a particular invocation of the *Miranda* right to counsel was timely and therefore, effective. *See People v. Schuning*, 399 Ill. App.3d 1073, 928 N.E.2d 128 (2010) and the cases discussed in the Court's opinion.

In *Montejo v. Louisiana*, 556 U.S. 778, ____, 129 S.Ct. 2079, 2091 (2009) (an opinion issued after the *Hambly* opinion), the Court, in addressing the workability of the *Edwards* rule, stated:

> Their principal objection to its elimination is that the Edwards regime which remains will not provide an administrable rule. But this Court has praised Edwards precisely because it provides '"clear and unequivocal" guidelines to the law enforcement profession,' . . . Montejo expresses concern that courts will have to determine whether statements made at preliminary hearings constitute Edwards invocations—thus implicating all the practical problems of the Louisiana rule we discussed above, see Part II, supra. That concern is misguided. 'We have in fact never held that a person can invoke his Miranda rights anticipatorily, in a context other than "custodial interrogation" . . . .' McNeil, supra, at 182, n.3, 111 S.Ct. 2204. What matters for Miranda and Edwards is what happens when the defendant is approached for interrogation, and (if he consents) what happens during the interrogation—not what happened at any preliminary hearing

In *Bobby v. Dixon*, 565 U.S. ____, 132 S.Ct. 29 (2011) (per curiam) the police on November 4, while the defendant was present at a police station, advised the defendant of the *Miranda* warnings and asked to talk to him about a person's disappearance. The defendant declined to answer questions without his lawyer present and left the station. 565 U.S. at ____. 132 S.Ct. at 28. The defendant was not in *Miranda* custody at the time this occurred. On November 9 the defendant was arrested and subsequently gave a statement to the police. The Sixth Circuit Court of Appeals held that the police could not speak to/interrogate the defendant on November 9 because of his invocation of his *Miranda* right to counsel on November 4. The Supreme Court disagreed*:*

> First, according to the Sixth Circuit, the *Miranda* decision itself clearly established that police could not speak to Dixon on November 9, because on November 4 Dixon had refused to speak to police without his lawyer. That is plainly wrong. It is undisputed that Dixon was not in custody during his chance encounter with police on November 4. And this Court has "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.' " *McNeil v. Wisconsin*, 501 U.S. 171, 182, n. 3, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991); see

also *Montejo v. Louisiana*, 556 U.S. 778, ––––, 129 S.Ct. 2079, 2090, 173 L.Ed.2d 955 (2009) ("If the defendant is not in custody then [*Miranda* and its progeny] do not apply").

565 U.S. at ____, 132 S.Ct. at 29-30.

THE APPLICABILITY OF THE *DAVIS* CLEAR ARTICULATION AND NO CLARIFICATION RULES IN A PRE-WAIVER (RATHER THAN A POST-WAIVER) SITUATION

Introduction

The discussion that follows addresses the issue of whether the *Davis* clear articulation rule and no clarification rule are applicable to/to be used in other than when a defendant attempts to subsequently invoke a previously waived *Miranda* right to remain silent or *Miranda* right to counsel (a post-waiver situation)-are the *Davis* clear articulation rule and no clarification rule applicable to a situation involving a person's initial/pre-waiver invocation (either before or after receiving the *Miranda* warnings) of either the *Miranda* right to remain silent or the *Miranda* right to counsel? In the discussion that follows the term "*Davis* rule" refers to the clear articulation and no clarification rules.

The Davis Case

In *Davis v. United States*, 512 U.S. 452, 114 S.Ct. 2350 (1994), the Court addressed the issue of the required/allowed police action when a defendant's words/actions are ambiguous and equivocal in a post-waiver *Miranda* right to counsel situation/context-after the defendant had already waived his *Miranda* rights. In *Davis* the defendant had previously signed a waiver of his *Miranda* right to counsel and had agreed to talk without an attorney present. At some point in the interrogation the defendant then ambiguously requested an attorney. It was in this post-waiver context that the Court announced/created the clear articulation and no clarification rules. The Court in *Davis* did not address whether the same rules would also apply to an ambiguous invocation of the *Miranda* right to counsel before such a waiver had occurred-a pre-waiver/initial invocation situation. *Wimbish v. State*, 201 Md. App. 239, 29 A.3d 635, 642 (2011). In fact the Court's opinion contains some language that would support the position that the rules are not applicable in a pre-waiver situation.

Between Davis And Thompkins

Between the *Davis* and *Thompkins* opinions numerous courts in the United States had directly addressed the issue of whether the holding of the Court in *Davis*/the *Davis* rule was applicable in pre-waiver *Miranda* right to counsel situations and in pre-waiver *Miranda* right to remain silent situations in jurisdictions that had held that the *Davis* rule was applicable in *Miranda* right to remain silent situations.

The vast majority/overwhelming number of courts that directly addressed the pre-waiver/post-waiver distinction/issue between *Davis* and *Thompkins* held that the holding of the Court in *Davis*/the *Davis* rule is only applicable in post-waiver situations (after the defendant had

already waived his *Miranda* rights). In *State v. Turner*, 305 S.W.3d 508 (Tenn. 2010), *cert. denied*, ____ U.S. ____, 130 S.Ct. 3396 (2010), the Court in a pre-waiver situation, in the context of the *Miranda* right to counsel and after an extensive discussion of this issue including cases from other jurisdictions, came to this conclusion. The Court further held, as other courts have also held, that in a pre-waiver ambiguous invocation situation the police/interrogation officers are limited to asking clarification questions. This issue was also extensively discussed in *United States v. Rodriguez*, 518 F.3d 1072 (9th Cir. 2008).

In *In re Christopher K.*, 217 Ill. 2d 348, 841 N.E.2d 945, 965-66 (2005), the Court held that the *Davis* holding/rule is applicable to situations where the suspect makes an ambiguous reference to counsel immediately after he is advised of the *Miranda* rights. It should be noted that in *Rodriguez*, 518 F.3d at 1079 n 6, the Court observed that *Christopher K.* was the only published decision (where the Court had directly addressed the pre-wavier/post-waiver issue) that had held that the *Davis* rule was applicable in a pre-waiver situation.

It should be noted that in many cases courts have applied the *Davis* rule to pre-waiver situations without addressing the pre-waiver/post-waiver distinction issue. Two Wisconsin examples of this are *State v. Hampton*, 2010 WI App 169, 330 Wis.2d 531, 793 N.W.2d 901 (the Court used the clear articulate rule to determine that the defendant did not invoke the *Miranda* right to counsel and to remain silent in a pre-waiver situation-both prior to and during the advisal of the *Miranda* rights) and *State v. Fischer*, 2003 WI App 5, 259 Wis.2d 799, 656 N.W.2d 503 (the defendant was in custody and had not yet been advised of the *Miranda* warnings).

Post Thompkins

Does the opinion of the Court in *Thompkins* effect the *Davis* rule pre-waiver/post-waiver distinction issue? In *Thompkins*, the Court, after holding that the *Davis* clear articulation rule applies to both the *Miranda* right to counsel and the *Miranda* right to remain silent, in a pre-waiver situation held that the defendant did not invoke his *Miranda* right to remain silent using the *Davis* clear articulation rule. Although the Supreme Court for the first time applied the *Davis* rule to a pre-waiver situation, the majority opinion did not address the pre-waiver/post-waiver distinction issue. Although the majority opinion did not expressly acknowledge its extension of the *Davis* rule to a pre-waiver situation, Justice Sotomayer did:

> In addition, the suspect's equivocal reference to a lawyer in *Davis* occurred only *after* he had given express oral and written waivers of his rights. *Davis* ' holding is explicitly predicated on that fact. See 512 U.S., at 461, 114 S.Ct. 2350 ("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"). The Court ignores this aspect of *Davis,* as well as the decisions of numerous federal and state courts declining to apply a clear-statement rule when a suspect has not previously given an express waiver of rights.[FN7]
>
> FN7. See, *e.g., United States v. Plugh,* 576 F.3d 135, 143 (C.A.2 2009) (" *Davis* only provides guidance ... [when] a defendant makes a claim that he *subsequently* invoked previously waived Fifth Amendment rights"); *United States v. Rodriguez,* 518 F.3d 1072, 1074 (C.A.9 2008) (*Davis* ' " 'clear statement' " rule "applies only *after* the police have already obtained an unambiguous and unequivocal waiver of *Miranda* rights"); *State v. Tuttle,* 2002 SD 94, ¶ 14, 650 N.W.2d 20, 28; *State v. Holloway,* 2000 ME 172, ¶ 12, 760 A.2d 223, 228; *State v. Leyva,* 951 P.2d 738, 743 (Utah 1997).

560 U.S. at ____, 130 S.Ct. at 2275.

In *United States v. Plugh,* 648 F.3d 118 (2d Cir. 2011), the Court, in an earlier opinion [576 F.3d 135 (2d Cir. 2009)] prior to *Thompkins*, had held that the defendant had invoked his *Miranda* rights based on the theory that the *Davis* rule is not applicable in a pre-waiver/initial invocation situation. 648 F.3d at 120-22. In a new opinion after *Thompson*, the Court reversed its prior decision based on its opinion that in *Thompkins* the Court clarified that the *Davis* rule does control a court's analysis of an initial/pre-waiver invocation of both the *Miranda* right to remain silent and the *Miranda* right to counsel. 648 F.3d at 120, 123. It should be noted that the earlier *Plugh* opinion was referred to by Justice Sotomayer's in her dissent in *Thompkins.*

In *Wimbish v. State,* 201 Md. App. 239, 29 A.3d 635 (2011), the Court, in the context of an allegation that the defendant had invoked his *Miranda* right to counsel in a pre-waiver situation, addressed the pre-waiver/post-waiver distinction issue in light of the Court's decision in *Thompkins.* In an earlier opinion, *Freeman v. State,* 158 Md. App. 402, 857 A.2d 557 (2004), the Court had ruled that the *Davis* rule was not applicable in a pre-waiver situation. 29 A.3d at 642-43. The Court in *Wimbish,* in holding that the defendant did not invoke the *Miranda* right to counsel, stated that the opinion of the Court in *Thompkins* calls into question the conclusions it reached in *Freeman*/its holding in *Freeman* is no longer viable because of the *Thompkins* opinion. 29 A.3d at 643.

In *Commonwealth v. Clarke,* 461 Mass. 336, 960 N.E.2d 306 (2012), the Court first held that in *Thompkins* the Court held that the *Davis* clear articulation standard/test is applicable in a prewaiver context. The Court then held, however, that under the Massachusetts Constitution the *Davis* clear articulation test/standard is not applicable in a prewaiver context.

THE INITIATION OF QUESTIONING BY THE DEFENDANT AFTER THE POLICE DID NOT CEASE QUESTIONING OF THE DEFENANT AFTER THE DEFENDANT INVOKED THE *MIRANDA* RIGHT TO COUNSEL

In *Dorsey v. United States,* 2 A.3d 222 (D.C. 2010), the Court addressed the admissibility of a statement given by a defendant after the defendant initiated a conversation with the police after the police did not cease questioning of the defendant after he invoked the *Miranda* right to counsel during a prior interrogation.