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EARNING THE RIGHT TO REMAIN SILENT AFTER *BERGHUIS V. THOMPKINS*

Isa Chakarian[†]

INTRODUCTION

Even the interrogating detective conceded that the interrogation of Van Chester Thompkins was “very, very one sided” and “nearly a monologue.”¹ Detective Helgert, the primary interrogator, described Mr. Thompkins as “largely silent” and “not verbally communicative” throughout the three-hour interrogation.² According to Helgert’s testimony, throughout the interrogation, Mr. Thompkins appeared “peculiar” and “sullen.”³ Mr. Thompkins refused to make eye contact with the detectives and kept his head down.⁴ Describing Mr. Thompkins’s response to the officers’ attempts to get him to talk, Helgert admitted, “not only did it not illicit any admissions or denials, for that matter, it did not illicit any sort of reaction.”⁵

Mr. Thompkins’s interrogation took place in an “austere” eight by ten feet room in a detention facility, during which he was made to sit in a school-room type chair.⁶ Initially unsuccessful, the two detectives who interrogated Mr. Thompkins resorted to using a number of tactics in an effort to get him to speak. They told him, there are “two sides to a story,” and that “[p]eople are going to want to hear from you.”⁷ When these efforts failed to produce a statement from Mr. Thompkins, Helgert made a last ditch effort. He appealed to Mr. Thompkins’s spirituality. Helgert asked Mr. Thompkins whether he believed in God and “if he prayed to God to forgive him for shooting that boy down.”⁸ After at least two hours and forty-five minutes of consistently exercising his right to

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¹ Brief for Respondent, *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010) (No. 08-1470), 2010 WL 265634, at *2 [hereinafter Brief for Respondent].

² Brief for Respondent at *2.

³ *Id.* at *5.

⁴ *Id.*

⁵ *Id.* at *5–6.

⁶ *Id.* at *5.

⁷ *Id.* at *6.

⁸ Brief for Respondent *supra* note 1, at *6.

remain silent, Mr. Thompson tearfully answered “Yes” to both questions.⁹ These two one-word answers were later used as evidence against Mr. Thompson in the fatal shooting of Samuel Morris. The propriety of this interrogation was litigated all the way to the Supreme Court.

In *Berghuis v. Thompson*, the Court held that to trigger the procedural duty on police officers to “scrupulously honor” the right to remain silent, the individual must first invoke that right clearly and unambiguously.¹⁰ This Note describes how lower federal and state courts are interpreting and applying the *Berghuis* clear statement requirement. An additional objective is to compare the various interpretations of the *Berghuis* clear statement requirement to determine which approach sets out the best guidelines for distinguishing between clear and ambiguous invocations of the right to remain silent. I attempted to reach these goals by surveying 66 federal and state cases that extensively or substantially discuss the *Berghuis* decision.

Parts I and II begin with a discussion of important Supreme Court precedents on the Fifth Amendment privilege against compelled self-incrimination. In Part III, I turn to the specific issue of invocation. There, I argue that the *Berghuis* Court’s failure to set out a meaningful standard by which courts can differentiate between clear and ambiguous invocations of the right to remain silent has resulted in varying interpretations of the clear statement requirement among lower federal and state courts. Specifically, my research revealed that lower courts’ understanding of the *Berghuis* invocation standard fits into roughly three categories of interpretation.

After comparing and contrasting the three categories of interpretation in Part IV, I argue in Part V that an approach based on the totality of the circumstances is the best way to determine whether an individual has “unambiguously” invoked his or her right to remain silent. An approach to the invocation inquiry which takes into account all of the relevant facts provides a balance between the interests of the state in solving crime and the rights and dignity of ordinary citizens that comes closer to objective fairness. Such a standard also acknowledges the reality that the conditions of custodial interrogation are specifically designed to undermine the individual’s ability to exercise his or her rights. Additionally, the totality of the circumstances test redistributes the burden of

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⁹ *Id.*

¹⁰ 130 S. Ct. 2250, 2260 (2010).

persuasion between the accused and the state because it accounts for the statements, conduct, and demeanor of the interrogating police officer in relation to the individual's invocation. By operating in this way, the totality of the circumstances test is more consistent with *Miranda's* assertion that the burden of persuasion rests with the state, "since [it] is responsible for establishing the isolated circumstances under which the interrogation takes place . . . ."¹¹

Unlike the totality of the circumstances test, the other two standards discussed in this Note fail to achieve objectivity because they ignore the affect of the custodial interrogation environment on the individual's ability to exercise the right to remain silent. Furthermore, standards that fail to take into account the totality of the circumstances are grounded in a superficial analysis because they only provide courts with a snapshot of the interrogation, whereas the totality standard provides courts with a richer factual basis for deciding on the invocation question. Finally, the totality of the circumstances standard provides the potential for greater consistency across decisions dealing with the invocation inquiry, by specifically identifying and considering contextual factors that give a rational explanation for why one statement counts as unambiguous while another does not.

I. BACKGROUND

In *Miranda v. Arizona* the Supreme Court aimed to set out a broader set of protections against coerced confessions than that provided by the voluntariness doctrine and the Fifth and Fourteenth Amendment due process standards which had preceded it.¹² The *Miranda* Court held that in the context of custodial interrogation, statements made by an accused individual are inadmissible unless the police abide by certain procedures that operate to protect the individual's Fifth Amendment privilege against compelled self-incrimination and the Sixth Amendment right to counsel.¹³ The underlying rationale of the *Miranda* procedures is to ensure that the individual who makes a confession during custodial interrogation does so of his or her own free will.¹⁴ Prior to *Mi-*

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¹¹ *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

¹² See *Dickerson v. United States*, 530 U.S. 428, 432–33 (2000); *Miranda*, 384 U.S. at 457 (discussing shortcomings of the totality of the circumstances test for determining the voluntariness of a confession).

¹³ *Miranda*, 384 U.S. at 478–79. See also James L. Buchwalter, *Construction and Application of Constitutional Rule of Miranda – Supreme Court Cases*, 17 A.L.R. FED. 2d 465 (2011).

¹⁴ *Miranda*, 384 U.S. at 462 (explaining that the issue of admissibility for purposes

*rand*a, confessions obtained during the course of custodial interrogation were judged against the standard of “voluntariness” and the due process clause of the Fifth and Fourteenth Amendments.¹⁵ The voluntariness test is grounded in the Fifth Amendment’s privilege against compelled self-incrimination, and consists of examining “‘whether a defendant’s will was overborne’ by the circumstances surrounding the individual’s confession.”¹⁶ In applying the voluntariness test, courts take into consideration “the totality of all the surrounding circumstances,” which includes the characteristics of the accused and the details of the interrogation.¹⁷

In *Miranda*, the Supreme Court took a markedly different approach to determining whether a confession obtained during the course of custodial interrogation is admissible. The Court emphasized the effect of modern custodial interrogation tactics on the ability of the individual to make an unfettered and voluntary choice to speak or remain silent; the Court very clearly asserted that custodial interrogation is an inherently compulsive process designed to jeopardize the individual’s free choice to remain silent.¹⁸ According to the *Miranda* Court, the traditional totality of the circumstances test was ineffective in catching involuntary custodial confessions, and in fact, posed an “unacceptably great” risk that such confessions would escape detection.¹⁹ *Miranda* held that a confession is admissible only if the police abide by certain procedures that operate to dispel the inherent compulsion of custodial interrogation and protect the individual’s right to exercise his or

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of the Fifth Amendment privilege against self-incrimination depends on whether the confession is voluntary; whether a confession is involuntary depends on proof establishing that but for external forces in the context of custodial interrogation, the individual would not have made the confession (citing *Bram v. United States*, 168 U.S. 532, 542 (1897)). See also Illan M. Romano, Note and Comment, *Is Miranda on the Verge of Extinction? The Supreme Court Loosens Miranda’s Grip in Favor of Law Enforcement*, 35 NOVA L. REV. 525, 528 (2011) (describing the central goal of *Miranda* as ensuring that the individual makes a free choice to speak to the police).

¹⁵ *Dickerson*, 530 U.S. at 432 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)) (discussing the pre-*Miranda* law governing admission of confessions).

¹⁶ *Id.* at 433–34 (citing *Bram*, 168 U.S. at 542 and *Brown v. Mississippi*, 297 U.S. 278, 286–87 (1936), which initially set forth the voluntariness test, and *Escobedo v. Illinois*, 378 U.S. 478, 486, 492 (1964) and *Schneckloth*, 412 U.S. at 225–29, which refined the due process standard for admissibility of confessions).

¹⁷ *Id.* at 434 (citing *Schneckloth*, 412 U.S. at 226).

¹⁸ *Miranda*, 384 U.S. at 467 (“We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.”).

¹⁹ See *Missouri v. Seibert*, 542 U.S. 600, 608 (2004) (quoting *Dickerson*, 530 U.S. at 442) (describing why the Court abandoned the “totality of the circumstances” voluntariness inquiry in favor of the *Miranda* protections).

her free will when choosing to make a statement to the police.²⁰

The *Miranda* procedures are a series of bright-line rules that establish a clear way of determining whether a particular statement is admissible, consistent with the Fifth Amendment.²¹ These procedural requirements were designed to diminish the coercion inherent in custodial interrogation, which “blurs the line between voluntary and involuntary statements,” and thus heightens the risk that the privilege against self-incrimination will not be observed.²²

The first and perhaps most enduring of the straightforward *Miranda* procedural protections is the requirement that interrogating police officers warn the individual of his or her Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to an attorney.²³ Specifically, the warning requirement established by *Miranda* requires the police to advise the accused prior to interrogation of: (1) the right to remain silent and that any statements made by the accused can and will be used against her in court; and (2) the right to an attorney, the right to have the attorney present during interrogation, and the right to have an attorney appointed if the accused is indigent.²⁴ According to the *Miranda* Court, the warning requirement serves three principle purposes. First, the warning serves to make persons who are unaware of the privilege conscious of the right, which is a threshold requirement for its intelligent exercise.²⁵ Second, the Court reasoned that such warnings served to assure the individual that his or her decision to exercise these rights would be respected by the police at any time during the course of the interrogation.²⁶ Finally, the Court held that the most important purpose of the warnings is that they help overcome the inherent pressures of custodial interrogation.²⁷ Thus, if the police fail to advise the individual of his or her *Miranda* rights before the interrogation, any statements made

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²⁰ *Miranda*, 384 U.S. at 444.

²¹ *Id.* at 458 (“Unless adequate protective devices are employed to dispel the inherent compulsion in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.”).

²² *Dickerson*, 530 U.S. at 435. See also George M. Dery III, *Do You Believe in Miranda? The Supreme Court Reveals Its Doubts in Berghuis v. Thompkins by Paradoxically Ruling that Suspects Can Only Invoke Their Right to Remain Silent by Speaking*, 21 GEO. MASON U. C.R. L.J. 407, 413 (2011) (citing to *Dickerson* in describing the underlying concerns addressed by *Miranda*, and characterizing the rules that were established in *Miranda* as “straightforward”).

²³ *Miranda*, 384 U.S. at 467–68.

²⁴ *Id.* at 444–45, 479.

²⁵ *Id.* at 468.

²⁶ *Id.*

²⁷ *Id.*

by the individual during the interrogation, whether inculpatory or exculpatory, are inadmissible.²⁸

The second important procedural rule established by *Miranda* is the requirement that police obtain an affirmative waiver of rights from the individual prior to commencing the interrogation.²⁹ The Court was very clear in holding that merely warning the individual of the right to remain silent and the right to counsel is not enough to sufficiently allay the coercive nature of police interrogation.³⁰ In order to effectively combat the inherent compulsion of custodial interrogation, the police can only interrogate the individual after he or she has expressly waived the rights protected by *Miranda*.³¹ In effect, this second procedural requirement precludes persistent police questioning in the absence of an affirmative waiver of the rights.³² Nine years after *Miranda* was decided, the Supreme Court explicitly affirmed the ban on persistent police questioning in *Michigan v. Mosley*,³³ and held that a critical safeguard of the *Miranda* procedures is the individual's "right to cut off questioning."³⁴ The *Mosley* Court recognized unrelenting questioning to be an element of coerciveness, which wears down the individual's resistance and compels him or her to speak.³⁵

The *Miranda* Court went further than merely requiring the police to obtain an express waiver of rights from the individual prior to the commencement of the interrogation. The Court established a presumption against the finding of waiver by holding that even

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²⁸ *Id.* at 444–45, 476–77. *See also* *Missouri v. Seibert*, 542 U.S. 600, 608 (2004) (“[F]ailure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained. Conversely, giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a waiver.”).

²⁹ *Miranda*, 384 U.S. at 476 (“The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.”). *See also* Richard L. Budden, *All in All, Miranda Loses Another Brick from Its Wall: The U.S. Supreme Court Swings Its Hammer in Berghuis v. Thompson, Dealing a Crushing Blow to the Right to Remain Silent*, 50 WASHBURN L.J. 483, 505 (2010).

³⁰ *Miranda*, 384 U.S. at 469–70.

³¹ *Id.* at 479. *See also* Brief for Respondent, *supra* note 1, at *19 (asserting that “*Miranda* requires an affirmative waiver of rights before questioning begins”); Budden, *supra* note 29, at 505.

³² Brief for Respondent, *supra* note 1, at *46 (citing *Michigan v. Mosley*, 423 U.S. 96, 105–06 (1975)).

³³ *Mosley*, 423 U.S. at 105–06.

³⁴ *Id.* at 103–04 (quoting *Miranda*, 384 U.S. at 474).

³⁵ *Id.* at 104.

where the police obtain an express waiver, it is not necessarily tantamount to a *voluntary* waiver.³⁶ Additionally, *Miranda* holds that in a motion to suppress statements that were obtained in violation of its prescribed procedures, the prosecution bears a heavy burden in proving that the individual knowingly, intelligently, and voluntarily waived his or her rights.³⁷ Moreover, waiver can never be presumed simply from the silence of the accused after warnings are given or merely from the fact that a confession is ultimately obtained.³⁸

Later Supreme Court decisions limited the scope of *Miranda*'s express pre-interrogation waiver requirement, holding that *Miranda* did not set up a *per se* rule requiring an express waiver in all situations.³⁹ In *North Carolina v. Butler*, the Court recognized an implied waiver based on "the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver."⁴⁰ In *Butler*, the Court determined that the facts were sufficient to establish an implied waiver because the accused individual verbally indicated to the police his willingness to make statements immediately after he received *Miranda* warnings even though he refused to waive his rights in writing.⁴¹

In addition to setting up a regime which requires the police to obtain an express waiver prior to interrogation, the *Miranda* procedures established a standard that allows the individual to assert his or her right to remain silent through an implied invocation.⁴² The Court specifically stated that if the individual "indicates in any

³⁶ *Miranda*, 384 U.S. at 471. See also *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2269 (2010) (Sotomayor, J., dissenting) (discussing the presumption against the finding of waiver as interpreted by the Court in *North Carolina v. Butler*, 441 U.S. 369 (1979)). Indeed, even the *Berghuis* Court acknowledged language in *Miranda* which indicates that waivers are difficult to establish absent an explicit written waiver or an express oral statement. *Id.* at 2260–61 (citing *Miranda*, 384 U.S. at 475).

³⁷ *Miranda*, 384 U.S. at 475. In *Moran v. Burbine*, the Court further established that the individual must know "the nature of the right being abandoned and the consequences of the decision to abandon it" and that the waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception." 475 U.S. 412, 421 (1986).

³⁸ See *Miranda*, 384 U.S. at 475; *Butler*, 441 U.S. at 373.

³⁹ See *Romano*, *supra* note 14, at 538 (noting that "the language in *Miranda* should not be read to require a *per se* rule that only an express waiver is sufficient to illustrate a waiver").

⁴⁰ *Butler*, 441 U.S. at 373.

⁴¹ *Id.* See also Brief for Respondent, *supra* note 1, at *18–24.

⁴² *Miranda*, 384 U.S. at 444–45. See also Dery III, *supra* note 22, at 407, 433 (pointing out the extent to which *Berghuis* flips *Miranda* on its head by establishing a very low standard for waiver, but requiring an incongruously high standard for invocation, and arguing that the imbalance between the care demanded of lay individuals and the informality permitted to professional police casts doubt on the *Berghuis* Court's commitment to *Miranda*).

manner that he does not wish to be interrogated, the police may not question him.”⁴³ Going further, the Court held that “[t]he mere fact that [the individual] may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.”⁴⁴

II. THE CONSTITUTIONAL STATUS OF *MIRANDA*

The Supreme Court in *Berghuis v. Thompkins* reached two conclusions that effectively reduced *Miranda*’s protections to the mere requirement that police warn the individual of his or her right to remain silent and right to counsel prior to commencing the interrogation. In many ways the Court’s indifference toward the *Miranda* rules comes as no surprise. Since the Supreme Court decided *Miranda*, it has repeatedly distinguished *Miranda* violations from actual coercion which violates the Fifth Amendment, and interpreted *Miranda* as having announced “only prophylactic rules” that go above and beyond the right against compelled self-incrimination.⁴⁵ It is apparent that the majority in *Berghuis* supported Chief Justice Robert’s position by repeatedly limiting the reach of *Miranda*, stating, “[t]he main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel,”⁴⁶ and explaining that “the primary protection afforded suspects subjected to custodial interrogation is the *Miranda* warnings themselves.”⁴⁷

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⁴³ *Miranda*, 384 U.S. at 445.

⁴⁴ *Id.* Subsequent Supreme Court decisions have limited the scope of the implied invocation standard. For example, in *Michigan v. Mosley*, the Court ruled that even where an individual expresses his or her wish to remain silent, a statement made thereafter could be admissible as a subsequent waiver of the right so long as the police “scrupulously honor” the individual’s right to cut off questioning. *Michigan v. Mosley*, 423 U.S. 96, 104 (1975).

⁴⁵ See *Dickerson v. United States*, 530 U.S. 428, 450 (2000) (Scalia, J., dissenting). Indeed, during the oral argument in *Berghuis*, Chief Justice Roberts repeatedly expressed his view that *Miranda*’s procedural requirements are not grounded in the Constitution by drawing a distinction between the procedural requirements of *Miranda* and the Fifth Amendment privilege against compelled self-incrimination. Transcript of Oral Argument at 40–42, 49–51, *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010) (No. 08-1470) [hereinafter Transcript of Oral Argument] (Chief Justice Roberts: “I thought there was no dispute on this record that there was no voluntariness. We are talking about a violation of the technical, important but formal, *Miranda* requirements. This is not a case where the person says: My statements were involuntary.”).

⁴⁶ *Berghuis*, 130 S. Ct. at 2261.

⁴⁷ *Id.* at 2263 (citing *Davis v. United States*, 512 U.S. 452, 460 (1994)).

In several cases decided after *Miranda*, the Supreme Court has expressly stated that a violation of *Miranda*'s procedural rules does not necessarily amount to a violation of the Constitution.⁴⁸ For example, in *Michigan v. Tucker*, the Court limited application of the exclusionary rule to evidence recovered as a direct result of a *Miranda* violation.⁴⁹ In that case, the Court described *Miranda*'s procedural safeguards as "not themselves rights protected by the Constitution" but instead "measures to insure that the right against compulsory self-incrimination was protected."⁵⁰ The Court also went on to state that the police officer's conduct in this case "did not abridge [the defendant's] constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege."⁵¹

In *Oregon v. Hass* the Supreme Court permitted the admissibility of statements obtained in violation of *Miranda* for purposes of impeachment at trial.⁵² The Court again distinguished *Miranda*'s procedural requirements from the "voluntariness" standards of the Fifth and Fourteenth Amendments by stating that, despite the *Miranda* violation, there was no evidence or suggestion that the defendant's statements to the officers were coerced or involuntary.⁵³

In *New York v. Quarles* the Court held that a "public safety exception" justified the failure of the police to give the defendant *Miranda* warnings and permitted the admission of his unwarned statements and the evidentiary fruits of that statement in the prosecution's case in chief.⁵⁴ As in *Michigan v. Tucker*, the Court distinguished between actual coercion and a violation of the *Miranda* procedures, explaining that "[i]n this case we have before us no claim that [the defendant's] statements were actually compelled by police conduct which overcame his will to resist."⁵⁵ The Court also

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⁴⁸ For a general discussion, see Harvey Gee, *In Order to Be Silent, You Must First Speak: The Supreme Court Extends Davis's Clarity Requirement to the Right to Remain Silent in Berghuis v. Thompson*, 44 J. MARSHALL L. REV. 423, 427-34 (2011).

⁴⁹ *Michigan v. Tucker*, 417 U.S. 433, 439 (1974).

⁵⁰ *Id.* at 444.

⁵¹ *Id.* at 446.

⁵² *Oregon v. Hass*, 420 U.S. 714, 721-22 (1975) (citing *Harris v. New York*, 401 U.S. 222, 222-23 (1971)).

⁵³ *Id.* at 722. See also Dery III, *supra* note 22, at 411 (describing the Court's reasoning as further distinguishing *Miranda* from compulsory self-incrimination).

⁵⁴ *New York v. Quarles*, 467 U.S. 649, 657 (1984) (reasoning that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self incrimination").

⁵⁵ *Id.* at 654.

characterized the *Miranda* procedural rules merely as “practical re-inforcement” of the Fifth Amendment.⁵⁶

Also consider *Oregon v. Elstad*, where the Supreme Court again declined to apply the exclusionary rule to evidence obtained as a result of a *Miranda* violation. In holding that the defendant’s written confession was admissible, the Court rejected the argument that the failure of police to give him his *Miranda* warnings amounted to a constitutional violation.⁵⁷ The Court was explicit in concluding that a *Miranda* violation was distinct from a violation of the Fifth Amendment:

The *Miranda* exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony. Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Thus, in the individual case, *Miranda*’s preventative medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.⁵⁸

The culmination of these erosions came in *Dickerson v. United States*. The Court considered in *Dickerson* whether Congress had the authority to supersede its decision in *Miranda* by passing legislation which expressly designated voluntariness as the basis for admissibility of statements obtained during custodial investigation.⁵⁹ The Court ultimately ruled that *Miranda* is constitutionally based,⁶⁰ but its underlying rationale raises questions about the Court’s commitment to treating the *Miranda* procedural protections as themselves arising out of the Fifth Amendment. For example, the Court admitted that numerous exceptions to *Miranda* have been recognized⁶¹

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⁵⁶ *Id.* (citing *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)). See also Dery III, *supra* note 22, at 411 (citing additional language from *Quarles* where the Court distinguishes *Miranda* from the Fifth Amendment, and observing that, “[r]ather than coming directly out of the Fifth Amendment, the *Quarles* Court characterized *Miranda*’s ‘procedural safeguards’ as merely ‘associated with the privilege against compulsory self-incrimination.’”).

⁵⁷ *Hass*, 470 U.S. 298, 305–06 (1985).

⁵⁸ *Id.* at 306–07.

⁵⁹ See *Dickerson v. United States*, 530 U.S. 428, 436–37 (2000).

⁶⁰ See *id.* (discussing the rationale underlying *Miranda*’s constitutional basis).

⁶¹ *Id.* at 441 (but countering this point, the Court stated that *Miranda* has also been broadly applied, which demonstrated “not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable”).

and expressed some uncertainty as to whether it would have ruled the same way if the issue were one of first impression.⁶² Furthermore, in its actual discussion of *Miranda* as a constitutionally based ruling, the Court seemed to limit its focus to *Miranda*'s warning requirement. In explaining why the Congressional legislation at issue failed to be equally as effective as *Miranda* in preventing coerced confessions, the Court's focus was specifically limited to the fact that the law failed to contain a warning requirement;⁶³ the Court made no reference to *Miranda*'s other important procedural rules, such as the requirement that police obtain a waiver prior to commencing an interrogation. *Dickerson* appeared to sum up all of *Miranda*'s "procedure" as the requirement that police merely warn the individual in custody of his or her rights.⁶⁴

After *Dickerson*, the limited extent to which the Court considers *Miranda* as based in the Fifth Amendment is apparent in a number of decisions that have continued to cut the substance out of *Miranda*'s procedural safeguards. *Berghuis v. Thompkins* was decided shortly after two cases in which the Court dealt significant blows to *Miranda*'s requirement that individuals must be "clearly informed" of their rights prior to the interrogation,⁶⁵ and that the police must immediately cease interrogation when an individual invokes his or her right to an attorney.⁶⁶

In *Florida v. Powell* the Court concluded that the defendant was "clearly informed" of his right to counsel even though police officers never expressly told him that an attorney could be present with him throughout the interrogation.⁶⁷ Although the police officers failed to explicitly advise Mr. Powell of a fundamental aspect of his rights, the Supreme Court nonetheless concluded that, taken together, the officers' statements "reasonably conveyed" Mr. Powell's right to have an attorney present.⁶⁸ *Powell* is significant because it has the effect of reducing *Miranda*'s requirement that individuals be "clearly informed" of their rights to a standard that merely requires the warnings to be "reasonably convey[ed]."⁶⁹ Based on the

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⁶² *Id.* at 443.

⁶³ *Id.* at 442.

⁶⁴ *Id.*

⁶⁵ *Miranda v. Arizona*, 384 U.S. 436, 471–72 (1966).

⁶⁶ *Id.* at 474.

⁶⁷ *Florida v. Powell*, 130 S. Ct. 1195, 1205 (2010). The issue before the Court in *Powell* was whether the Self-Incrimination Clause of the Fifth Amendment required suppression of the accused individual's written confession since the police had obtained an earlier statement from him without advising him of his *Miranda* rights.

⁶⁸ *Id.* at 1204–05.

⁶⁹ See Romano, *supra* note 14, at 531–32.

reasoning of *Powell*, the police are capable of “reasonably conveying” an individual’s rights to him even when they fail to convey a fundamental aspect of the *Miranda* warnings.

The following day, in *Maryland v. Shatzer*, the Supreme Court cut another important piece out of *Miranda* by creating an exception to the rule established in *Edwards v. Arizona*, which requires police officers to immediately cease the interrogation of an individual who asserts the right to counsel.⁷⁰ In *Shatzer*, the Court reached three conclusions that significantly diminished the *Miranda* procedural safeguard of the individual’s right to refuse questioning without the presence of an attorney. The Court held that Mr. Shatzer experienced a “break in custody” when he returned to the general prison population after a 2003 interrogation that took place at the Maryland Correctional Institute.⁷¹ The Court went even further by asserting that a so-called “break in custody” lasting 14 days is sufficient to eliminate the dangers of coercion prevented by the *Miranda* procedural safeguards and the *Edwards* rule.⁷² These rulings culminated in the Court’s most significant disposition: that such a break in custody is sufficient to lift *Edwards*’s perpetual ban on further police questioning of an individual who has invoked the right to counsel,⁷³ thereby permitting the police to go back and re-interrogate an individual who has invoked his or her right to an attorney.

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⁷⁰ *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010). The facts of this case established that in August 2003 Michael Blaine Shatzer was initially interrogated at the Maryland Correctional Institute where he was serving a prison sentence in connection with suspicions that he had sexually abused his son. Because Mr. Shatzer declined to speak without an attorney present during this initial questioning, the officer stopped the interrogation and Mr. Shatzer returned to the general prison population. Two and a half years later the police discovered additional evidence implicating Mr. Shatzer in the sexual abuse of his son, and a different officer returned to interrogate Mr. Shatzer. This second interrogation took place in a prison maintenance room and lasted for approximately half an hour. Five days later the police returned to administer a polygraph test to Mr. Shatzer, at which time they advised him of his *Miranda* rights and obtained a written waiver. Upon being informed that he failed the polygraph test, Mr. Shatzer began to cry and made incriminating statements. For a thorough discussion of *Florida v. Powell* and *Maryland v. Shatzer*, see Kit Kinports, *The Supreme Court’s Love-Hate Relationship with Miranda*, 101 J. CRIM. L. & CRIMINOLOGY 375 (2011).

⁷¹ 130 S. Ct. at 1224–25 (discussing the difference in experience for an individual in “*Miranda* custody” as opposed to an individual sentenced to a prison term as justification for the “break in custody” rationale).

⁷² *Id.* at 1223.

⁷³ *Id.* at 1222–23. See also Romano, *supra* note 14, at 532–33.

III. BERGHUIS V. THOMPkins

In *Berghuis v. Thompkins* the Supreme Court reached two conclusions, effectively overturning the most important holdings of *Miranda*. First, the Supreme Court held that the prosecution may prove waiver merely by showing that the accused eventually made incriminating statements after having received and understood his or her *Miranda* rights.⁷⁴ Second, the Court held that the accused individual must unambiguously and clearly invoke his or her right to remain silent.⁷⁵

Berghuis held that “where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused’s uncoerced statement establishes an implied waiver of the right to remain silent.”⁷⁶ The Court further ruled that “as a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford.”⁷⁷ In this case, Mr. Thompkins made statements concerning his involvement in the suspected murder after two hours and forty-five minutes of a three-hour interrogation.⁷⁸ His statements consisted of giving two “Yes” answers in response to detectives’ questions about whether he believed in God and prayed to God for forgiveness for shooting the victim.⁷⁹ The Supreme Court held that by giving these “Yes” answers in response to the officer’s questions at the end of the three-hour interrogation, Mr. Thompkins engaged in a “course of conduct indicating waiver” of his right to remain silent.⁸⁰

The Court also concluded that police are not required to obtain an express waiver of *Miranda* rights before proceeding with the interrogation.⁸¹ It explained that in order for an accused individual’s statements to be admissible at trial, the police simply have to give the accused understandable *Miranda* warnings.⁸² Once this condition is established, the court can proceed to determine whether the individual made an express or implied waiver of his or

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⁷⁴ *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2263–64 (2010).

⁷⁵ *Id.* at 2259–60.

⁷⁶ *Id.* at 2262.

⁷⁷ *Id.*

⁷⁸ See Brief for Respondent, *supra* note 1, at *1–2.

⁷⁹ *Id.*

⁸⁰ *Berghuis*, 130 S. Ct. at 2263 (quoting *North Carolina v. Butler*, 441 U.S. 369, 373 (1979)).

⁸¹ *Id.*

⁸² *Id.* at 2264.

her rights on the basis of the whole course of questioning.⁸³

The *Berghuis* Court's waiver standard diminishes the procedural safeguards established by *Miranda* in several ways. *Berghuis* held that the State can prove a valid waiver merely by establishing that the police gave the individual understandable rights, and that the individual made uncoerced statements.⁸⁴ This ruling undermines a long history of Supreme Court cases that have consistently held that a "heavy burden" rests on the prosecution to prove a valid waiver.⁸⁵

Additionally, the *Berghuis* waiver standard contradicts clear Supreme Court precedent which prohibits the inference of waiver from the fact that the police ultimately obtain a confession.⁸⁶ *Miranda* specifically held that waiver may not be presumed "simply from the fact that a confession was in fact eventually obtained."⁸⁷ By holding that inculpatory statements are now sufficient to establish an implied waiver, the *Berghuis* Court ignored the underlying premise, acknowledged by the Supreme Court in *Miranda* and *Butler*, that custodial interrogation consists of pressures designed to jeopardize the privilege against self-incrimination.⁸⁸

Further, the *Berghuis* Court's reliance on *Butler* for the determination that an implied waiver can be inferred from the "whole course of questioning"⁸⁹ is problematic. In *Butler*, the Court inferred a valid waiver based on William Butler's express willingness to speak to the police immediately after he received *Miranda* warnings and refused to waive his rights in writing.⁹⁰ The *Butler* Court did not reach its conclusion regarding implied waivers on the basis of the "whole course of questioning." Rather, its conclusion relied precisely on the fact that Mr. Butler willingly began speaking to the interrogating officers right after he was advised of his *Miranda* rights at the beginning of the interrogation.⁹¹ By contrast, Mr. Thompkins not only refused to waive his rights in writing, but he

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⁸³ *Id.*

⁸⁴ *Id.* at 2261.

⁸⁵ See Michael L. Vander Giessen, *Berghuis v. Thompkins: The Continued Erosion of Miranda's Protections*, 46 GONZ. L. REV. 189, 201-02 (2011); Charles Weisselberg & Stephanos Bibas, *Debate: The Right to Remain Silent*, 159 U. PA. L. REV. PENNUMBRA 69, 72-73 (2010).

⁸⁶ See *Berghuis*, 130 S. Ct. at 2271 (Sotomayor, J., dissenting). See also Vander Giessen, *supra* note 85, at 201-02.

⁸⁷ *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

⁸⁸ Weisselberg & Bibas, *supra* note 85, at 73-74.

⁸⁹ *Berghuis*, 130 S. Ct. at 2264.

⁹⁰ *North Carolina v. Butler*, 441 U.S. 369, 373-74 (1979).

⁹¹ *Id.*

also sat in silence and was uncommunicative for nearly three hours before he made any statements.⁹² In ruling that Mr. Thompson voluntarily waived his right to remain silent so far into the interrogation, the *Berghuis* Court undermined *Miranda*'s admonition that the "fact of a lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights."⁹³

Finally, as Professor Weisselberg points out, the *Berghuis* waiver standard is also regrettable because it has the additional effect of shifting the burden of proof onto the individual to prove that he or she did not waive the right to remain silent.⁹⁴ As discussed above, the Supreme Court ruled that a valid waiver may be presumed when an individual who has a full understanding of his or her rights "acts in a manner inconsistent with their exercise."⁹⁵ The Court was also explicit in pointing out that Mr. Thompson made no contention that he did not understand his rights, suggesting that the burden for rebutting the presumption of waiver was on him.⁹⁶ Thus, the *Berghuis* waiver standard not only lifts the prosecution's "heavy burden" for proving waiver, but it also places a new weight on the individual to rebut the presumption of waiver.

Berghuis also held that in order for the individual to validly invoke the right to remain silent, he or she must do so unambiguously and clearly.⁹⁷ That is, the act of remaining silent is, by itself, insufficient to trigger the police officer's duty to stop questioning. To properly invoke the right to remain silent, the accused individual must clearly and unambiguously state that he or she wishes to remain silent, or does not want to speak to the police.⁹⁸ If the accused makes an ambiguous invocation, the police are not required to end the interrogation or even ask clarifying questions to affirmatively ascertain the intent of the accused with respect to exercising his or her right to remain silent.⁹⁹

The *Berghuis* Court's new invocation standard is problematic for at least three reasons. First, this standard departs from Supreme

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⁹² *Berghuis*, 130 S. Ct. at 2256–57.

⁹³ *Miranda v. Arizona*, 384 U.S. 436, 476 (1966). See also Transcript of Oral Argument, *supra* note 45, at *34–36 (attorney for Mr. Thompson arguing that given the length of his interrogation and facts showing his lack of willingness to talk to the police, there is evidence of coercion precluding the finding of a valid waiver).

⁹⁴ Weisselberg & Bibas, *supra* note 85, at 72–73.

⁹⁵ *Berghuis*, 130 S. Ct. at 2262.

⁹⁶ Weisselberg & Bibas, *supra* note 85, at 72–73.

⁹⁷ *Berghuis*, 130 S. Ct. at 2259–60.

⁹⁸ *Id.* at 2260.

⁹⁹ *Id.* at 2259–60.

Court precedent, which established specific procedures for invoking the right to remain silent, and applied a particular rule to guard against violations of that right. Second, the *Berghuis* Court's invocation standard created a legal distinction, which rests on the dubious assumption that all people, regardless of the environment they are in, use direct and unqualified language to convey their intent. As a result, the new invocation standard for the Fifth Amendment right to remain silent is disproportionately disadvantageous to women, racial minorities, and the socio-economically powerless, demographics who tend to communicate in indirect or qualified speech patterns.¹⁰⁰ Third, the *Berghuis* Court neglected to set out a careful standard for invoking the right to remain silent that could be applied to situations in which the individual affirmatively makes some statement that *might* constitute an invocation of the right to silence, as opposed to merely remaining silent throughout most of an interrogation.

IV. THE *BERGHUIS* CLEAR STATEMENT RULE IN PRACTICE FOR THE VALID EXERCISE OF THE RIGHT TO REMAIN SILENT

What is missing from the Court's discussion of the invocation standard are guidelines for situations in which the individual affirmatively makes some statement that may be construed as an invocation of the right to remain silent. Criticism of the *Berghuis* Court's invocation standard points out that since the majority failed to specify what is required for an invocation to meet the unambiguous threshold, lower courts run the risk of rejecting "as ambiguous an array of statements whose meaning might otherwise be thought plain."¹⁰¹ Additional criticism points out that the new invocation standard is similar to the voluntariness standard, which *Miranda* replaced, in that it is inconsistent and unworkable due to its inherent ambiguity.¹⁰² This criticism suggests that the Supreme Court's new invocation standard will not achieve its purported intent, which was to create a bright line rule that would help the police recognize when a person has invoked his or her constitutional right to remain silent.¹⁰³

The central purpose of this paper is to understand and describe how lower federal and state courts are applying the *Berghuis*

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¹⁰⁰ See generally Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259 (1993).

¹⁰¹ Vander Giessen, *supra* note 85, at 206 (quoting *Berghuis*, 130 S. Ct. at 2277 (Sotomayor, J., dissenting)).

¹⁰² See Budden, *supra* note 29, at 503.

¹⁰³ *Berghuis*, 130 S. Ct. at 2260.

clear statement requirement. An additional purpose is to compare the varying interpretations of the clear statement requirement to determine which approach sets out the most effective guidelines for distinguishing between clear and ambiguous invocations of the right to remain silent.

I attempted to answer these questions by analyzing lower federal and state court decisions applying the *Berghuis* invocation standard. I surveyed a total of 66 cases decided in the year since *Berghuis v. Thompkins* was decided. Of these, 6 were circuit courts of appeals cases, 37 were federal district court cases, and 23 were state level cases. I chose to focus my survey on cases in which *Berghuis v. Thompkins* is discussed in some detail.¹⁰⁴ Of the 66 cases I surveyed, 13 included an extensive or substantial discussion of the *Berghuis* invocation standard.

My survey reveals that there are at least three different interpretations of the *Berghuis* clear statement requirement. First, in what I call the “standard of clarity” approach, the court’s analysis focuses solely on the words or statements made by the individual in exercising his or her right to remain silent. Under this test, the words a person uses to invoke the right to remain silent must meet a certain threshold of clarity in order for the court to find an affirmative and unambiguous assertion of that right.¹⁰⁵

By comparison, courts employing what I term the “standard of reasonableness” test analyze the clarity of the asserted invocation from the perspective of the “reasonable police officer” or the “reasonable person.” Unfortunately, in the cases discussed under this category of analysis, courts generally do not identify the factors that help determine whether a particular invocation is affirmative and unambiguous from the perspective of the reasonable police officer or person.¹⁰⁶ Without a discussion of these factors, the “standard of reasonableness” test used by some courts operates very similarly to

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¹⁰⁴ In Westlaw, these cases are given three or four green stars to indicate their depth of treatment of *Berghuis v. Thompkins*.

¹⁰⁵ These cases include *United States v. McCarthy*, No. 09-2259, 2010 WL 2413024 (10th Cir. June 16, 2010); *United States v. Anderson*, No. 10-cr-84-JD, 2011 WL 1304218 (Dist. N.H. Apr. 6, 2011); *Welch v. Harrington*, No. CV 09-01041-JVS (JEM), 2010 WL 4794237 (C.D. Cal. Oct. 18, 2010); *People v. Hernandez*, No. B223310, 2011 WL 539448 (Cal. Ct. App. 2d Dist. Feb. 17, 2011); *People v. Addi*, No. C063132, 2010 WL 4160693 (Cal. Ct. App. 3d Dist. Oct. 25, 2010); *State v. Saeger*, 329 Wis.2d 711, 2010 WL 3155264 (Wis. Ct. App. Aug. 11, 2010).

¹⁰⁶ These cases include *Hurd v. Terhune*, 619 F.3d 1080 (9th Cir. 2010); *Ingram v. Varga*, No. ED CV 10-00732-AHM (VBK), 2011 WL 835788 (C.D. Cal. Jan. 21, 2011); *United States v. Arballo-Villa*, No. CR 09-1539-TUC-DCB(HCE), 2010 WL 3947330 (Dist. Ariz. Sept. 14, 2010); *State v. Demetrius M. Diaz-Bridges*, No. 08-08-1014, 2010 WL 3932392 (N.J. Super. Ct. App. Div. Sept. 21, 2010), *rev’d* 208 N.J. 544 (2012).

the “standard of clarity” approach, where the only basis for the analysis is the particular words or statements used by the individual to assert his or her right to remain silent.

The third category of analysis here determines the invocation question on the basis of the “totality of the circumstances.” Courts that employ the totality of the circumstances test to determine whether an individual has affirmatively and unambiguously invoked his or her right to remain silent focus their attention on the particular interaction between the individual and interrogating officers, as well as the context of this interaction. Under this test, the particular words or statements used by the individual to assert the right to remain silent are only one part of the analysis. This test also accounts for the interaction between the individual and the police by focusing on the actions and statements of the police officers in response to the individual’s asserted invocation.¹⁰⁷ Each of these varying interpretations of the *Berghuis* invocation rule is discussed below.

1. “Standard of Clarity” Test

Courts that employ what is here called the “standard of clarity” test to determine whether a person has affirmatively and unambiguously invoked his or her right to remain silent focus their analysis exclusively on the words or statements used by the person to assert that right. The “standard of clarity” test does not consider the effect of the custodial interrogation environment on a person’s choice of words when expressing his or her intent. Nor does it account for the effect of the particular interaction between the police and individual on the person’s ability to affirmatively and unequivocally assert his or her right to remain silent. In some cases, courts applying the “standard of clarity” test only recognize an assertion as affirmative and unambiguous if the individual uses precise language, and literally states that he or she wishes to remain silent, or does not want to speak with the police.¹⁰⁸ The overall affect of the “standard of clarity” is that it places a heavy burden on the individual, who must use specific language in order to exercise the right

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¹⁰⁷ These cases include *People v. Manzo*, 121 Cal.Rptr.3d 207 (Cal. Ct. App. 4th Dist., Jan. 31, 2011); *State v. Jauregui-Arballo*, No. 36379, 2010 Ida. App. Unpub. LEXIS 370 (Idaho Ct. App. Oct. 7, 2010).

¹⁰⁸ In justifying this level of precision, courts cite to the language from *Berghuis v. Thompson* where the Supreme Court states that had Mr. Thompson said he wanted to remain silent or that he did not want to speak with the police, he would have unambiguously invoked his right to remain silent. *Berghuis v. Thompson*, 130 S. Ct. 2250, 2254, 2263 (2010).

to remain silent. The “standard of clarity” test is the least objectively fair invocation inquiry; it ignores the reality of varying speech patterns and the ways in which the power imbalance inherent in custodial interrogation affects the ability of individuals to assertively invoke the right to remain silent.

For example, consider *Welch v. Harrington*, where the District Court for the Central District of California decided that the statement, “I want to go back to my cell,” did not constitute an unambiguous invocation of the right to remain silent.¹⁰⁹ In January 2006, Lorenzo Welch was interrogated by Long Beach Police detectives about his involvement in the murder of a Rolling Twenties gang member.¹¹⁰ During the first hour of the interrogation, detectives questioned Mr. Welch about his residence, gang affiliation, and criminal record.¹¹¹ Following this series of questions, the detectives switched the subject of their interrogation to Mr. Welch’s suspected involvement in the murder.¹¹² Evidence at a hearing on Mr. Welch’s motion to suppress established that at this point Mr. Welch told the officers that he thought he should have an attorney.¹¹³ Shortly after making this statement Mr. Welch said, “I want to go back to my cell.”¹¹⁴ Detective Richard Conant testified that following Mr. Welch’s request he waited in silence for 15 seconds to see if Mr. Welch was going to repeat his request for an attorney or say that he wanted to leave.¹¹⁵ When Mr. Welch did neither, the detectives resumed questioning him.¹¹⁶ About 15 to 20 minutes later, Mr. Welch made statements implicating himself in the murder.¹¹⁷

On appeal, the defense argued that Mr. Welch’s statement, “I want to go back to my cell,” could not be interpreted as anything but a desire to terminate the officers’ questioning.¹¹⁸ The district court disagreed, and explained that similar to Mr. Thompkins, Mr. Welch had failed to state that he wanted to remain silent or that he did not want to talk to the police.¹¹⁹ The court explained that, at best, Mr. Welch “might” have been invoking his right to remain silent, and stated that, “in order to invoke the right to remain si-

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¹⁰⁹ *Welch*, 2010 WL 4794237, at *8–10.

¹¹⁰ *Id.* at *6.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Welch*, 2010 WL 4794237, at *6.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at *8.

¹¹⁹ *Id.*

lent, a suspect need say only, 'I have nothing to say.'"¹²⁰

Compare *People v. Addi*, decided in the Court of Appeal for the Third District of California. Amera Khalid Addi was questioned by two police officers regarding her involvement in the shooting of a rival gang member on December 4, 2007.¹²¹ On that day Ms. Addi was subjected to two rounds of interrogation, each approximately 45 minutes apart.¹²² During the first interrogation, one of the detectives assumed an accusatory tone and told Ms. Addi that the police had a tape recording of her telling a fellow gang member that she knew the location of the gun used in the shooting.¹²³ Ms. Addi demanded to hear the tape, and after the detective played it for her she made statements such as: "Can you just take me back to my cell;" "I just wanna go. If I have to go to a cell, take me to a cell. Cause I have nothing to say;" and "I have nothing to say."¹²⁴ The detectives continued to question Ms. Addi after she made these statements, and subjected her to a second round of interrogation.¹²⁵ During the second interrogation Ms. Addi revealed the location of the gun used in the shooting.¹²⁶

The Court of Appeal reversed the trial court's conclusion that Ms. Addi invoked her right to remain silent.¹²⁷ In its analysis, the court stated that although Ms. Addi was not required to "utter the exact word," "she never stated specifically that she 'wanted to remain silent or that she did not want to talk with the police.'"¹²⁸ The court concluded by stating that Ms. Addi's language and tone failed to objectively communicate to the detectives her intent to remain silent.¹²⁹

A similar case is *United States v. Newland*, where the court held that statements such as, "I wanna go back upstairs. . . . So you came out here for no reason. I'd like to go back upstairs," and, "Alright, like I said . . . I'll go back upstairs . . . You made a worthless trip," did not constitute unequivocal invocations of the right to remain

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¹²⁰ *Id.*

¹²¹ *People v. Addi*, No. C063132, 2010 WL 4160693, at *2 (Cal. Ct. App. 3d Dist. Oct. 25, 2010).

¹²² *Id.* at *3.

¹²³ *Id.* at *2.

¹²⁴ *Id.*

¹²⁵ *Id.* at *2-3.

¹²⁶ *Id.* at *3.

¹²⁷ *Addi*, 2010 WL 4160693, at *4.

¹²⁸ *Id.* at *6 (quoting *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010)).

¹²⁹ *Id.*

silent.¹³⁰ Donald Newland was interrogated in an interview room in the basement of the LaPorte County Jail on June 20, 2008 on charges related to theft and gun possession.¹³¹ On that date, Mr. Newland was interrogated three separate times.¹³² Only statements made by Mr. Newland during the third interrogation were at issue on appeal.¹³³ The facts established that approximately six minutes into the third interrogation, Mr. Newland responded to police questioning by stating, “I wanna go back upstairs. . . . So you came out here for no reason. I’d like to go back upstairs.”¹³⁴ Although the detectives persisted in questioning him, Mr. Newland made a second statement about ten minutes later, again stating “I’ll go back upstairs. . . . I’m done.”¹³⁵

In denying the claim that Mr. Newland unambiguously invoked his right to remain silent, the district court explained that requesting to go back upstairs is not the same as asking to cease police interrogation.¹³⁶ The court stated that Mr. Newland’s visible agitation when stating that he wanted to go back upstairs and that the officers wasted a trip to see him, could have meant that he wanted the interrogation to end just as much as it could have been an angry response to the officers’ questioning.¹³⁷ The court concluded that Mr. Newland’s statements did not constitute clear and unambiguous assertions of his intent to remain silent, or his wish to stop speaking with the police.¹³⁸

2. *The Standard of “Reasonableness”*

In contrast to the “standard of clarity,” the “standard of reasonableness,” which is employed by a number of courts that follow the *Berghuis* invocation rule, emphasizes *Miranda*’s holding that the right to remain silent may be invoked in any manner. On its face, the “standard of reasonableness” does not appear to focus solely on the words or statements used by the person invoking his or her right to remain silent. In this category of analysis, courts often reference the “context” in which the asserted invocation is made when discussing whether a person affirmatively and unambiguously

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¹³⁰ United States v. Newland, No. 3:09-CR-71 JD, 2010 WL 2629504, at *4 (N.D.Ind. June 25, 2010).

¹³¹ *Id.* at *1.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at *2.

¹³⁵ *Id.*

¹³⁶ *Newland*, 2010 WL 2629504, at *5.

¹³⁷ *Id.*

¹³⁸ *Id.*

invoked his or her right to remain silent. However, a close look at the reasoning of courts applying this standard reveals that it is devoid of any meaningful discussion of facts that would explain how the court is distinguishing between clear and equivocal invocations of the right to remain silent. The overall result is that, similar to the “standard of clarity,” it appears to depend entirely on the words or statements made by the person invoking his or her right to silence. The only difference between the “standard of clarity” and the “standard of reasonableness” ends up being the level of precision required of the person who wishes to invoke his or her right to remain silent. Thus, the “standard of reasonableness” is not as burdensome on the individual as the “standard of clarity.”

In *State v. Demetrius M. Diaz-Bridges*, the Superior Court of New Jersey held that the individual’s repeated requests to speak with his mother constituted an unambiguous invocation of his right to remain silent.¹³⁹ On May 2, 2008, Demetrius M. Diaz-Bridges was interrogated for nearly ten hours at the Raleigh Police Department in North Carolina about his involvement in the murder of Elizabeth O’Brien.¹⁴⁰ Three hours and forty-two minutes into the interrogation, Mr. Diaz-Bridges requested to speak to his mother for the first time, asking: “Can I just call my mom first?”¹⁴¹ Approximately nine minutes later, Mr. Diaz-Bridges confessed to the murder. The interrogating officers did not permit Mr. Diaz-Bridges to telephone his mother until six hours and forty-eight minutes into the interrogation.¹⁴² Mr. Diaz-Bridges requested to speak to his mother at least 15 times between his first request and when he was finally permitted to place the call.¹⁴³

On appeal, the Appellate Division held that Mr. Diaz-Bridges’s initial request to speak to his mother did not constitute a clear and unambiguous invocation of the right to remain silent.¹⁴⁴ However, the court held that Mr. Diaz-Bridges’s subsequent statements indicating that he wished to speak to his mother did satisfy the clear

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¹³⁹ *State v. Demetrius M. Diaz-Bridges*, No. 08–08–1014, 2010 WL 3932392, at *14 (N.J. Super. Ct. App. Div. Sept. 21, 2010), *rev’d* *State v. Diaz-Bridges*, 208 N.J. 544 (2012).

¹⁴⁰ *Id.* at *1–5.

¹⁴¹ *Id.* at *2.

¹⁴² *Id.* at *3.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at *11. The New Jersey Supreme Court reversed. Applying a totality of the circumstances analysis, the Court held that “we do not discern in any of the defendant’s requests to speak with his mother an invocation of the right to silence.” *Diaz-Bridges*, 208 N.J. at 570.

statement requirement for the right to remain silent.¹⁴⁵ The court justified its decision by reference to *Miranda's* holding that, even after an interrogation has commenced, an individual may invoke his or her right to remain silent in any manner during the interrogation.¹⁴⁶ The court emphasized that the right to silence does not need to be expressed with the utmost legal precision.¹⁴⁷

It is not clear from the court's analysis why Mr. Diaz-Bridges's initial requests to call his mother failed to constitute an affirmative and unambiguous invocation of the right to remain silent, but his later statements did. The only explanation provided by the court on this point is that Mr. Diaz-Bridges made several statements subsequent to his first request to call his mother, which the detectives could have reasonably construed as an indication that he wanted to remain silent.¹⁴⁸ The court points to the fact that approximately six hours and forty five minutes into the interrogation, when the detectives asked Mr. Diaz-Bridges if he wanted to talk to his mother, he stated, "I want to hear her say it's gonna be okay. . . . I don't have nobody. I have nobody. And this thing is gonna do nothing but make it worse. I just want to hear her say it's gonna be all right, that's it."¹⁴⁹ Shortly after he made this statement, Mr. Diaz-Bridges told the detectives, "I can't do this shit, man. I just want to go home."¹⁵⁰ According to the court, "upon making that emphatic statement" it was satisfied that Mr. Diaz-Bridges invoked his right to remain silent.¹⁵¹

The overall affect of the court's failure to identify and discuss the specific factors that distinguish Mr. Diaz-Bridges's later statements from his earlier requests to speak to his mother is that its analysis rests solely on the particular words Mr. Diaz-Bridges used to invoke his right to remain silent. Indeed, the court's conclusion in this case that Mr. Diaz-Bridge's later statements constituted an affirmative and unambiguous invocation of the right to remain silent turned on the fact that these later statements were "emphatic" as compared to his initial statements.¹⁵² Thus, the court's references to "context" and "reasonableness" have little meaning. The court provides no discussion of the factors surrounding the interro-

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¹⁴⁵ *Diaz-Bridges*, 2010 WL 3932392, at *14.

¹⁴⁶ *Id.* at *10.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at *14.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Diaz-Bridges*, 2010 WL 3932392, at *14.

¹⁵² *See id.* at *14.

gation context and the interaction between the police and Mr. Diaz-Bridges that would explain the difference between his initial requests to call his mother and his later statements. Thus, the only difference between the standard applied by the *Diaz-Bridges* court and the “standard of clarity” is that in *Diaz-Bridges* the court was willing to accept an explanatory invocation of the right to remain silent. Unlike the “standard of clarity,” the “standard of reasonableness” as it was applied in *Diaz-Bridges* does not burden individuals with the requirement that they use precise words or language to invoke the right to remain silent.¹⁵³

Furthermore, the court’s final determination that Mr. Diaz-Bridges’s later statements constituted affirmative and clear invocations of the right to remain silent rest entirely on a subjective analysis. The court’s only substantive explanation for accepting Mr. Diaz-Bridges’s later statements as unambiguous invocations is that they were “emphatic” as compared to his initial requests to speak to his mother.¹⁵⁴ The court otherwise neglects to identify and discuss the specific factors that distinguish Mr. Diaz-Bridges’s affirmative and clear invocation from his initial statements. Indeed, there is no indication in the court’s reasoning why only some of at least 15 requests made by Mr. Diaz-Bridges to speak to his mother over the course of the ten-hour interrogation counted as “emphatic.” In other words, in reaching its conclusion the court may have perceived his repeated requests as being more urgent the longer the interrogation proceeded. Notwithstanding this possibility, the problem in the court’s analysis remains that it never identifies these or any other facts to support its final determination.

Also consider *Ingram v. Varga*, where the district court held that the statement, “You know I can’t go there man. I don’t want to incriminate myself,” constituted an unambiguous and clear invocation of the right to remain silent.¹⁵⁵ In this case, the facts established that Tyrone Ingram was arrested after a routine traffic stop revealed that Mr. Ingram’s girlfriend was in the backseat of his car and had suffered serious physical injuries to her face and body.¹⁵⁶ At the time of Mr. Ingram’s arrest, Deputy Trevor Montgomery read him his *Miranda* rights and asked Mr. Ingram if he wished to waive his rights and speak with the deputies.¹⁵⁷ Upon Mr. Ingram’s

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¹⁵³ See *id.* at *10.

¹⁵⁴ See *id.* at *14.

¹⁵⁵ *Ingram v. Varga*, No. ED CV 10-00732-AHM (VBK), 2011 WL 835788, at *4 (C.D. Cal. Jan. 21, 2011).

¹⁵⁶ *Id.* at *3–6.

¹⁵⁷ *Id.* at *4.

agreement to speak, Deputy Montgomery asked what happened to the victim's teeth.¹⁵⁸ In response, Mr. Ingram stated, "You know I can't go there, man. I don't want to incriminate myself."¹⁵⁹

The federal district court stated that the California Court of Appeals erred when it concluded that Mr. Ingram's statement constituted an equivocal and unclear invocation of his right to remain silent.¹⁶⁰ In its analysis, the court reasoned that under *Miranda*, an individual may indicate that he or she wishes to remain silent "in any manner" and that in invoking a constitutional right, "a suspect need not speak with the discrimination of an Oxford don."¹⁶¹ The court concluded that any reasonable person would understand the statement, "I don't want to go there, man" as meaning that the accused did not want to answer the officer's questions, and that the statement, "I don't want to incriminate myself" was a clear reference to the right not to incriminate oneself under the Fifth Amendment.¹⁶² In a footnote, the court suggests that Officer Montgomery's act of discontinuing his questions regarding the victim's teeth immediately after Mr. Ingram made the statements at issue tended to indicate that he subjectively understood Mr. Ingram to mean that he wished to invoke his right to remain silent.¹⁶³

Similar to the court in *Diaz-Bridges*, the *Ingram v. Varga* court appears to interpret the invocation rule broadly, accepting an explanatory refusal to answer further police questioning as an affirmative and unequivocal invocation of the right to remain silent.¹⁶⁴ However, the court's reasoning is similarly lacking in references to contextual factors of the interrogation or facts related to the interaction between the individual and the police, which would explain the basis for the court's conclusion that Mr. Ingram affirmatively and unambiguously invoked his right to remain silent. The effect of the court's failure to ground its determination in such facts is that its analysis appears to rely primarily on the language of Mr. Ingram's refusals to further police questioning. The court's reference to the conduct of the interrogating officer, which suggested that he understood Mr. Ingram's refusals to be clear invocations of

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¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at *19. Although the district court found that defendant's *Miranda* rights were violated, his conviction was sustained under the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d). *Varga*, 2011 WL 835788, at *20.

¹⁶¹ *Id.* at *19 (quoting *Davis v. United States*, 512 U.S. 452, 459 (1994)).

¹⁶² *Id.* at *19 n.7.

¹⁶³ *Id.* at *19.

¹⁶⁴ *See id.*

the right to silence is important, but it is only discussed parenthetically, and clearly does not form the central focus of the court's conclusion.¹⁶⁵

In contrast, in *State v. Saeger*, the Wisconsin Court of Appeals used a similar analysis but reached the opposite result. Phillip Saeger was interrogated by two detectives in the South Beloit police department about his role in several burglaries that occurred in surrounding counties.¹⁶⁶ At some point during the interview the detectives learned that Mr. Saeger was fearful of receiving federal gun charges.¹⁶⁷ After learning that a gun stolen during one of the burglaries was found at Mr. Saeger's girlfriend's house, the detectives told Mr. Saeger that he could be charged under federal law and sentenced to twenty-five years in prison.¹⁶⁸ At the hearing on his motion to suppress the statements, Mr. Saeger testified that upon receiving this news he became angry and scared, and 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."¹⁶⁹ Immediately after he made these statements, the detectives engaged Mr. Saeger in negotiations and eventually told him they would not bring federal charges against him or his girlfriend.¹⁷⁰

In response to Mr. Saeger's challenge, the Court of Appeals cited to an earlier ruling in which it held that although an individual could invoke the right to remain silent without using any words, he or she must make it sufficiently clear that the intention is to cut off questioning so that a reasonable police officer in the circumstances would understand the statement to be an invocation of the right to remain silent.¹⁷¹ The court then held that it was reasonable for the police officers to conclude that Mr. Saeger's statement, when taken in context, was merely a "fencing mechanism" to get a deal that would free him of exposure to federal charges.¹⁷² The court acknowledged that while a reasonable person could also interpret Mr. Saeger's statement to mean that he actually wanted

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¹⁶⁵ See *id.* at *19 n.7

¹⁶⁶ *State v. Saeger*, 329 Wis.2d 711, 2010 WL 3155264, at *1 (Wis. Ct. App. Aug. 11, 2010).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at *2.

¹⁷² *Saeger*, 2010 WL 3155264, at *3.

to invoke his right to remain silent, it interpreted the existence of a competing inference against Mr. Saeger. Indeed, the court concluded that because an alternative inference could be drawn from the statements, it was equivocal as a matter of law.¹⁷³

The court's reasoning in *Saeger* demonstrates that one of the biggest problems with the "standard of reasonableness" is that it tends to operate subjectively. In its analysis, the court neglects to identify or discuss any specific factors that distinguish an affirmative and clear invocation of the right to remain silent, and it admits that a reasonable person could interpret Mr. Saeger's statements to be an invocation of his right to remain silent. Without citing to any specific factors in the interrogation itself, nor in the interaction between Mr. Saeger and the interrogators, the court ultimately concludes that Mr. Saeger's statements constituted a "fencing mechanism," and then goes on to interpret the possibility of this fact against him.¹⁷⁴

3. "*Totality of the Circumstances*"

In the third category of analysis described here, courts employ a "totality of the circumstances" test, which focuses on the context of the custodial interrogation, and specifically, factors that describe the interaction between the individual and interrogating officer. To be sure, the "totality of circumstances" test focuses on the plain meaning of the words used by the individual to invoke his or her right to remain silent; however, the analysis does not end there. Rather, under this "totality of the circumstances" test courts inquire into factors such as the individual's conduct, the content of the interrogation, the demeanor and tone of the interrogating officer, the officer's response to the individual's ambiguous invocation, the point at which the individual invoked the right to remain silent, and the questions that elicited the invocation. The overall effect of the "totality of the circumstances" test is that it lifts the heavy burden of the *Berghuis* clear statement requirement off the individual. Additionally, the "totality of the circumstances" test provides a more objective and consistent approach to distinguishing between affirmative and unambiguous invocations of the right to remain silent.

For example, in *Hurd v. Terhune*, the Ninth Circuit Court of Appeals held that a person's refusal to submit to a polygraph test and reenact the shooting of his wife constituted an unambiguous

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¹⁷³ *Id.*

¹⁷⁴ *See id.*

invocation of the right to remain silent.¹⁷⁵ Dale R. Hurd was taken into police custody after fatally shooting his wife.¹⁷⁶ Mr. Hurd initially agreed to cooperate with the police and speak without an attorney present.¹⁷⁷ However, after Mr. Hurd told the police officers his version of the events leading up to the shooting, the interrogating detective asked Mr. Hurd to submit to a polygraph examination.¹⁷⁸ The court's opinion states that Mr. Hurd refused the detective's request to conduct the reenactment.¹⁷⁹ It also explains that the detective then asked Mr. Hurd to demonstrate how he shot his wife.¹⁸⁰ Mr. Hurd refused this demand as well, using statements such as, "No," "I can't," and "I don't want to act it out because that—it's not that clear."¹⁸¹ Nevertheless, the detectives continued to pressure Mr. Hurd to submit to a polygraph test and reenact the shooting of his wife.¹⁸² The court notes that in response to Mr. Hurd's refusals, the detectives told Mr. Hurd that he would go to jail for being uncooperative; that the District Attorney would not appreciate Mr. Hurd's refusals; and that a judge and jury would find his lack of cooperation unreasonable.¹⁸³

In his appeal, Mr. Hurd argued that his repeated refusals to submit to a polygraph test or reenact the shooting of his wife were consistent with an unequivocal assertion of his right to remain silent.¹⁸⁴ The Court of Appeals rejected the trial court's explanation that Mr. Hurd did not invoke his Fifth Amendment privilege on the ground that he offered responses and explanations instead of flat refusals.¹⁸⁵ After citing to the *Berghuis* clear statement rule, the court stated, "a suspect still need not utter a 'talismanic phrase' to invoke the right to silence."¹⁸⁶ Focusing on Mr. Hurd's conduct—in addition to his words—the court held that his responses were objectively unambiguous in context, because he repeatedly refused to perform the demonstration of his wife's shooting.¹⁸⁷ Significantly, in reaching its conclusion, the court also relied on com-

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¹⁷⁵ Hurd v. Terhune, 619 F.3d 1080, 1088 (9th Cir. 2010).

¹⁷⁶ *Id.* at 1082–83.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1083–84.

¹⁷⁹ *Id.* at 1084.

¹⁸⁰ *Id.*

¹⁸¹ *Terhune*, 619 F.3d at 1089.

¹⁸² *Id.* at 1084.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 1089 (quoting *Arnold v. Runnels*, 421 F.3d 859, 866 (9th Cir. 2005)).

¹⁸⁷ *Terhune*, 619 F.3d at 1088.

ments by the interrogating officers.¹⁸⁸ The court does not provide the officers' specific statements in its opinion; however, it is significant that the court focused on the officers' comments, and found them important to the overall analysis, precisely because they demonstrated that the officers subjectively understood Mr. Hurd's responses to be unambiguous invocations.¹⁸⁹

Similarly, in *People v. Manzo*, the Court of Appeal for the Fourth District in California held that the circumstances of the case and the context of the words used by the officers and the individual established that Martin Manzo unequivocally invoked his right to remain silent.¹⁹⁰ Mr. Manzo was questioned by police regarding his involvement in the fatal shooting of José Valdez.¹⁹¹ The video recording and written transcript of Mr. Manzo's interrogation established that shortly after the police officers began to advise him of his *Miranda* rights, one of the officers told Mr. Manzo that he wanted to give him an opportunity to tell his version of the events leading up to the shooting.¹⁹² Mr. Manzo replied, "Oh, hell no. Don't even. . . . Don't even mention it."¹⁹³ Before the interrogating officer could even finish reading him his *Miranda* rights, Mr. Manzo interrupted the officer and made statements such as, "I'm doing what my right" and "I'm doing my right."¹⁹⁴

The reviewing court concluded that Mr. Manzo unambiguously invoked his right to remain silent.¹⁹⁵ In its reasoning the court cited to *Berghuis v. Thompson*, and characterized the Supreme Court's holding as stating that under the new invocation standard, "suspects *may* invoke the right to remain silent only by an unambiguous statement to that effect."¹⁹⁶ However, the court then emphasized *Miranda*, stating that the interrogation must cease when the individual indicates "in any manner" that he wishes to remain silent.¹⁹⁷ The court underscored this point by stating that no particular form of words or conduct is necessary to invoke the

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¹⁸⁸ See *id.* at 1089 (noting that "the interrogating officer's comment show that they subjectively understand Hurd's responses as unambiguous refusals").

¹⁸⁹ *Id.*

¹⁹⁰ *People v. Manzo*, 121 Cal.Rptr.3d 207, 218 (Cal. Ct. App. 4th Dist., Jan. 31, 2011).

¹⁹¹ *Id.* at 214–18.

¹⁹² *Id.* at 217.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 218.

¹⁹⁵ *Id.* at 216.

¹⁹⁶ *Manzo*, 121 Cal.Rptr.3d at 219 (citing *Berghuis*, 130 S. Ct. at 2260) (emphasis added).

¹⁹⁷ *Id.*

right to remain silent; individuals are not required to use specific words such as “invoke” or “assert” to unambiguously invoke the right to remain silent; and that an individual’s assertion of the right to remain silent cannot be conditioned on the use of certain technical words or other similar formalities.¹⁹⁸

The court also included a substantial description of the factual basis for its determination. In addition to considering the substance of Mr. Manzo’s statements, the court analyzed whether his conduct inferentially established that he wished to exercise his right to remain silent.¹⁹⁹ For example, the court found it significant that after the police officers finished advising Mr. Manzo of his *Miranda* rights and asked him whether he understood each right, Mr. Manzo remained silent for approximately eight seconds instead of responding immediately.²⁰⁰ Further, the court attached great weight to the fact that in response to the officers’ second inquiry as to whether he understood his *Miranda* rights, instead of answering that particular question, Mr. Manzo stated he was “doing what my right.”²⁰¹ The court explained that Mr. Manzo confirmed his invocation when, after further questioning about whether he understood his rights, he emphatically stated, “I’m doing my right.”²⁰²

The Court of Appeals of Idaho considered similar and additional factors in *State v. Jauregui-Arballo*, where it reversed the trial court’s denial of the defense’s motion to suppress, holding that a reasonable police officer in the circumstances would have understood the statements at issue as unambiguous and unequivocal invocations of the right to remain silent.²⁰³ The facts of Mr. Jauregui-Arballo’s interrogation established that on several occasions throughout the questioning, he told the interrogating police officer that he did not wish to continue answering questions, making statements such as: “Like I said, I am not talking anymore,” and “I’m not going to talk about anything with you. I told you already!”²⁰⁴ Additionally, Mr. Jauregui-Arballo made statements indicating that his head hurt and that he would be willing to speak at

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¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Manzo*, 121 Cal.Rptr.3d at 219.

²⁰³ *State v. Jauregui-Arballo*, No. 36379, 2010 Ida. App. Unpub. LEXIS 370, at *7–8 (Idaho Ct. App. Oct. 7, 2010).

²⁰⁴ *Id.* at *6–12.

a later time.²⁰⁵

In its analysis of the invocation issue, the court looked beyond the language of Mr. Jauregui-Arballo's statements, and considered ten specific contextual factors as the basis for determining whether Mr. Jauregui-Arballo's statement constituted an unequivocal invocation of the right to remain silent. These factors included: (1) the plain meaning of the individual's words; (2) the officer's response to these words; (3) the individual's speech patterns; (4) the content of the interrogation; (5) the demeanor and tone of the interrogating officer; (6) the individual's conduct during the questioning; (7) the point at which the individual invoked the right to remain silent; (8) the questions which drew the invocation; (9) the officer's response; and (10) who was present during the questioning.²⁰⁶

In this case, the court attached significance to the statements and conduct of the interrogating officer in response to Mr. Jauregui-Arballo's statements. For example, the court focused on the fact that after Mr. Jauregui-Arballo stated, "I'm not going to talk about anything with you. I told you already!" the interrogating officer reacted by leaving the room for approximately four minutes, and upon his return, he began asking Mr. Jauregui-Arballo a series of innocuous questions for the purpose of filling out paperwork related to the charges against him.²⁰⁷ The court explained that the officer's act of leaving the interrogation room after Mr. Jauregui-Arballo told the officer he was not going to talk about anything indicated that the officer understood Mr. Jauregui-Arballo's statement to be a request to stop the interrogation.²⁰⁸ The court further explained that the officer's subsequent action of asking Mr. Jauregui-Arballo a series of innocuous questions also indicated that the officer was complying with Mr. Jauregui-Arballo's repeated requests to stop the interrogation.²⁰⁹

In addition to these factors, the Idaho Court of Appeals noted that Mr. Jauregui-Arballo's responses came after a change in the officer's demeanor and the tone of the interrogation, where he began to make accusations against Mr. Jauregui-Arballo as opposed to merely questioning him.²¹⁰ The court also emphasized that the officer's own statements established that he subjectively under-

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²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at *15.

²⁰⁸ *Id.* at *13.

²⁰⁹ *Jauregui-Arballo*, 2010 Ida. App. Unpub. LEXIS 370, at *14.

²¹⁰ *Id.* at *15.

stood Mr. Jauregui-Arballo's statements to mean that did not want to talk to the officer.²¹¹

V. RECOMMENDATIONS AND CONCLUSION

Courts deciding whether an accused individual affirmatively and unambiguously has invoked the right to remain silent should apply the totality of the circumstances test.²¹² This analysis provides a fair and objective balance between the interests of the state in solving crime and the rights and dignity of ordinary citizens. By focusing on the factors underlying the interaction between the individual and interrogating police officers, the totality of the circumstances test takes pressure off the individual to use precise words in order to sufficiently invoke his or her right to remain silent. Unlike the standard of clarity, the totality of circumstances test gives weight to many important factors, such as the conduct of the individual, the individual's speech patterns, the officer's responses to the individual's statements, and the content and tone of the interrogation.

Furthermore, by taking some weight off the plain meaning of the individual's words, the totality of the circumstances rule recognizes the existence of varying speech patterns, and is thus fairer to particular vulnerable groups in society, such as women, racial minorities, limited English-proficient persons, and the socio-economically powerless. The *Berghuis* invocation rule is regrettable because of its likely disproportionate impact on individuals and groups who communicate using indirect or qualified speech patterns. Studies on this point show that characteristics such as gender, race, and socio-economic status correlate with the use of different manners of speaking adopted by specific communities under certain circum-

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²¹¹ *Id.* at *13.

²¹² The "totality of the circumstances" approach has often been adopted by the Supreme Court where the factual context is crucial and the relative importance of any one particular factor in resolving the question before the Court depends on the specific facts of the case. As the Court noted in *Illinois v. Gates*, "the evidence . . . collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." 462 U.S. 213, 231 (1983) (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)). See, e.g., *Stansbury v. California*, 511 U.S. 318 (1994) and *Berkemer v. McCarty*, 468 U.S. 420 (1983) (whether a person is in custody for purposes of the Fifth Amendment privilege against self-incrimination); *Gates*, 462 U.S. at 235 (what is the quantum of proof that constitutes probable cause); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (when does police conduct invalidate a person's consent to search); *Neil v. Biggers*, 409 U.S. 188 (1972) (when is a police-arranged identification procedure reliable despite it being suggestive).

stances.²¹³ In her research, Professor Ainsworth has found that a characteristic manner of speaking, which can be described as an indirect and tentative style of speech, correlates with distinct segments of the population, such as women, racial minorities, and the socio-economically powerless.²¹⁴ By creating a legal distinction which focuses on particular words and only recognizes affirmative and direct expressions of the right to remain silent, the Supreme Court's new invocation rule operates to disadvantage women, racial minorities, and the poor, because of their manner of speaking.

The new invocation standard also has a negative effect on criminal defendants because it neglects to consider the context of custodial interrogation and the power dynamic inherent in this interaction. Professor Ainsworth found that the adoption of an indirect and qualified style of speech, whether conscious or unconscious, is a response by the speaker to contextual powerlessness.²¹⁵ Thus, taking into consideration the context of the interaction between the speaker and listener, including the power relations inherent in the situation, is necessary to understanding how people speak and what they mean.²¹⁶ Research suggests that equivocation is the result of circumstances or contexts in which speakers find themselves, where direct and assertive statements are perceived as leading to negative consequences for the speaker.²¹⁷ As Professor Ainsworth and others suggest, powerless people, who most often perceive themselves as being in defensive situations, are more likely to adopt equivocal speech patterns under such circumstances.²¹⁸ The *Berghuis* invocation rule focuses almost entirely on the words used by the person being interrogated, and it fails to take into account the nature of the interaction between the individual and interrogating officers. Thus, it not only fails to accommodate varying patterns of language used among all arrestees, but it also fails to account for the power imbalance in the communicative relationship between the individual and interrogator.

The totality of the circumstances rule assuages the disproport-

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²¹³ Ainsworth, *supra* note 100, at 273, 286–87.

²¹⁴ *Id.* at 286–87.

²¹⁵ *Id.* at 284–85.

²¹⁶ *Id.* at 289–92.

²¹⁷ *Id.* at 284. See also Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1537–38 (2008) (explaining that suspects are in a position of powerlessness in the stationhouse; to avoid offending those in power and for other reasons, suspects may articulate their intent in tentative ways, which will not be recognized as invocations under a standard that only recognizes “unambiguous” assertions of the right to remain silent).

²¹⁸ Ainsworth, *supra* note 100, at 284–85.

tionate impact of the *Berghuis* invocation rule in two ways. Because the totality of the circumstances test focuses on factors such as the officer's responses to the individual's words, the content of the interrogation, demeanor and tone of the interrogating officer, and the officer's responses to the individual's invocation, it takes some pressure off the individual to use precise language in order to meet the "unambiguous" threshold. Second, in giving weight to the demeanor, tone, questions, responses and conduct of interrogating police officers, the totality of the circumstances test accounts for the fact that the power relations inherent to custodial interrogation affect the way individuals speak and express their intent. Unlike the other standards discussed here, the totality of the circumstances rule accounts for the fact that through their words and conduct police officers create the coercive conditions of custodial interrogation, and recognizes that individuals will adopt an equivocal and qualified style of speech in response to the conduct and responses of the interrogating officers. Thus, the rule accounts for contextual powerlessness in the invocation calculus in a way that none of the other standards do.

Additionally, courts should adopt the totality of the circumstances analysis because it provides a substantial degree of consistency and flexibility in the decision-making process. On one hand, the totality of circumstances rule provides guidance and constraint because it requires courts to consider and discuss a number of specific factors related to the interaction between the individual and police officers during custodial interrogation. Thus, unlike the "standard of reasonableness," which operates subjectively due to the lack of any apparent constraints on its decision-making process, the "totality of the circumstances" test provides a substantial amount of guidance because its analysis is framed by specific facts related to the interaction between the individual and interrogators. Through the "totality of the circumstances" test courts can draw clear distinctions between affirmative and unambiguous invocations on a case-by-case basis. On the other hand, the rule also provides courts with the flexibility to weigh and balance the various factors underlying the communicative relationship between the individual and interrogator.

In setting out the new standard for valid invocations of the right to remain silent, the *Berghuis* Court neglected to provide any guidelines as to the application of the standard to situations involving an individual who makes an affirmative statement that may or may not be construed as an invocation of the right to remain silent.

This failure resulted in the lower courts issuing decisions based on inconsistent and varying interpretations of the *Berghuis* invocation standard.

In my attempt to evaluate and classify the different interpretations of the *Berghuis* invocation standard among lower courts, I discovered cases that fit roughly into three different categories of interpretation: (1) “standard of clarity,” (2) “standard of reasonableness,” and (3) the “totality of circumstances” test. Based on my analysis of these three categories, I recommend that courts adopt the “totality of the circumstances” test to determining whether an individual has affirmatively and unambiguously invoked the right to remain silent because it is the least burdensome on criminal defendants. It also provides courts with substantial guidance and predictability in the decision-making process. Thus, the “totality of the circumstances” test provides a fair and objective balance between the interests of the state in solving crime and the rights and dignity of ordinary citizens.