IN THE SUPREME COURT FOR THE STATE OF ALASKA

STATE OF ALASKA, Petitioner, v. STEVEN RIDENOUR, Respondent.	Supreme Court No. S-18952

Trial Court No. 3KO-16-00012CR

PETITION FOR HEARING FROM THE COURT OF APPEALS

BRIEF OF AMICUS CURIAE THE INNOCENCE PROJECT IN SUPPORT OF RESPONDENT

Filed in the Supreme Court
for the State of Alaska on
this ___ day of_____, 2024

Meredith Montgomery,
Clerk, Appellate Courts

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No person shall be put in jeopardy twice for the same offense. No person shall be compelled in any criminal proceeding to be a witness against himself.

INTEREST OF AMICUS CURIAE

The Innocence Project is a non-profit organization dedicated to providing pro bono legal services and other resources to individuals who may have been wrongfully convicted. In addition to post-conviction litigation, the Innocence Project works to prevent future miscarriages of justice by identifying the causes of wrongful convictions, participating as *amicus curiae* in cases of broader significance to the criminal justice system, and pursuing legislative and administrative reforms that aim to improve the truth-seeking function of the criminal legal system. Such reforms include those designed to prevent the elicitation of false confessions made by innocent people in response to coercive police interrogation.

False confessions are a primary cause of wrongful convictions, contributing to approximately one-third of all known convictions that were later overturned through DNA evidence. *See* DNA Exonerations in the United States, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last viewed Nov. 18, 2024). The procedural protections provided under *Miranda v. Arizona* were established, in part, to ward against the risk of false confessions by assuring that suspects are aware of and may exercise their rights in the inherently coercive context of police interrogation. *See* 384 U.S. 436, 455, n.24 (1966) (describing the "heavy toll" custodial interrogation takes on individuals and discussing a known false confession).

This case requires the Court to decide whether, under the Alaska Constitution, a person's ambiguous or equivocal invocation of the right to counsel is sufficient to invoke *Miranda*'s protection and end the interrogation—despite the federal rule to the contrary. *See Davis v. United States*, 512 U.S. 452, 461-62 (1994) (holding that, under the federal

constitution, "[i]f the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him").

As a leading advocate for the wrongfully convicted, *amicus* has a compelling interest in ensuring that individuals subjected to police interrogation have adequate safeguards against the type of coercion that can elicit false confessions. Requiring interrogating officers to honor even unclear or ambiguous requests for counsel helps provide such safeguards and is an especially important protection for this State's most vulnerable populations. Those individuals who are at heightened risk of falsely confessing—such as adolescents and individuals living with cognitive disabilities—are precisely who is less likely to understand and clearly invoke their *Miranda* rights in a manner that would function to end the interrogation under federal law. *Amicus* therefore urges this Court to reaffirm that the Alaska Constitution requires police officers to honor a suspect's invocation of the right to counsel in interrogation, however ambiguous.

SUMMARY OF ARGUMENT

Even before the advent of DNA testing revealed the extent of the problem of false confessions, the U.S. Supreme Court recognized that "[i]nterrogation procedures may . . . give rise to a false confession." *Miranda*, 384 U.S. at 455-456, n. 24. In recognition of the "coercive impact 'inherent in custodial surroundings,'"[1] *Miranda* requires that subjects of interrogation be informed of their constitutional rights before an interrogation begins and, as relevant here, "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Miranda*, 384 U.S. at 474.

This Court has historically afforded *Miranda*'s protection to subjects of interrogation who express even an ambiguous desire to invoke their right to counsel, finding it to be "plain" that "*no particular form of words or conduct is necessary*" to invoke the right and end the interrogation. *Giacomazzi v. State*, 633 P.2d 218, 221 (Alaska 1981) (internal citation and quotation marks omitted) (emphasis added). However, after this Court's ruling in *Giacomazzi*, the United States Supreme Court, in *Davis v. United States,* held that, under federal law, subjects of interrogation must make *unequivocal* invocations of the right for such invocations to be honored. 512 U.S. 452, 462 (1994).

Here, during a custodial interrogation, Respondent asked the interrogating officer: "Should I do this without an attorney?" Rather than end the interrogation, or clarify whether Respondent in fact wanted to invoke his right to counsel, the officer said he could not advise Respondent whether or not to speak and continued to interrogate him. The Court of

[1] *Hampel v. State*, 706 P.2d 1173, 1178 (Alaska Ct. App. 1985) (quoting *Miranda*, 384 U.S. at 458).

Appeals held that although the officer's continued interrogation of Respondent did not violate the *federal* constitution, it did violate Article I, Section 9 of the Alaska Constitution, which has historically been interpreted "more broadly" than its federal counterpart. *Ridenour v. State*, 539 P.3d 530, 535 (Alaska Ct. App. 2023).

Following in the footsteps of eight other state supreme courts around the country, and consistent with Alaska's longstanding precedent of interpreting the right against self-incrimination "more broadly" than the federal Fifth Amendment,[2] *amicus* urges this Court to uphold the decision below and reaffirm that, under the Alaska Constitution, any reference to counsel, however ambiguous, will function as an invocation that must be "scrupulously honored."[3] Accordingly, upon any reference to counsel—including, as here, a suspect's question about whether counsel would benefit him—interrogating officers must cease questioning the suspect, but for questions that are narrowly tailored to "seek clarification of the suspect's desires." *Giacomazzi*, 633 P.2d at 222.

To hold otherwise ignores the scientifically-established reality, discussed below, that many people cannot fully grasp the functional meaning of their *Miranda* rights—and that those who are at a heightened risk of falsely confessing in response to police coercion have

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[2] *C.D. v. State*, 458 P.3d 81, 87 (Alaska 2020) (noting that this Court has "interpreted Alaska's privilege against self-incrimination to be broader than its federal counterpart" to reflect "'a complex of our fundamental values and aspirations,'" including "'the protection of individual liberty and privacy'" (quoting *State v. Gonzalez*, 825 P.2d 920, 933 (Alaska App. 1992)); *see also Scott v. State*, 519 P.2d 774, 783 (Alaska 1974).

[3] *Accord Munson v. State*, 123 P.3d 1042, 1049 (Alaska 2005) (holding that an "officer must scrupulously honor the suspect's request" to remain silent, once "a suspect makes 'an attempt to cut off questioning'") (internal citations omitted).

particular difficulty comprehending, let alone clearly invoking, their rights. Accordingly, the federal rule inadequately protects the state's "most vulnerable" from false confession and, consequently, wrongful conviction. *State v. Purcell*, 203 A.3d 542, 544, 565-67 (Conn. 2019) (holding that the federal rule requiring clear and unequivocal invocation of the right to counsel did not apply under state law because, among other reasons, it "disadvantage[s] the most vulnerable of our citizens").

ARGUMENT

I. Coercive Police Interrogation—Which *Miranda* is Meant to Safeguard Against—Places the Innocent at Risk of False Confession and, Consequently, Wrongful Conviction.

In the last several decades, false confessions—innocent people "admitting" to having committed a crime in response to coercive police interrogation—have been "recognized as one of the leading sources of erroneous convictions of innocent individuals." Jessica R. Klaver et al., *Effects of Personality, Interrogation Techniques and Plausibility in an Experimental False Confession Paradigm*, 13 LEGAL & CRIM. PSYCH. 71, 72 (2008) (citations omitted)*; see also* DNA Exonerations in the United States, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last viewed Nov. 18, 2024) (noting that false confessions contributed to the wrongful convictions underlying nearly one-third of known DNA exonerations). These *documented* false confessions "most surely represent the tip of an iceberg," since DNA testing is unavailable to establish innocence in most criminal cases, and wrongful conviction statistics do not include those false confessions disproved before or at trial. Saul

M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. AND HUM. BEHAV. 3 (2009).

Experts studying the phenomenon of false confessions have identified various factors that are associated with an increased risk that innocent people will falsely incriminate themselves in response to police interrogation. These risk factors are categorized broadly into the "dispositional" characteristics of the confessor (such as youth or cognitive disability) and the "situational" circumstances of the interrogation itself (such as the police interrogation tactics or the environment in which the interrogation occurred). *See id.* at 3, 4.

Protection of the right against self-incrimination in an interrogation setting is critical because, overwhelmingly, interrogating officers are trained to use the "Reid Technique" of interrogation—a technique that is inherently coercive and utilizes a variety of tactics that are recognized "situational" risk factors for false confessions. *See id*. at 7. Named after one of its founders, John Reid, the Reid Technique has been the "most widely publicized and probably most widely used" interrogation method in the United States since its inception in the 1960s. Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L. J. 791, 808 (2006). The Reid Technique instructs officers to isolate the suspect in a "small private room, which increases his or her anxiety and incentive to escape." Kassin et al., *Police-Induced Confessions*, at 7. Interrogating officers then engage in a nine-step process that is intended to "lead suspects to see confession as an expedient means of escape." *Id*. Although the Reid Technique is effective in eliciting confessions, it relies on interrogation

tactics that pose a risk of "the ultimate failure of the suspect interview process—a false confession from an innocent suspect"; in fact, the method's guilt-presumptive, psychologically-manipulative tactics have coerced many innocent people to falsely confess. Joseph Eastwood & Kerry Watkins, *Psychological Persuasion in Suspect Interviews*, 11 INVESTIGATIVE INTERVIEWING RSCH. & PRAC. J. 54, 57 (2021) (noting that "[t]he propensity for Reid-style approaches to create false confessions has been demonstrated within both laboratory paradigms and real-world cases") (citation omitted). For example, the Reid Technique instructs officers to "develop a 'minimizing theme' that, among other things, downplays the moral seriousness of the offense." Timothy J. Luke & Fabiana Alceste, *The Mechanisms of Minimization: How Interrogation Tactics Suggest Lenient Sentencing Through Pragmatic Implication*, 44 L. & HUM. BEHAV. 266, 267 (2020). Such "minimization" tactics increase the risk of false confession because such tactics have been shown to communicate "by implication that leniency in punishment is forthcoming upon confession." Kassin et al., *Police-Induced Confessions*, at 3, 12.

Certainly, adults without any mental health or cognitive issues can and do falsely confess as a result of these and other psychologically coercive police tactics. However, individuals with "dispositional" risk factors—such as youth, intellectual disability, or certain psychiatric diagnoses—are at an increased risk of falsely confessing in response to such tactics. *Id.* at 19-22.

Once a false confession is uttered in an interrogation room, the confession typically functions as the catalyst to a chain of events that ends in wrongful conviction, as the confession tends to bias the investigative process. Following a confession, police often

"close the investigation, deem the case solved, and overlook exculpatory information—even if the confession is internally inconsistent, contradicted by external evidence, or the product of coercive interrogation." Saul M. Kassin, *Why Confessions Trump Innocence*, 67 AM. PSYCHOLOGIST 431, 433 (2012) (citations omitted). False confessions can also "taint[] the perceptions of . . . forensic experts." *Id*. at 436. Indeed, a 2006 study found that latent fingerprint experts changed 17% of their previously correct matches or exclusions when presented with a false confession. *Id.* at 437. As one expert aptly stated, "no other class of evidence is so profoundly prejudicial" as the false confession, which has a "strong biasing effect on the perceptions and decision-making of criminal justice officials." Richard A. Leo, *False Confessions: Causes, Consequences, and Implications,* 37 J. AM. ACAD. PSYCHIATRY L 332, 340 (2009) (citation omitted).

Moreover, "confessions have more impact on verdicts" than most other forms of evidence, including eyewitness identification. Sara C. Appleby & Saul M. Kassin, *When Self-Report Trumps Science: Effects of Confessions, DNA, and Prosecutorial Theories on Perceptions of Guilt*, 22 PSYCH. PUB. POL'Y & L. 127, 127 (2016). Even in the face of compelling evidence of innocence, if a false confession is admitted into evidence, then the innocent "confessor" is at significant risk of wrongful conviction. *Id.* at 127-29. In fact, 22% of exonerees whose wrongful convictions were based on confession evidence now known to be false were convicted despite the availability of exculpatory DNA evidence at the time of trial. *See* DNA Exonerations in the United States, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last viewed Nov. 18, 2024); *see also* Appleby & Kassin, *When Self-Report Trumps Science*, *supra*, at

127-28 (discussing a report analyzing nineteen cases in which innocent confessors to rape and/or murder were tried and convicted despite exculpatory DNA tests).

Take, for example, the case of Juan Rivera.[4] In 1992, based on an unreliable tip from a police informant, Mr. Rivera was arrested for the tragic rape and murder of an 11-year-old girl in Waukegan, Illinois. Mr. Rivera, who was 19 years old at the time, was interrogated by police over the course of four days. He repeatedly insisted on his innocence until, at the end of the fourth day of interrogation, he broke down, and ultimately agreed to sign two written confessions. Despite the absence of any forensic evidence connecting Mr. Rivera to the crime, a jury convicted Mr. Rivera based on his confession. Thereafter, (as a result of unrelated trial errors), his conviction was vacated, and he was retried twice more. At all three of his trials, juries were persuaded by Mr. Rivera's false confessions, despite his young age and the extensive length of the days-long interrogation. Strikingly, DNA testing conducted between Mr. Rivera's second and third trials revealed that the male biological fluid found on the young victim belonged to an unknown man, *and not Mr. Rivera*. The jury that was presented with this exculpatory DNA evidence was nonetheless persuaded by Mr. Rivera's confession and convicted him anyway.

It was not until 2011—after Mr. Rivera spent nearly two decades wrongfully imprisoned—that an appellate court overturned his conviction, holding that his conviction was "unjustified and cannot stand." *People v. Rivera*, 962 N.E.2d 53, 67 (Ill. App. Ct.

[4] *See* Juan Rivera, THE NATIONAL REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3850 (last accessed November 18, 2024).

2011). His conviction was overturned, the State dropped charges, and Mr. Rivera was released and awarded a certificate of innocence. Mr. Rivera, an innocent man, spent 20 years in prison, despite available evidence of innocence, based on the persuasive power of his false confession.

False confessions not only convict the innocent, but are also a threat to public safety, since the true perpetrator is left free to commit additional crimes. *See* DNA Exonerations in the United State*s*, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last viewed Nov. 18, 2024) (noting that the real perpetrator was identified in 75% of false confession cases that were uncovered through post-conviction DNA testing, and that, while the innocent person was wrongfully prosecuted and incarcerated, those true perpetrators went on to commit "48 additional crimes for which they were convicted, including 25 murders, 14 rapes, and 9 other violent crimes"). Given this tragic injustice that typically follows the elicitation of a false confession, it is critical that courts fashion rules to ensure the effectiveness of the procedural protections provided by *Miranda*.

II. People Who Are Most Vulnerable to Interrogation Coercion Also Have Diminished Capacity to Understand and Invoke *Miranda.*

Experts studying false confessions overwhelmingly agree that children and adolescents, people with "intellectual disabilities" or "diagnosed psychological disorders," as well as "individuals with compliant or suggestible personalities," are "particularly vulnerable to influence during an interrogation." Saul M. Kassin et al., *On the General Acceptance of Confessions Research: Opinions of the Scientific Community*, 73 AM.

PSYCHOLOGIST 63, 70-72 (2018). These same groups of people are less likely than the average adult to comprehend and clearly assert their *Miranda* rights, leaving them without meaningful protection from coercion in the interrogation room.

When the *Davis* Court declined to impose a requirement under the U.S. Constitution for interrogating officers to stop and clarify ambiguous invocations of the right to counsel, it recognized that its holding "might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present." 512 U.S. at 460. In the 30 years since *Davis*, additional social science research has provided further proof that many people—particularly members of the populations who are at a heightened risk of falsely confessing—may not feel at liberty to invoke their rights assertively or unequivocally.[5] Moreover, scientific study has demonstrated conclusively that all subjects of interrogation, but especially those with particular vulnerabilities, often do not grasp the functional meaning of their *Miranda* rights and waiver, and thus are unlikely to have the capacity to unequivocally invoke their rights.

[5] The National Association of Criminal Defense Lawyers (NACDL) submitted an *amicus* brief in *Davis* and discussed certain social science research available at that time. *See* Brief for National Association of Criminal Defense Lawyers, as Amicus Curiae Supporting Petitioner, *Davis v United States*, 512 U.S. 452 (1994) (No. 92-1949), 1993 U.S. S. Ct. Briefs LEXIS 650. Although the NACDL discussed some of the social science research discussed below—such as the use of indirect and non-assertive language used by certain populations, the power imbalance in police interrogations, and the deceptive tactics used by police—it did not address the social science showing how many individuals misunderstand the meaning and function of their *Miranda* rights. Moreover, the *Davis* Court did not, and could not, have the benefit of the additional social science research that has been conducted in the 30 years since that decision.

Despite the *Miranda* rule's underlying purpose of providing suspects with the knowledge and rights necessary to prevent or disengage from a coercive interrogation if they so choose, studies have shown that "people continue to harbor misconceptions about the meaning and function of *Miranda* rights." Laura Smalarz, Kyle C. Scherr, and Saul M. Kassin, *Miranda at 50: A Psychological Analysis*, 25 J. CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 455, 456 (2016). "Despite the ubiquity of *Miranda* warnings in television dramas that may lead the public to believe that everyone knows their rights, the evidence gathered since *Davis* is to the contrary." *Purcell*, 203 A.3d at 563 (citing social science articles). In fact, the inaccurate depictions of *Miranda* warnings in television, movies, and other media have added to individuals' misunderstanding of the nature and scope of their rights, which "may lead to uncertainty and hesitation in invocations or discourage invocations altogether." Ian Farrell & Nancy Leong, *How Crime Dramas Undermine Miranda*, 14 UC IRVINE L. REV. 211, 214, 254-55 (2024). Indeed, "[e]ven in favorable conditions, educated adults in the US . . . struggle to fully comprehend their rights[.]" Saul M. Kassin, Kyle C. Scherr, and Fabiana Alceste, *The Right to Remain Silent: Realities and Illusions*, in THE ROUTLEDGE INTERNATIONAL HANDBOOK OF LEGAL AND INVESTIGATIVE PSYCHOLOGY 4 (Ray Bull and Iris Blandón-Gitlin eds., 2019) (citations omitted); *see also Purcell*, 203 A.3d at 564 (noting that "even the [well educated] have difficulty understanding their *Miranda* warnings" (quotation marks and citations omitted; brackets in original)). People arrested and subjected to interrogations are, often, "not as well educated" when compared to the average adult and have "significantly lower" literacy levels as compared to the general public, further hindering

their *Miranda* comprehension. Charles D. Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519, 1568 (2008). This is especially true in the context of "the right to counsel and the appointment of counsel," which "typically requires a much higher level of ability for substantial understanding than other components" of the *Miranda* warnings. *Id.* at 1567. The stress associated with police interrogation and accusations of wrongdoing further undermine *Miranda* comprehension. Kyle C. Scherr and Stephanie Madon, *"Go Ahead and Sign": An Experimental Examination of Miranda Waivers and Comprehension*, 37 LAW HUM. BEHAV. 208, 209 (2013). Indeed, a recent study found that stress diminished comprehension levels of "highly functioning college students down to those of . . . adults diagnosed as psychotic." Smalarz et al., *Miranda at 50*, at 456. Given the inherently stressful nature of custodial interrogations, studies have shown that "comprehension levels fall dramatically" for detained individuals. Kassin et al., *The Right to Remain Silent*, at 4.

Moreover, most people, young and old, innocent or otherwise, are intimidated by police and unlikely to forcefully and clearly assert their rights. Nowhere is this more true than in an interrogation room. Thus, "[t]o avoid offending those in power and for other reasons, suspects may articulate their positions in tentative ways." Weisselberg, *Mourning Miranda*, at 1588. Research reveals that "[i]n the real world, instances of suspects invoking their rights hesitantly and ambiguously are legion, demonstrating that most people are not sure whether they should invoke their rights and do not know what they need to do to if they want to invoke." Farrell & Leong, *How Crime Dramas Undermine Miranda*, at 255. As the Alaska Court of Appeals recognized, "[i]f no reasonable effort were made to clarify equivocal requests for counsel during custodial interrogations, only those who are most

assertive and articulate would be capable of effectively exercising their [right to counsel]. Little would remain of *Miranda*'s declaration that the right to counsel may be invoked 'in any manner.'" *Hampel*, 706 P.2d at 1180 (quoting *Miranda* 384 U.S. at 444). In addition, those who do not speak English as their first language may have additional barriers to comprehension and invocation. *Purcell*, 203 A.3d at 563-64; Floralynn Einesman, *Confessions and Culture: The Interaction of Miranda and Diversity*, 90 J. CRIM. L. & CRIMINOLOGY 1, 39 (1999); Weisselberg, *Mourning Miranda*, at 1572-73 ("[N]on-native speakers, as well as people raised in countries with different justice systems, may have particular difficulty understanding the language of warnings and the role of lawyers and others in our criminal justice system.") (citation omitted). Moreover, research has suggested that women and people of color may be less likely to use assertive, unequivocal language when attempting to invoke their rights and may, instead, use permissive language or nonstandard terms. Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114(1) MICH. L. REV. 1, 19 (2015). As Justice Souter aptly noted in a concurring opinion, "[s]ocial science confirms what common sense would suggest, that individuals who feel intimidated or powerless are more likely to speak in equivocal or nonstandard terms when no ambiguity or equivocation is meant." *Davis*, 512 U.S. at 470 n.4 (Souter, J., concurring).

While the science reveals that even adults with average education and intelligence levels may have difficulty clearly and unequivocally invoking their *Miranda* rights in the context of a high-stress police interrogation, the problem is all the more acute for those with "dispositional" risk factors for false confession. For example, children and

adolescents, whose brains are still developing and maturing, not only have an increased susceptibility to interrogation coercion, but are also far less likely than adults to grasp the meaning and function of their fundamental rights in the interrogation room. Naomi E. S. Goldstein et al., *Evaluation of Miranda Waiver Capacity*, in APA HANDBOOK OF PSYCHOLOGY AND JUVENILE JUSTICE 467, 475 (Kirk Heilbrun ed., 2016); Hannah R. Gourdie, Note, *The Guiding Hand of Counsel, For a Price: Juvenile Public Defender Fees and Their Effects*, 62 WM. & MARY L. REV. 999, 1022-23 (2021). "The single most important factor that predicts [suspects'] comprehension of [their] *Miranda* rights is age." Maryam Ahranjani, *School "Safety" Measures Jump Constitutional Guardrails,* 44 SEATTLE U. L. REV. 273, 290 (2021). Even if they comprehend the literal meaning of *Miranda* warnings, children and adolescents may not comprehend the warnings' "relevan[ce] to the situation they are in," nor appreciate that they could actually exercise their rights in the face of a police officer's demand for compliance. Kassin et al, *Police-Induced Confessions*, at 8. Indeed, juveniles "have greater difficulty than adults conceiving of a right as an absolute entitlement that they can exercise without adverse consequences." Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. OF CRIM. L. & CRIMINOLOGY 219, 229-30 (2006). And, significantly, when attempting to invoke their *Miranda* rights, young people "may speak indirectly or assert [their] rights tentatively to avoid conflict with those in power." Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J. L. & PUB. POL'Y 395, 412 (2013).

Likewise, people with intellectual disabilities are at heightened risk of false confession, as they are "prone to fall victim to police tactics, such as the use of leading questions and coercive statements during interrogation . . . [and a] . . . need to please authority figures." Sydnee L. Erickson, et. al., *The Predictive Power of Intelligence*: *Miranda Abilities of Individuals with Intellectual Disability,* 44 L. & HUM. BEHAV. 60, 62 (2019). Scientific study has demonstrated that such individuals also "display remarkably low abilities relevant to comprehending *Miranda* rights." *Id.* at 66.

Thus, while many people struggle to comprehend and clearly assert their rights in the interrogation room, those most likely to falsely confess in the fact of police coercion are at significant disadvantage. *See* Kassin et al., *The Right to Remain Silent*, at 5.

III. To Provide Adequate Safeguards against False Confessions, Any Invocation of the Right to Counsel, However Ambiguous, Must Be Scrupulously Honored under Art. 1 § 9 of the Alaska Constitution.

The law in Alaska regarding the fundamental right to counsel is, and should continue to be, straightforward: when a suspect makes *any* indication of a desire for an attorney, the right to counsel is triggered and questioning must cease. Officers may ask questions, if needed, to "seek clarification of the suspect's desires[,] [but may not] . . . utilize the guise of clarification as a subterfuge for coercion or intimidation." *Giacomazzi*, 633 P.2d at 222 (internal citation and quotation marks omitted). Such a rule is especially important to protect those most vulnerable to police coercion, and, consequently, at a heightened risk of falsely confessing.

As noted above, the U.S. Supreme Court in *Davis* "decline[d] to adopt a rule requiring officers to ask clarifying questions" when "a suspect makes a statement that *might*

be a request for an attorney" after the suspect waived his or her *Miranda* rights. *Davis*, 512 U.S. at 461. Yet, as this Court has explained, federal constitutional law sets the floor, not the ceiling, for rights of Alaskans. *See Scott*, 519 P.2d at 783 (citing *Baker v. Fairbanks*, 471 P.2d 386, 401-02 (Alaska 1970) (noting that the Court is "not bound to follow blindly a federal constitutional construction of a fundamental principle if [they] are convinced that the result is based on unsound reason or logic").

Because of the federal rule's inadequate protection of the right to counsel in interrogation, eight state supreme courts around the country have departed from the *Davis* rule. The Supreme Court of Connecticut, for example, declined to follow *Davis* because, even when "a custodial suspect understands the literal meaning of the words contained in the warnings, the constitutional principles embedded in those words are far from obvious" and suspects may not "know the unequivocal manner in which they would have to exercise those rights to give them effect, a piece of significant information that is not shared with them when they are given the warnings or before they are asked to waive their rights." *Purcell*, 203 A.3d at 563-64 (emphasis omitted). Accordingly, the court concluded that a rule requiring suspects to make unequivocal requests for counsel, as required under federal law, disadvantages vulnerable individuals, including young people, "the disabled," and those for whom English is a second language. *Id.* at 564-66. The *Purcell* court further explained that, in *Davis*, the U.S. Supreme Court failed "to appreciate that its rule would disproportionately disadvantage certain suspect or quasi-suspect classes, who more commonly rely on indirect speech patterns." *Id.* at 564. Thus, under Connecticut law, "if a suspect makes an equivocal statement that arguably can be construed as a request for

counsel, interrogation must cease except for narrow questions designed to clarify the earlier statement and the suspect's desire for counsel." *Id.* at 567 (quotation marks and citations omitted).

The Supreme Court of New Jersey likewise recently reaffirmed its "reject[ion of] the federal standard enunciated by the Supreme Court in *Davis* and found 'it prudent to continue to apply [its] precedent' requiring that interrogators conduct an appropriate inquiry into a suspect's ambiguous invocation of the right to counsel." *State v. Gonzalez*, 268 A.3d 329, 339 (N.J. 2022) (quoting *State v. Chew*, 695 A.2d 1301, 1318 (N.J. 1997)). The *Gonzalez* court continued to embrace "New Jersey's more flexible approach" whereby "a suspect need not be articulate, clear, or explicit in requesting counsel; any indication of a desire for counsel, however ambiguous, will trigger entitlement to counsel." *Id.* (internal quotation marks and citation omitted).

Six other states have similarly declined to follow *Davis* and provide its citizens with more robust protections than the bare minimum required under federal rule.[6] For example, the Mississippi Supreme Court, rejecting *Davis*, reasoned that a rule that honors ambiguous invocations "adequately guards the right to counsel for custodial suspects who may not know that the right to counsel must be unambiguously asserted, or that the right exists regardless of the amount of time it might take to obtain counsel." *Downey v. State*, 144 So.

[6] *Downey v. State*, 144 So.3d 146, 151-52 (Miss. 2014); *Commonwealth v. Santos*, 974 N.E.2d 1, 14 (Mass. 2012); *State v. Risk*, 598 N.W.2d 642, 648-49 (Minn. 1999); *Steckel v. State*, 711 A.2d 5, 10-11 (Del. 1998); *State v. Charboneau*, 913 P.2d 308, 317 (Or. 1996); *State v. Hoey*, 881 P.2d 504, 523 (Haw. 1994).

3d 146, 151 (Miss. 2014). Similarly, the Minnesota Supreme Court rejected *Davis* and reasoned that it does not "cavalierly interpret [its] state constitution more expansively than the United States Supreme Court has interpreted the federal constitution," but that a stop and clarify rule is consistent with its "long tradition of assuring the right to counsel." *State v. Risk*, 598 N.W.2d 642, 649 (Minn. 1999) (cleaned up).

In an analogous context, state supreme courts have rejected federal rules that limit the rights of the accused in interrogation rooms, where the federal rule may allow an officer to exploit a suspect's vulnerability during an uncounseled interrogation. For example, West Virginia's high court declined to follow the federal rule articulated in *Montejo v. Louisiana*,[7] which allows a subject of interrogation to waive their Sixth Amendment right to counsel—even after the initiation of the criminal prosecution and once that right has

[7] In 2009, the Supreme Court held that, under the federal Sixth Amendment right to counsel, an individual who is already represented by counsel may waive this constitutional right when approached and questioned by police and that "the decision to waive need not itself be counseled." *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625 (1986), which had established a rule that "forbid[] police to initiate interrogation of a criminal defendant once he has requested counsel at an arraignment or similar proceeding"). Accordingly, under current federal law, a represented person can be approached by law enforcement and interrogated without their lawyer present, even after the individual's right to counsel has attached, so long as the individual waives their *Miranda* rights voluntarily, knowingly, and intelligently. *Id.* ("[W]hen a defendant is read his *Miranda* rights . . . and agrees to waive those rights, that typically does the trick[.]"). At least three state supreme courts have rejected the *Montejo* rule, finding that it does not provide ample protection of the right to counsel in interrogation. See *Keysor v. Commonwealth*, 486 S.W.3d 273, 281 (Ky. 2016); *State v. Lawson*, 296 Kan. 1084, 1098–99 (2013); *State v. Bevel*, 231 W. Va. 346, 355–56 (2013).

formally attached[8]—by simply executing an uncounseled *Miranda* waiver. *State v. Bevel*, 231 W. Va. 346, 355–56 (2013). The West Virginia Supreme Court found that the federal rule was insufficiently protective of an individual's right to counsel in interrogation and reasoned that

> no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights.

Id. at 355–56 (quotation omitted). Likewise, the Supreme Court of Kentucky declined to follow the *Montejo* rule, reasoning that it allowed interrogating officers to "entice an unsuspecting defendant with favors his attorney cannot obtain, like alluring assurances of better outcomes and offers of leniency in exchange for cooperative waivers." *Keysor v. Commonwealth*, 486 S.W.3d 273, 281 (Ky 2016). Here too the federal *Davis* rule provides officers an "easy opportunity to adeptly place a wedge between the accused and his lawyer," *id.*, by dismissing a suspect's apparent request to consult counsel as an, allegedly, ambiguous invocation. *See e.g.*, *State v. Demesme*, 228 So. 3d 1206 (La. 2017) (holding that officers were permitted to continue their interrogation when the suspect said "why don't you just give me a lawyer[,] dog"—a statement which officers, and a reviewing court, interpreted as an ambiguous request for counsel because it, purportedly, could have been interpreted as the suspect's request for a "lawyer dog").

[8] The U.S. Supreme Court has "firmly established" that, under federal law, the Sixth Amendment right to counsel only attaches after the government's initiation of "adversary judicial proceedings." *United States v. Gouveia*, 467 U.S. 180, 187 (1984).

This Court should not "blindly adhere to changes in federal constitutional law" following a U.S. Supreme Court decision that has "'forced a serious reevaluation of . . . fundamentals.'" *Munson*, 123 P.3d at 1049, n.48 (quoting *Gonzalez*, 825 P.2d at 931). Rather, to help safeguard innocent people from the type of police coercion that can elicit false confessions, this Court should decline to follow the federal *Davis* rule, and require officers in this State to scrupulously honor any ambiguous invocations of the right to counsel.

CONCLUSION

Honoring ambiguous or equivocal invocations for counsel made by individuals under the high stress of police interrogation is especially important to protect those most vulnerable to police coercion and, consequently, at a heightened risk for false confessions. To help protect this State's most vulnerable populations from wrongful conviction, this Court should affirm the Court of Appeals' ruling and hold that under Article 1, § 9 of the Alaska Constitution, police interrogation must cease, but for narrow clarifying questions, upon any request for counsel, even if purportedly ambiguous or equivocal.

Respectfully submitted, this 2nd day of December, 2024.

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