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STATE OF WASHINGTON

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NO. 80391-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CLERK

STATE OF WASHINGTON,

Respondent,

v.

JAMES DANIEL RADCLIFFE,

Petitioner.

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FILED
SUPREME COURT
STATE OF WASHINGTON

**BRIEF OF *AMICUS CURIAE* OF THE AMERICAN CIVIL
LIBERTIES UNION OF WASHINGTON**

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I. SUMMARY OF ARGUMENT AND PRELIMINARY

STATEMENT

The issue before the Court is whether this Court will adhere to its 1982 holding in *State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (1982), in which this Court concluded, for sound reasons still valid today, that when a suspect in custody makes an equivocal request for counsel, any further interrogation must be limited to questions seeking to *clarify* the suspect's desire to consult with counsel before being subjected to any further questioning.

Nothing in *Robtoy* suggested that *all* questioning had to cease in the face of the suspect's equivocal reference to counsel. Moreover, nothing in *Robtoy* would prohibit a return to more focused interrogation once the issue of waiver of the right to counsel was fully explored and concluded with an explicit waiver by the suspect, done knowingly, intelligently, and voluntarily, which would then corroborate the suspect's desire to resume the conversation with police.

This Court noted in *Robtoy* that permitting law enforcement officers to question the suspect to determine his or her wishes provided appropriate protections, in light of the lengthy history in this Court's jurisprudence of "indulg[ing] in every reasonable presumption against

waiver” of the right to counsel. *Robtoy*, 98 Wn.2d at 40 (quoting *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)).

Robtoy was good law in 1982, and remains good law in 2008, notwithstanding the decision of the United States Supreme Court in *Davis v. United States*, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994).

As this Court knows, and as the parties to this action have fully briefed, the *Davis* Court concluded that equivocal requests for counsel do not warrant a cessation of interrogation focused on the investigation at hand. The *Davis* Court departed from bedrock constitutional principles and shifted the burden away from the police and away from the indulgence of every reasonable presumption against waiver. Instead, the *Davis* Court placed the entire burden onto the suspect, imposing on the suspect the obligation to articulate, in the clearest of terms, the desire to consult with counsel prior to submitting to any further interrogation.

In this Brief, *Amicus* writes to urge this Court to reject this dramatic paradigmatic shift of responsibility to the suspect, which would require a rejection of the notion, which has served the people of the State of Washington so well for so long, that courts will err on the side of *rejecting* waiver of fundamental constitutional rights, unless and until the waiver has been clearly, explicitly, and affirmatively established.

The *Robtoy* framework has worked well for more than a quarter century, and nothing suggested by the State justifies adopting the draconian *Davis* approach under Article I, Section 9 of the Washington State Constitution.

A. Interest of Amicus Curiae in These Proceedings

As noted in the accompanying “Motion for Leave to File *Amicus Curiae* Brief,” the ACLU is a statewide, nonpartisan, nonprofit organization with over 20,000 members, dedicated to the preservation and defense of constitutional and civil liberties, including, among many others, safeguards against coercive police questioning and the essential role of counsel in vindicating the constitutional rights of the accused.

The ACLU strongly supports adherence to the provisions of Article 1, Section 9 of the Washington State Constitution, which protects a suspect or an accused from being compelled to give evidence against him or herself.

Amicus writes in support of Petitioner’s position that this Court’s holding in *Robtoy* is still the law in the State of Washington, and should remain the law in the State of Washington, notwithstanding the holding in *Davis*.

B. Amicus Curiae’s Familiarity with the Issues and Scope of the Arguments to be Presented by the Parties

Prior to preparing and submitting this Brief of *Amicus Curiae*, *Amicus* has reviewed the following documents and pleadings:

1. “Findings of Fact and Conclusions of Law Re CrR 3.5 Hearing,” entered in the Thurston County Superior Court on November 4, 2005;
2. “Opening Brief of Appellant” filed in the Court of Appeals (Division Two) and dated October 4, 2006;
3. “Respondent’s Brief,” filed in the Court of Appeals and dated December 22, 2006;
4. “Part Published Opinion” issued by the Court of Appeals (Division Two), filed on June 12, 2007;
5. “Petition for Review” submitted by Petitioner and dated July 10, 2007;
6. “Supplemental Brief of Respondent – State of Washington,” dated May 5, 2008; and
7. “Supplemental Brief of Petitioner,” accepted for filing in this Court on May 6, 2008.

Having reviewed the foregoing, and having done its own independent research, *Amicus* is familiar with the issues and the arguments of the parties.

II. ARGUMENTS OF AMICUS CURIAE

A. The Underlying Principles of *Miranda* Provide Important Guidance Supporting the *Robtoy* Rule.

In *Miranda v. Arizona*, 384 U.S. 436, 479, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), the United States Supreme Court determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the accused that he has the right to remain silent and the right to the presence of an attorney. If the accused "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." If he or she requests counsel, "the interrogation must cease until an attorney is present." *Id.* at 473-74.

Miranda, of course, clearly recognized that the person being interrogated may validly waive the right to counsel, but the burden shifted to the State to establish that the suspect validly waived the privilege against self-incrimination and the right to retained or appointed counsel. *See Escobedo v. Illinois*, 378 U.S. 478, 490 n.14, 12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964). This Court in *Robtoy* properly adhered to the requirement that a valid waiver of important constitutional rights be proven by the State. *Robtoy* recognized that the need for the State to bear this burden of proving waiver is particularly strong in the context of police

interrogations, which involve inherently coercive circumstances.

Miranda, supra.

B. Cases Following *Miranda* Shed Further Light on the Validity of the *Robtoy* Rule.

Whether a suspect properly waived the privilege against self-incrimination depends “upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” *Edwards v. Arizona*, 451 U.S. 477, 482, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981).

In *State v. Pierce*, 94 Wn.2d 345, 618 P.2d 62 (1980), this Court determined that such a waiver was possible when the right to cut off questioning was scrupulously honored. *Pierce* involved the question of whether a defendant could validly waive his previously asserted right to counsel when questioning was later reinitiated by the police. The *Pierce* Court upheld a waiver because the police did not engage in any further actions that amounted to interrogation before obtaining a valid waiver or assuring the presence of an attorney, and the police did not engage in any tactics that tended or attempted to coerce the suspect to change his mind, thus the subsequent waiver was knowing and voluntary. *Id.* at 352.

The following year, the United States Supreme Court decided *Edwards v. Arizona, supra.* The *Edwards* Court concluded that a suspect can validly waive the right to counsel after he or she has initially asserted

it, only if the *suspect* initiates further communication, exchanges, or reestablishes a “line of communication with the police.” *Edwards, supra*, 451 U.S. at 484-85. This is so, held the Court in *Edwards*, because it would be “inconsistent with *Miranda* and its progeny for the authorities, at their instance, to re-interrogate an accused in custody if he has clearly asserted his right to counsel.” *Id.* at 485.

Pierce and *Edwards* recognized the importance of the police “scrupulously honoring” a suspect's invocation of his or her right to silence and/or right to counsel during interrogation. It was against this backdrop that this Court decided *Robtoy* in the year following *Edwards*.

In deciding *Robtoy*, this Court was well-aware of some federal decisions that bore on the issue [e.g., *inter alia*, *Nash v. Estelle*, 597 F.2d 513 (5th Cir. 1979) and *Thompson v. Wainwright*, 601 F.2d 768 (5th Cir. 1979)]. These cases provided guidance as to how a suspect's question about his or her rights should be handled by the police.

The Fifth Circuit in *Nash* noted that when a suspect, who has been informed of his rights, expresses both a desire for counsel and a desire to continue the interview without the presence of counsel, it is permissible for the police officer conducting the interrogation to inquire further, but for the purpose of clarifying the suspect's wishes. *Nash*, at 517-18.

Any further questioning after the equivocal assertion of the right to counsel must be strictly confined to clarifying the suspect's request. Whenever even an equivocal request for an attorney is made by a suspect during custodial interrogation, the scope of that interrogation is immediately narrowed to one subject, and one subject only. Further questioning thereafter must be limited to clarifying that request until it is clarified. *Thompson*, supra, 601 F.2d at 771.

C. The *Robtoy* Rule Properly Accommodates Both the Important Interests of the State and the Suspect's Constitutional Rights.

In *Robtoy*, the trial court found that Mr. Robtoy's statement was not an unequivocal request for an attorney. The court there based this finding on the testimony of the interrogating police detective, who testified as follows:

A: . . . He was--like he appeared to be thinking like this (demonstrating), and he said that--he said, "Maybe I should call my attorney." I recall that he waited for a while, and he paused there, and I told him, you know, "Mike, if you say you want your attorney, this conversation ends right here," and he said that he knew that.

Q: Who did he direct that comment at or towards?

A: Well, he--me and Rusty [Simpson] were in the room, but he directed that comment--It was kind of like a thought to himself. It was kind of like "I know I could do that. Maybe I should, but I'm still -" You know, like he was still considering "I'm going to -" like he knew he had this problem, and it wasn't going to go away, and "I want to tell somebody about it."

Q: Did he ask Trooper Simpson for an attorney?

A: He did not.

Q: Did he ask you for an attorney?

A: No.

Q: How long after he said this did the pause last?

A: He--it seemed to me like he paused for about 20 seconds. He didn't say anything, and I told him--first I told him that "Do you understand that once you say you want an attorney, you know, we have to stop talking." It's going to be difficult to change and go back and forth.

Q: What did he say to that?

A: Said that he knew that.

Q: Okay.

A: Then he paused, and he seemed to have difficulty starting to talk, so I told him that what I was going to do, I'd go ahead and start typing the questions, and I would try to make them as easy as possible getting into this thing and that if we arrived at a point where he didn't want to answer any questions, he didn't want to say anything more or he wanted his attorney, to say so, and so he said, "Okay."

Robtoy, supra, 98 Wn.2d at 40-41.

This Court concluded that the detective's questioning was properly within the scope of the *Nash* rule, because after Mr. Robtoy made his equivocal statement regarding an attorney, the detective sought clarification of Mr. Robtoy's words. This Court pointed out that there was no further interrogation about any offense until the detective was satisfied

that Mr. Robtoy expressed no present desire to have the presence of counsel. Moreover, this Court took note of the fact that the detective reminded Mr. Robtoy that he would cease questioning immediately if Mr. Robtoy decided at a later point that he wanted to remain silent or speak with a lawyer. *Robtoy, supra*, 98 Wn.2d at 41. The *Robtoy* Court recognized that this procedure, permitting law enforcement officers to question the suspect but limited to determining his or her wishes, provided appropriate protections, in light of the lengthy history in this Court's jurisprudence of "indulg[ing] in every reasonable presumption against waiver" of the right to counsel. *Id.* at 40 (quoting *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)).

By contrast, in the instant case, the detective testified that after telling Petitioner that the State would be subjecting the alleged victim's clothes to DNA testing to trace the presence of ejaculate and its donor, that detective stated, with regard to Petitioner's response, "[b]asically at that time he said that he didn't know how much trouble he was in and didn't know if he needed a lawyer." RP (10.3.05) at 99. The detective replied that he could not give Petitioner legal advice, and offered to read his rights to him. RP (10.3.05) at 99.

The detective went on to indicate that he told Petitioner that "if he didn't feel comfortable giving a taped statement, he could write me a

statement out, and if he didn't [feel] comfortable doing that, he could just tell me it and I would type it into my report." RP (10.3.05) at 99-100, and that Petitioner told him that of those choices, he would talk to the detective about the allegations. RP (10.3.05) at 100.

Petitioner did not re-initiate the questioning. Instead, the detective interrogating him forced the issue by telling Petitioner that the "ball was in his court," and gave him four possible choices as how to proceed, three of which involved making a statement to police. Those four were (1) the detective would re-read Petitioner's *Miranda* rights, and, if he had any questions, to reference those rights; (2) make a taped statement; (3) make a written statement; or (4) "just tell me it and I would type it into my report." RP at 99-100.

The detective did not tell Petitioner (unlike the detective who interrogated Mr. Robtoy), that if he wanted an attorney, the interrogation would stop until he got one, nor did the detective ask Petitioner if he actually wanted an attorney. Moreover, after Petitioner told the detective that "he didn't know how much trouble he was in and he did not know if he needed a lawyer," it was plain that the detective steered the suspect in the direction of a waiver, rather than attempting to clarify the suspect's comment about needing an attorney, in violation of the *Robtoy* rule. The circumstances of this case illustrate why adherence to the *Robtoy* rule, for

this suspect and all others, is a critical safeguard to ensuring that statements obtained by police are based only on valid waivers of constitutional rights.

D. Serious Structural Flaws in the Holding of *Davis v. United States* Demonstrate the Validity of the *Robtoy* Rule.

The majority in the *Davis* decision, *supra*, approved of what it called an “objective inquiry” into whether or not a suspect’s halting reference to an attorney should be interpreted as an invocation of the right to counsel under *Miranda*. *Davis* held that “[i]f the statement fails to meet the requisite level of clarity,” the interrogator can treat it as ambiguous and may continue questioning. The Court acknowledged that this standard allows suspects’ statements to be disregarded as an invocation of the right to counsel in cases where suspects do not “*clearly* articulate their right to counsel although they actually want to have a lawyer present.” *Davis, supra*, 512 U.S. at 459-60 (emphasis added).

The *Davis* Court noted that this “objective inquiry” into the meaning of a suspect’s uttered equivocation allows a trial court to disregard the *subjective* intent of the suspect, and instead requires that the suspect “articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” *Id.* at 459.

The *Davis* holding thus creates a “burden of clarity upon individuals in custody,” as Justice Souter noted in his concurring opinion. *Id.* at 470.

Amicus urges this Court to recognize that this shift, imposing a “burden of clarity” on the suspect, and allowing the police (and courts) to focus on the bare words themselves and not on the possible meanings or intentions behind those words, is inconsistent with the constitutional mandate of Wash. Const. Art. 1, sec. 9, because it is the rare suspect in a criminal matter, who, by virtue of education or socio-economic background, would be capable of meeting such a demanding standard of clarity.

Moreover, the *Davis* holding creates a whole new set of problems by assuming that all suspects should be held to the same burden of clarity, given the range of legal sophistication of those who are taken into custody (e.g., the college professor accused of taking indecent liberties with a student, the accountant taken into custody for suspected embezzlement, the lawyer or judge arrested for suspicion of DUI, the high school dropout accused of selling drugs, the immigrant to the United States who did not grow up watching all of the movies and television programs depicting *Miranda* warnings given in the interrogation room, etc.).

What is remarkable about the *Davis* decision is that the Court admitted that its new rule would create a contradiction between a custodial suspect's *intention* and his or her *words*, when it held that "requiring a clear assertion of the right to counsel 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." *Id.* at 460.

This acknowledgement by the *Davis* Court completely stands on its head its very own formulation, as articulated in *Brewer v. Williams, supra*, that courts must indulge every reasonable presumption against waiver.

This Court has never backed away from that presumption against waiver of a fundamental constitutional right. Thus, in keeping with that tradition, in the face of ambiguous invocations of the right to counsel, the burden must remain on law enforcement to clarify a suspect's intention before continuing questioning, when a suspect makes an ambiguous or equivocal reference to counsel.

This rule, recognized in *Robtoy*, takes account of the practical reality that a suspect may be intending to invoke his or her rights, when analyzing the meaning of a suspect's ambiguous or equivocal reference to counsel. It appropriately responds to the uncertainty raised by the

suspect's words by providing a procedure for removing the uncertainty.

The worst approach, and the least helpful, is the *Davis* standard, due to the fact that in addition to providing no practical guidance to law enforcement and the courts, the *Davis* approach rewards and protects the constitutional rights of the educated and sophisticated, but penalizes the under-educated and unsophisticated. The *Davis* standard encourages the police and the courts to overlook violations of suspects' privilege against self-incrimination, in violation of Wash. Const. Art. 1, sec. 9.

The standard this Court adopted a little over 25 years ago, which took a great deal of guidance from cases decided several years earlier by the Fifth Circuit, imposes no additional burden on police, who had grown accustomed to the jurisprudence that required them to clarify a suspect's intentions and, in the face of ambiguity, secure a definitive waiver. There is no evidence that this 25 year old burden has, for any reason, become untenable in 2008, or will become untenable in the years ahead. The Court should continue to adhere to *Robtoy*.

E. Petitioner's *Gunwall* Analysis Provides More than Adequate Justification for this Court to Decline to Follow *Davis*.

In Petitioner's "Supplemental Brief," at 13-18, he engaged in a so-called "*Gunwall* analysis" to analyze the factors articulated by this Court in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), in order to demonstrate that this Court should interpret the protections afforded by

Article 1, Section 9 of the Washington Constitution more broadly than did the United States Supreme Court in interpreting the Fifth Amendment in *Davis*.

Amicus contends that Petitioner succeeded in that regard, because there is no holding from this Court to support the suggestion that with regard to ambiguous or equivocal invocations of the right to counsel, Article 1, Section 9 protections are co-extensive with those of the Fifth Amendment to the United States Constitution.

For this reason, too, this Court should adhere to its holding in *State v. Robtoy*, which was correctly decided in 1982 and remains the appropriate standard.

F. Other State's Approaches to the *Davis* Decision.

In 1994, not long after the *Davis* decision was announced, the Supreme Court of Hawai'i explicitly rejected the *Davis* holding and refused to apply it. While it is true that that court concluded that Article 1, Section 10 of its constitution afforded its citizens greater protection than did the Fifth Amendment, it is instructive to note that court's rationale:

While the question we address today is an open one, its answer requires coherence with nearly three decades of case law addressing the relationship between police and criminal suspects in custodial interrogation.

Throughout that period, two precepts have commanded broad assent: that the *Miranda* safeguards exist to assure that the individual's right to choose between speech and

silence remains unfettered throughout the interrogation process, and that the justification for *Miranda* rules, intended to operate in the real world, must be consistent with practical realities.

A rule barring government agents from further interrogation until they determine whether a suspect's ambiguous statement was meant as a request for counsel fulfills both ambitions. It assures that a suspect's choice whether or not to deal with police through counsel will be scrupulously honored, and it faces both the real-world reasons why misunderstandings arise between suspect and interrogator and the real-world limitations on the capacity of police and trial courts to apply fine distinctions and intricate rules.

State v. Hoey, 77 Hawai'i 17, 36, 881 P.2d 504, 523 (1994).

Similarly, in *Deck v. State of Florida*, 653 So.2d 435 (Fla. App. 5th Dist. 1995), the Florida Court of Appeals, citing the *Hoey* case with approval, noted that pursuant to Article 1, Section 9 of the Florida Constitution, courts in Florida would continue to adhere to the same approach as enunciated by this Court in *Robtoy*, and would decline to follow the lead of the United States Supreme Court in *Davis*.

III. CONCLUSION

In the State of Washington, when a suspect in custody makes an equivocal or ambiguous request for counsel, or equivocally or ambiguously invokes the right to counsel, law enforcement officers must cease questions related to their investigation, and must shift their focus to seek to obtain explicit clarification of the suspect's intentions or desires with regard to the presence of counsel.

Amicus Curiae urges this Court to reject the holding of the United States Supreme Court in *Davis v. United States*, to adhere to the rule it announced in *State v. Robtoy*, and to reverse the decision of the Court of Appeals (Division Two) in the instant case.

DATED this 27th day of May, 2008.

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