No. 84660-0

Stephens, J. (dissenting)—Over 40 years ago, this court weighed the interests at stake in admitting confessions into evidence and concluded that something more than a "swearing contest" is required to prove a defendant validly waived *Miranda*[1] rights before confessing. *State v. Davis*, 73 Wn.2d 271, 287–88, 438 P.2d 185 (1968). Today, the majority thinks differently. I dissent because the concerns we expressed in *Davis* have only intensified. Substantial research confirms there is a very real risk of involuntary confessions by suspects in custody. *See, e.g.*, Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law & Hum. Behav. 3 (2010) (finding that interrogation techniques produce high rates of involuntary confessions and advocating for the recording of all custodial interrogations); Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1052–53 (2010) (finding that 42 of the 252 inmates exonerated by the innocence project had falsely confessed to their crime). In light of valid concerns about the reliability of custodial confessions, this court should maintain its

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

safeguards, not abandon them.

The majority seems to suggest that our decision in *Davis* was based on little more than blind obeisance to then-existing United States Supreme Court precedent. Thus, the majority maintains, we rested our holding on the "'heavy burden'" mandated by the Supreme Court in *Miranda*, majority at 7, but later followed *Lego v. Twomey*, 404 U.S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972), in concluding this burden is met when voluntariness is established by a preponderance of the evidence. Majority at 9-10 (citing *State v. Braun*, 82 Wn.2d 157, 162, 509 P.2d 742 (1973)).

In fact, there was more to our decision in *Davis*. This court held that Washington requires "some firmer guaranty that constitutional rights have been observed . . . than can be provided by a mere 'swearing contest' between the accused and one interrogating police officer." *Davis*, 73 Wn.2d. at 287–88. Our reasoning was based on the concern for "the dual purposes of (1) protecting the individual from the potentiality of compulsion or coercion inherent in in-custody interrogation, and (2) protecting the individual from deceptive practices of interrogation." *State v. Hensler*, 109 Wn.2d 357, 362, 745 P.2d 34 (1987) (citing *Heinemann v. Whitman County*, 105 Wn.2d 796, 806, 718 P.2d 789 (1986)). Subsequent to *Davis*, we reiterated in *State v. Erho*, 77 Wn.2d 553, 557–59, 463 P.2d 779 (1970), that judicial confidence in the voluntariness of a custodial confession rests on requiring corroborating testimony of other officers present at the scene.

The concerns we identified in *Davis* and *Erho* have not abated. False

confessions are second only to faulty eyewitness identifications in producing invalid convictions, accounting for 14 to 25 percent of all exonerations. Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. Crim. L. & Criminology 825, 844 (2010). Increasingly, research has focused on the relationship between police interrogation methods and unreliable confessions. Garrett, *supra*, at 1052–53 (noting increased awareness among scholars, courts, legislators, and law enforcement that innocent people falsely confess due to psychological pressure during interrogations). While the concern over false confessions goes well beyond the question of whether a suspect validly waived *Miranda* rights, it highlights the importance of judicial safeguards to closely examine the voluntariness of custodial confessions. After all, "[c]onfessions are among the most powerful forms of evidence introduced in a court of law." Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis. L. Rev. 479, 485.

Moreover, it remains true that when the voluntariness of a confession is tested by only a "swearing contest," "almost invariably the police officer [will be] held by the trial court to be more credible than the accused." *Davis*, 73 Wn.2d at 286. The problem is compounded by the fact that the officer testifying is "the very person who allegedly violated the accused's constitutional rights." *Id*. To ensure confidence in custodial confessions, something more than a "swearing contest" must be required to prove that defendants voluntarily waived their *Miranda* rights. That "something more" is corroborating testimony or evidence, which this court

recognized is generally within the State's ability to provide. *Davis*, 73 Wn.2d at 286–87; *Erho*, 77 Wn.2d at 558–59.

Adhering to our precedent places no undue burden on the State. As we observed in *Davis*, in contrast to the accused, police have "numerous methods and techniques of establishing corroborating testimony and independent supporting evidence." 73 Wn.2d at 287; *see also State v. Haack*, 88 Wn. App. 423, 433–35, 958 P.2d 1001 (1997) (noting the burden is to present corroborating evidence *when available*). Moreover, it is the State's burden to establish the defendant effected a knowing, intelligent, and voluntary waiver of the right to remain silent.[2]

The rule we adopted over 40 years ago in *Davis* is still sound. Confessions derived from police interrogation present special concerns, so it is wise to require something more than a "swearing contest" to prove their voluntariness. Adhering to our precedent, I would affirm the Court of Appeals and hold that absent corroborating evidence or proof that such evidence is unavailable, Abdulle's custodial confession was inadmissible.

[2] Because the State bears the burden to present corroborating evidence or explain its absence, I agree with the Court of Appeals that Abdulle did not waive his right to raise the *Davis* issue by failing to argue it below. *State v. Abdulle*, 155 Wn. App 1046, 2010 WL 1756792, at *3. The majority does not state any quarrel with this conclusion.

AUTHOR:
Justice Debra L. Stephens

WE CONCUR:

Justice Charles W. Johnson

Justice Tom Chambers

Justice Mary E. Fairhurst