Appellate Brief Writing
Research, then research again

- Research *before* outlining
- Research *after* outline

- Research = 40% (30% Outlining, 30% writing)
- Importance of secondary resources to (1) gain a better understanding of the issue; (2) gather a list of essential primary sources
  - Treatises
  - Law Review articles
Outline

- Establish a theme (important in writing brief’s roadmap paragraphs)
- Logical step-by-step arguments
- Include all components of CRAC
  - Rules and their cites
  - Case law used in analysis and their cites
Examples of Outlines

• Susskin failed to **invoke** his right to silence based on the rationale of *Davis*.
  
  — **RULES:**
  
  • When a suspect’s waiver of his right to an attorney is ambiguous or equivocal [when that waiver comes after the suspect already initially and explicitly waived his right to an attorney], interrogating officers have no obligation to stop questioning. *Davis v. United States*, 512 U.S. 452, 462 (1994) (questioning may continue until the suspect makes an unambiguous request for an attorney).
  
  — **ANALYSIS:**
  
• The majority of federal Circuit Courts (seven) extend the *Davis* rule to a suspect’s waiver of his right to silence.
  – Two of the circuits (5th and 11th Cir.) apply Davis to waivers that follow the suspect’s initial waiver. *Barnes v. Johnson*, 160 F.3d 218, 225 (5th Cir. 1998); *Medina v. Singletary*, 59 F.3d 1095, 1100 (11th Cir. 1995).
  – Five other Circuits extend *Davis* even farther and allow interrogators to continue questioning after a suspect’s initial ambiguous waiver. *James v. Marshall*, 322 F.3d 103, 108 (1st Cir. 2003); *United States v. Hurst*, 228 F.3d 751, 759-60 (6th Cir. 2000); *United States v. Banks*, 78 F.3d 1190, 1197-98 (7th Cir. 1996); *Mills v. United States*, 519 U.S. 900 (1996); *United States v. Johnson*, 56 F.3d 947, 955 (8th Cir. 1995); *United States v. Nelson*, 450 F.3d 1201, 1212 (10th Cir. 2006).

  – Only one federal Circuit in *U.S. v. Rodriguez (9th Cir.*) holds that *Davis* applies only to post-waiver situations in which the suspect has already unequivocally waived his rights, but then makes an ambiguous request for a lawyer during questioning. *United States v. Rodriguez*, 518 F.3d 1072, ____ (9th Cir. 2008).
• Susskin impliedly **waived** his right to silence.

  – **RULES:**
    • A waiver need not be expressly given, but rather it may be implied. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).
      – In some cases [i.e. implied waivers], waivers “can be clearly inferred from the actions and words of the person interrogated,” thus permitting questioning without an express written or oral waiver. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).
      – Other “implied waivers” = a suspect who acknowledges his rights, does not invoke them, is not subject to coercion, and who answers questions voluntarily has impliedly waived his rights. *United States v. Velasquez*, 626 F.2d 314, 320 (3rd Cir. 1980); *United States v. Cardwell*, 433 F.3d 378, 389-390 (4th Cir. 2005); *United States v. Nichols*, 512 F.3d 789, 798 (6th Cir. 2008); *United States v. Binion*, 570 F.3d 1034, 1041 (8th Cir. 2009); *United States v. Washington*, 462 F.3d 1124, 1134 (9th Cir. 2006).
      – A valid waiver could not be presumed from silence or “from the fact that a confession was in fact eventually obtained.” *Miranda v. Arizona*, 384 U.S. 436, 475(1966).
• “Once the prosecutor proves that the warnings were given in a language that the suspect understands, courts find waivers in almost every case.” George C. Thomas III, *Separated at Birth but Siblings Nonetheless: Miranda and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1082 (2001).

— ANALYSIS

The brief: roadmap paragraphs

- Framing AND introducing
  - Framing: Establish the theme in the following paragraphs (ex. trends, stats, logic)
  - Introducing: But also describe the specific content you will discuss

Note:
- Write near the end of the writing process
Susskin initially challenges the admissibility of his incriminating statements he made to police during interrogation, but the Fifth Amendment allows his confession to be used in court. The Fifth Amendment protects a criminal suspect from being a witness against himself. U.S. CONST. amend. V. To ensure this protection against self-incrimination, this Court established *Miranda* rights, which (1) obligate police to inform the suspect of his right to counsel and his right to remain silent, and (2) require a suspect’s waiver of his rights to be made voluntarily, knowingly, and intelligently. *Miranda v. Arizona*, 384 U.S. 436, 444–79 (1966). Furthermore, without a waiver, police could not begin questioning the suspect in custody. *Edwards v. Arizona*, 451 U.S. 477, 485 (1981). Thus, the Miranda Court placed a “heavy burden” on the government to show that it had not unconstitutionally obtained a suspect’s self-incriminating confession. *Miranda*, 384 U.S. at 475. However, two lines of authority – (1) *Davis v. United States*, 512 U.S. 452 (1994), and its progeny, as well as (2) *North Carolina v. Butler*, 441 U.S. 369 (1979) and the development of the implied waivers doctrine – have abated the high standards set forth in *Miranda*, making it significantly easier for police to question custodial suspects and obtain confessions without violating the suspect’s Fifth Amendment rights. See Charles D. Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519, 1578–90 (2008) (“The Miranda Court’s high standards for waiver have largely been abrogated by *Davis v. United States* and lower court cases extending *Davis*, as well as by decisions finding implied waiver of rights if suspects simply answer questions during interrogation.”).
The Skeleton of the Brief

- **Use Clear Section Headings**
  - These help to let your reader know what topic you’re about to discuss
  - Be sure to make your sections headings a complete sentence.
    - NOT:
      - IV. International Consensus
    - BUT:
      - IV. An International Consensus Exists Against Sentencing Juveniles to Life Without Parole.
Example of Section Headings

– I. MR. SUSSKIN’S STATEMENTS MADE AFTER AN HOUR-LONG INTERROGATION SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE SINCE AGENT MCFADDEN FAILED TO OBTAIN MR. SUSSKIN’S WAIVER OF HIS RIGHT TO REMAIN SILENT.

  • A. Mr. Susskin Should Not Have Been Interrogated Since He Neither Expressly, nor Impliedly Waived his Right to Remain Silent.
    – 1. Mr. Susskin did not engage in a course of conduct that indicates a valid waiver.
    – 2. Mr. Susskin’s statement to police at the end of an hour-long interrogation does not constitute “voluntary” waiver
Example of Section Headings

I. A CUSTODIAL SUSPECT WHO ACKNOWLEDGES HIS *MIRANDA* RIGHTS, REFUSES TO SIGN AN ACKNOWLEDGMENT FORM, AND CONTINUES TO COMMUNICATE WITH POLICE BOTH FAILS TO INVOKE AND WAIVES HIS FIFTH AMENDMENT RIGHTS.

A. A custodial suspect who refuses to sign a Miranda acknowledgment form but continues to respond to police questioning fails to unambiguously and unequivocally invoke his Fifth Amendment right to silence.

B. A custodial suspect impliedly waives his right to silence knowingly and intelligently by acknowledging his Miranda rights, responding to police questioning, and expressing a willingness to speak with his interrogators.
The brief: The body

- CRAC
  - Conclusion
    - Always use transitions
    - Should clearly state your stance
  - Rules
    - If multiple rules, logical flow
    - May include policy
  - Analysis
    - Split into: (1) Examples, and (2) Application
      - Examples = rules in different contexts
      - Application = examples in the context of your case
    - Acknowledge opposition (i.e. counter arguments)
Examples of the “Conclusion” sentence

• Throughout the course of the interrogation, Mr. Susskin did not engage in a course of conduct that constitutes a valid waiver.

• Susskin’s course of conduct demonstrated a knowing an intelligent implied waiver of his right to silence.
Examples of the Rules

• This Court has established that “the question of waiver must be determined on ‘the particular facts and circumstances surrounding [the] case, including the background, experience and conduct of the accused.’” *Butler*, 441 U.S. at 374 – 75 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).
Examples of Rules

• A suspect’s waiver must be made knowingly and intelligently in for the waiver to be valid. *Miranda*, 384 U.S. at 444-79. A knowing and intelligent waiver is one that is made “with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.” *Colorado v. Spring*, 479 U.S. 564, 573 (1987). In determining whether a knowing and intelligent abandonment of Fifth Amendment rights have occurred, courts must look to the totality of circumstances, particularly to the “facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused.” *Edwards*, 541 U.S. at 482-86 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938))
Examples of the Analysis

In *Butler*, this Court found a suspect had impliedly waived his right where he told police “I will talk to you but I am not signing any form.” 441 U.S. at 371. Shortly after saying this, the suspect made incriminating statements to the police.

Mr. Suskin’s conduct is easily distinguishable from the suspect’s conduct in *Butler*. Mr. Susskin remained mostly silent after he acknowledged he understood his *Miranda* rights. Over the course of an hour he repeatedly avoided eye contact, shrugged his shoulders once, laughed once, and declined an invitation to go to the bathroom. Unlike the suspect in *Butler*, Mr Susskin did not make a statement immediately upon being informed of his rights, but spoke only after being interrogated by Special Agent McFadden for an hour.
Examples of Analysis

In *Butler*, after the criminal suspect was Mirandized, he verbally acknowledged his rights and subsequently replied to the interrogators, “I will talk to you but I am not signing any form.” This Court held that the incriminating statements the suspect then made in answering the interrogators’ questions were admissible because he had impliedly waived his rights in choosing to speak. Although the suspect in *Butler verbally* waived his rights, this Court held that a suspect’s general “course of conduct” could demonstrate an implied waiver.

Applying Butler here establishes that Susskin impliedly waived his right to silence by acknowledging his rights, responding to Agent McFadden’s questions, and evincing a willingness to discuss the investigation. After verbally acknowledging his rights, Susskin responded to Agent McFadden’s questions by shrugging his shoulders, laughing out loud, and giving direct verbal answers without ever refusing to respond or be questioned.
Multiple ways do divide

One option:
- **Paragraph 1**: Conclusion, Rules
- **Paragraph 2**: Analysis (Examples 1)
- **Paragraph 3**: Analysis (Examples 2)
- **Paragraph 4**: Analysis (Application 1)
- **Paragraph 5**: Analysis (Application 2)

Another option:
- **Paragraph 1**: Conclusion
- **Paragraph 2**: Rule 1 and Analysis (examples 1)
- **Paragraph 3**: Analysis (Application 1)
- **Paragraph 3**: Rule 2 and Analysis (examples 2)
- **Paragraph 4**: Analysis (Application 2)

Yet another option:
- **Paragraph 1**: Conclusion, Rules
- **Paragraph 2**: Analysis (examples 1 and applications 1)
- **Later paragraphs**: Analysis (examples 2 and applications 2)
Examples of paragraph formatting

- **Paragraph 1:** Mr. Susskin did not engage in a course of conduct that indicated a valid waiver. This Court established that “the question of waiver must be determined on ‘the particular facts and circumstances surrounding [the] case, including the background, experience and conduct of the accused.’” *Butler*, 441 U.S. at 374 – 75. In *Butler*, this Court found a suspect had impliedly waived his right where he told police “I will talk to you but I am not signing any form.” 441 U.S. at 371. Shortly after saying this, the suspect made incriminating statements to the police. *Id.* This Court found that since the suspect chose to speak with officers immediately after acknowledging his *Miranda* rights, he had clearly engaged in a course of conduct that indicated a voluntary waiver of his rights. *Id.* at 375 – 76.
Paragraph 2: Mr. Susskin’s conduct is easily distinguishable from the suspect’s conduct in *Butler*. Mr. Susskin remained mostly silent after he acknowledged he understood his *Miranda* rights. Over the course of a hour, he repeatedly avoided eye contact, shrugged his shoulders once, laughed once, and declined an invitation to go to the bathroom. Unlike the suspect in *Butler*, Mr. Susskin did not make a statement immediately upon being informed of his rights, but spoke only after being interrogated by Agent McFadden for an hour.
Active sentences
- **NOT**: Eric was shot by Alex
- **BUT**: Alex shot Eric

Counter-arguments
- **Explicit**: Respondent argues that Alex did not commit a murder because he shot Eric without malice aforethought, but those claims are meritless.
- **Subtle**: Alex shot Eric with malice aforethought.

Transitions
- **Ex.**: Not only did Alex shoot Eric with malice aforethought, but he did so without justification, excuse, or mitigating circumstances.

Order of arguments
Substantive Points

- Weight of case law
- Standard of Review
- Policy – usually important in controversial and appellate cases