of cases, a waiver need not always be express, nor does *Miranda* impose a formalistic waiver procedure.[385]

In *Berghuis v. Thompkins*, citing the societal benefit of requiring an accused to invoke *Miranda* rights unambiguously, the Court refocused its *Miranda* waiver analysis to whether a suspect understood his rights.[386] There, a suspect refused to sign a waiver form, remained largely silent during the ensuing 2-hour and 45-minute interrogation, but then made an incriminating statement. The five-Justice majority found that the suspect had failed to invoke his right to remain silent and also implicitly had waived the right. According to the Court, though a statement following silence alone may not be adequate to show a waiver, the prosecution may show an implied waiver by demonstrating that a suspect understood the *Miranda* warnings given him and subsequently made an uncoerced statement.[387] Further, once a suspect has knowingly and voluntarily waived his *Miranda* rights, police officers may continue questioning until and unless the suspect clearly invokes them later.[388]

Sixth, the admissions of an unwarned or improperly warned suspect *may not be used* directly against him at trial, but the Court has permitted some use for other purposes, such as impeachment. A confession or other incriminating admissions obtained in violation of *Miranda* may not, of course, be introduced against him at trial for purposes of establishing guilt [389] or for determining the sentence, at least in bifurcated trials in capital cases.[390] On the other hand, the "fruits" of such an unwarned confession or admission may be used in some circumstances if the statement was voluntary.[391]

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[385] North Carolina v. Butler, 441 U.S. 369 (1979). In *Butler*, the defendant had refused to sign a waiver but agreed to talk with FBI agents nonetheless. On considering whether the defendant had thereby waived his right to counsel (his right to remain silent aside), the Court held that no express oral or written statement was required. Though the defendant was never directly responsive on his desire for counsel, the Court found that a waiver could be inferred from his actions and words.

[386] 560 U.S. ___, No. 08–1470, slip op. (2010).

[387] 560 U.S. ___, No. 08–1470, slip op. at 12–13 (2010).

[388] Davis v. United States, 512 U.S. 452 (1994) (suspect's statement that "maybe I should talk to a lawyer," uttered after *Miranda* waiver and after an hour and a half of questioning, did not constitute such a clear request for an attorney when, in response to a direct follow-up question, he said "no, I don't want a lawyer").

[389] Miranda v. Arizona, 384 U.S. 436, 479 (1966). *See also* Harrison v. United States, 392 U.S. 219 (1968) (rejecting as tainted the prosecution's use at the second trial of defendant's testimony at his first trial rebutting confessions obtained in violation of *McNabb-Mallory*).

[390] Estelle v. Smith, 451 U.S. 454 (1981). The Court has yet to consider the applicability of the ruling in a noncapital, nonbifurcated trial case.

[391] United States v. Patane, 542 U.S. 630 (2004) (allowing introduction of a pistol, described as a "nontestimonial fruit" of an unwarned statement). *See also* Michigan v. Tucker, 417 U.S. 433 (1974) (upholding use of a witness revealed by defendant's statement elicited without proper *Miranda* warning). Note too that confessions