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The Right to Counsel During Custodial Interrogation: Equivocal References to an Attorney-Determining What Statements or Conduct Should Constitute an Accused's Invocation of the Right to Counsel

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I. INTRODUCTION

The fifth amendment to the United States Constitution guarantees to all persons the privilege against compelled self-incrimination.[1] In *Miranda v. Arizona*,[2] the United States Supreme Court

1. U.S. CONST. amend. V. The fifth amendment states: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." *Id.*

2. 384 U.S. 436 (1966). In *Miranda* the police arrested the defendant and took him to a special interrogation room where the defendant gave his confession. The police, however, failed to provide the defendant with a full warning of his constitutional right to con-

interpreted the fifth amendment to require a specified set of procedural safeguards that law enforcement officers must follow to protect adequately each individual's fifth amendment rights. The *Miranda* safeguards require that prior to an accused's custodial interrogation,[3] government officials must inform the accused that he has the right to remain silent; that any of his statements may be used against him in a subsequent criminal action; that he has the right to confer with counsel; and that if he cannot afford to hire counsel, the court will appoint an attorney to represent him.[4] The government may not use a confession obtained in violation of these *Miranda* safeguards to prove the guilt of a defendant.[5]

An accused's right to counsel at pretrial criminal proceedings protects that individual from providing a compelled or involuntary confession.[6] The right to counsel ensures that the government affords assistance to an accused in dealing with the criminal process[7] and also protects an accused from inadvertent self-incrimination.[8] An accused's right to have an attorney present during any questioning is absolute.[9] Courts must exclude any statement given by an accused during custodial interrogation unless the interrogating officers advise the accused, prior to questioning, of his right to have counsel present during questioning, and the accused voluntarily, knowingly, and intelligently waives this right.[10] Furthermore, *Miranda* holds that if an accused "indicates in any manner and at any stage of the process that he wishes to consult with an attorney

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sult with an attorney and to have one present during questioning. *Id.* at 491.

3. For the question of what constitutes custody, see *infra* note 41 and accompanying text. *See generally* Kamisar, *"Custodial Interrogation" Within the Meaning of* Miranda, in CRIMINAL LAW AND THE CONSTITUTION—SOURCES AND COMMENTARIES 335, 338-51 (1966); Smith, *The Threshold Question in Applying* Miranda: *What Constitutes Custodial Interrogation?*, 25 S.C.L. REV. 699 (1974).

4. 384 U.S. at 444, 479.

5. *Id.* at 479. *But see infra* notes 58-62 and accompanying text (detailing limited ways that a statement taken in violation of *Miranda* may be used).

6. *See* W. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 24.3, at 2-7 (rev. 2d ed. 1982).

7. *See* Estelle v. Smith, 451 U.S. 454, 469-70 (1981); Von Moltke v. Gillies, 332 U.S. 708, 721-22 (1948).

8. *See* Fare v. Michael C., 442 U.S. 707, 719 (1979).

9. *See* Miranda v. Arizona, 384 U.S. 436, 472 (1966).

10. *Id.* at 479. *But see* New York v. Quarles, 467 U.S. 649 (1984) (recognizing a public safety exception to the *Miranda* requirements); *see also* Gardner, *The Emerging Good Faith Exception to the* Miranda *Rule—A Critique*, 35 HASTINGS L.J. 429 (1984) (exploring a possible exception to the exclusionary rule when the interrogating officers act in good faith compliance with *Miranda*).

before speaking there can be no questioning."[11] Thus, even if an accused initially waives his right and agrees to speak with law enforcement officials, he may cease the questioning at any time by invoking his right to counsel. When an accused invokes his constitutional right to counsel, he also effectively exercises his right to remain silent, thus requiring the interrogation to cease until the government affords him the opportunity to confer with an attorney.[12]

This Note focuses on determining when an accused has invoked his right to counsel. Because *Miranda's* "in any manner" language does not indicate what degree of clarity is required for a defendant to invoke his right to counsel, the judiciary has struggled to create a standard to determine when an accused's equivocal reference to an attorney constitutes an invocation of the right to counsel. The Supreme Court has not addressed specifically the issue of whether an equivocal reference to an attorney is an invocation of the right to counsel.[13] Recently, in *Smith v. Illinois*[14] the Supreme Court explicitly declined to resolve the issue of equivocal references to an attorney.[15] Thus, the conflicting standards[16] for determining the consequences of an ambiguous reference to counsel remain among the various courts.

In addressing whether an accused has invoked his right to counsel by making an equivocal reference to an attorney, courts have developed three different approaches. The first approach re-

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11. 384 U.S. at 444-45.

12. *See* Edwards v. Arizona, 451 U.S. 477, 484-85 (1981). Once an accused has invoked the right to counsel, he is not subject to further interrogation by the authorities until counsel has been made available to him or unless the accused himself initiates further communications, exchanges, or conversations with the police. *Id.* at 485.

13. The Supreme Court has held that certain actions and statements do not constitute an invocation of counsel. *See* Fare v. Michael C., 442 U.S. 707 (1979) (holding that the defendant's request for his probation officer is not a request for counsel).

14. 105 S. Ct. 490 (1984). In *Smith v. Illinois* the Supreme Court found that the defendant's initial request for counsel was unambiguous and, therefore, declined to resolve the conflicting approaches developed by the lower courts for determining whether an accused's equivocal references to an attorney constitute an invocation of the right to counsel. The Court's limited holding stated that once an accused clearly invokes his right to counsel, courts may not use the accused's subsequent ambiguous remarks concerning his desire for an attorney to cast doubt on the accused's initial request for counsel. *Id.* at 495; *see infra* notes 91-95 and accompanying text (discussing *Smith v. Illinois*).

15. 105 S. Ct. at 493, 495. The Court currently is faced with the opportunity to decide this issue. *See* Connecticut v. Barrett, 197 Conn. 50, 495 A.2d 1044, *cert. granted*, 54 U.S.L.W. 3761 (May 19, 1986).

16. The Court spelled out the various conflicting standards in a footnote. *Id.* at 493 n.3.

quires that an accused's reference to an attorney reach a threshold standard of clarity before the accused's statements constitute an invocation of the right to counsel.[17] References too ambiguous to meet this threshold do not invoke the right to counsel. Courts adhering to the second approach hold that upon any reference to counsel by the accused, all interrogation must cease immediately and there may be no further interrogation until counsel is present.[18] Finally, the third approach requires that when an accused makes an equivocal reference to an attorney, the interrogating officials must immediately limit their questioning to a clarification of the accused's desires concerning counsel.[19] Officials may continue the interrogation only if the officials determine that the accused does not wish to invoke his right to counsel.

The purpose of this Note is to determine which approach best effectuates the proper balance between preserving an individual's constitutional rights and promoting the need of law enforcement officials to pursue legitimate criminal prosecutions in an effective manner. Part II examines the history of the right against compelled self-incrimination, particularly judicial interpretations of the right to counsel. Part III discusses the leading cases that apply the three different approaches courts have taken in determining when an accused has invoked the right to counsel. Part IV analyzes these approaches in light of other judicial precedent, everyday application of custodial interrogation procedures, and the need for stringent protection of each individual's constitutional rights. Part

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17. *See, e.g.*, State v. Johnson, 318 N.W.2d 417 (Iowa 1982); People v. Kendricks, 121 Ill. App. 3d 442, 462 N.E.2d 1256 (1984); People v. Harper, 94 Ill. App. 3d 298, 418 N.E.2d 894 (1981); People v. Krueger, 82 Ill. 2d 305, 412 N.E.2d 537 (1980); *see also* People v. Bestelmeyer, 166 Cal. App. 3d 520, 212 Cal. Rptr. 605 (1985); Bautista v. State, 632 S.W.2d 846 (Tex. Crim. App. 1982); Tanner v. State, 690 S.W.2d 96 (Tex. Crim. App. 1985); *see also* Palmer v. Wainwright, 725 F.2d 1511 (11th Cir.), *cert. denied*, 105 S. Ct. 227 (1984).

18. *See, e.g.*, People v. Duran, 140 Cal. App. 3d 485, 189 Cal. Rptr. 595, *cert. denied*, 464 U.S. 991 (1983); People v. Russo, 148 Cal. App. 3d 1172, 196 Cal. Rptr. 466 (1983); U.S. v. Lilla, 534 F. Supp. 1247 (N.D.N.Y. 1982); People v. Traubert, 199 Colo. 322, 608 P.2d 342 (1980); Hunt v. State, 632 S.W.2d 640 (Tex. Crim. App. 1982); Wentela v. State, 95 Wis. 2d 283, 290 N.W.2d 312 (1980); White v. Finkbeiner, 611 F.2d 186 (7th Cir. 1979); State v. Blakney, 605 P.2d 1093 (Mont. 1979); State v. Nash, 119 N.H. 728, 407 A.2d 365 (1979); Ochoa v. State, 573 S.W.2d 796 (Tex. Crim. App. 1978); People v. Superior Court, 15 Cal. 3d 729, 542 P.2d 1390, 125 Cal. Rptr. 798 (1975), *cert. denied*, 429 U.S. 816 (1976); U.S. v. Clark, 499 F.2d 802 (4th Cir. 1974); State v. Ayers, 16 Or. App. 300, 518 P.2d 190 (1974).

19. *See, e.g.*, Nash v. Estelle, 597 F.2d 513 (5th Cir.), *cert. denied*, 444 U.S. 981 (1979); Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979); United States v. Cherry, 733 F.2d 1124 (5th Cir. 1984); United States v. Porter, 764 F.2d 1 (1st Cir. 1985); Cannady v. State, 427 So. 2d 723 (Fla. 1983); State v. Acquin, 187 Conn. 647, 448 A.2d 163 (1982), *cert. denied*, 463 U.S. 1229 (1983); State v. Moulds, 105 Idaho 880, 673 P.2d 1074 (1983).

V concludes that the proper standard for determining when an accused has invoked his right to counsel is an approach that limits questioning of an accused to a clarification of the accused's desire for an attorney following any reference to an attorney that conceivably could be considered as a request for counsel.

II. DEVELOPMENT OF THE RIGHT TO COUNSEL DURING CUSTODIAL INTERROGATION

The fifth amendment[20] incorporated the common law privilege against self-incrimination[21] into the Constitution of the United States. Prior to the landmark case of *Miranda v. Arizona*,[22] however, courts used the due process clause of the fourteenth amendment to determine whether an accused's confession[23] should be admitted into evidence.[24] As the standard for admissibility, courts considered whether the confession was "voluntary."[25] Courts determined "voluntariness" by inquiring into the "totality of the circumstances" surrounding the interrogation.[26] Although courts al-

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20. U.S. CONST. amend. V; *see supra* note 1; *see also* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 426-27 (1968); Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935). In 1964 the Supreme Court made the privilege against self-incrimination binding on the states by incorporating the privilege into the due process clause of the fourteenth amendment. Malloy v. Hogan, 378 U.S. 1 (1964).

21. The privilege against self-incrimination originated in England with the fourteenth century statute *Prohibitio formata de Statuto Articuli Cleri* and the sixteenth century oath *ex officio mero*. *See generally* Levy, *The Right Against Self-Incrimination: History and Judicial History*, 84 POL. SCI. Q. 1 (1969) (tracing the development of the right against compelled self-incrimination); Horowitz, *The Privilege Against Self-Incrimination—How Did It Originate?*, 31 TEMP. L.Q. 121 (1958) (same); 8 J. WIGMORE, EVIDENCE § 2250 (J. McNaughton 2d ed. 1961) (same).

22. 384 U.S. 436 (1966).

23. Congress has described a "confession" as "any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing." 18 U.S.C. § 3501(e) (1982).

24. *See, e.g.*, Spano v. New York, 360 U.S. 315 (1959) (holding that flagrant use of deception to obtain confession violated accused's due process rights); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (holding that 36 hour marathon interrogation produced nonvoluntary confession and, thus, confession was inadmissible at trial); Brown v. Mississippi, 297 U.S. 278 (1936) (holding that use of police brutality to force confession violated accused's due process rights). *See generally* 8 J. WIGMORE, EVIDENCE § 2266 (J. McNaughton rev. ed. 1961).

25. *See* Culombe v. Connecticut, 367 U.S. 568 (1961).

26. The Court first developed the "totality of the circumstances" test in Johnson v. Zerbst, 304 U.S. 458 (1938). In *Johnson*, a sixth amendment right to counsel case, the Court stated that "[t]he determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case." *Id.* at 464. For examples of the Court's application of the "totality of the circumstances" test, see Columbe v. Connecticut, 367 U.S. 568 (1961); Reck v. Pate, 367 U.S.

ways excluded coerced confessions,[27] regardless of the reliability of the confession, the government satisfied due process requirements by showing that the confession was the "product of an essentially free and unconstrained choice by its maker."[28] The Supreme Court, however, never articulated a clear and predictable definition of "voluntariness."[29] The lack of a precise standard created difficulties for courts attempting to apply the totality of the circumstances test.[30]

Massiah v. United States[31] and *Escobedo v. Illinois*[32] heralded a change of direction, from a fourteenth amendment due process analysis to a sixth amendment right to counsel analysis, in the Supreme Court's handling of confession cases. In *Massiah* the Court held that the sixth amendment[33] barred the admission of the accused's incriminating statements when law enforcement officials, in the absence of counsel for the accused, deliberately and surreptitiously elicited the statements after the accused's indictment.[34] In *Escobedo* the Court held that the sixth amendment prohibited the use, at trial, of a preindictment incriminating statement that law enforcement officials deliberately had elicited during custodial interrogation after denying the accused's request to confer with an attorney.[35] The Supreme Court in *Escobedo* indicated that the sixth amendment right to counsel attaches "when the process shifts from investigatory to accusatory—when its focus is on the accused, and its purpose is to elicit a confession."[36] Just as courts

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433 (1961).

27. Courts have viewed coerced confessions as "revolting to the sense of justice." Brown v. Mississippi, 297 U.S. 278, 286 (1936).

28. *Culombe*, 367 U.S. at 602.

29. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 102-103.

30. *Id.* These difficulties included state courts' apparent persistence in using the ambiguity of the concept to validate confessions of doubtful constitutionality and an increased burden on the Supreme Court's workload. *Id.*

31. 377 U.S. 201 (1964).

32. 378 U.S. 478 (1964).

33. U.S. CONST. amend. VI. The sixth amendment states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." *Id.*

34. 377 U.S. at 206. At the arraignment, Massiah pleaded not guilty to charges of federal narcotics violations. After his release on bail, the police secretly recorded an incriminating conversation between Massiah and a co-defendant through a listening device planted on the co-defendant. *Id.* at 202-03.

35. Escobedo v. Illinois, 378 U.S. 478, 480-83 (1964). After being arrested and taken to a police station for interrogation, the defendant asked to see his lawyer. The police falsely stated that his lawyer did not want to see him. *Id.* at 481.

36. *Id.* at 492. The Court held:

had found a fourteenth amendment analysis unsatisfactory for handling confession cases, courts also concluded that a sixth amendment analysis was unsatisfactory in confession cases because the *Escobedo* "focus test" was unclear and, therefore, difficult to apply.[37]

Instead of clarifying *Escobedo's* sixth amendment "focus test," the Supreme Court in *Miranda v. Arizona*[38] injected the fifth amendment privilege against self-incrimination into confession case analysis.[39] One of the primary goals of the *Miranda* Court was to provide clear constitutional guidelines to which both law enforcement officers and courts could easily adhere. With this goal in mind, the Court sought to establish procedural safeguards outlining the admissibility of confessions under the fifth amendment.[40]

The *Miranda* holding rested on the premise that custodial interrogation[41] is inherently coercive.[42] The Court, therefore, held

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> [W]here . . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment . . . .

Id. at 490-91.

37. Both federal and state courts struggled with deciding what interpretation should be applied to *Escobedo*'s "focus test." *See* Warden, *Miranda—Some History, Some Observations, and Some Questions*, 20 VAND. L. REV. 39, 45-46 (1966) (listing various conflicts among courts over interpretation to be given *Escobedo*); Spring, *The Nebulous Nexus: Escobedo, Miranda and the New 5th Amendment*, 6 WASHBURN L.J. 428, 428-32 (1967) (arguing in part that the purpose of *Miranda* was to correct the inadequacies of *Escobedo*); *see also Miranda*, 384 U.S. at 440 n.2 (listing the scholarly debates regarding the ramifications of tbe *Escobedo* decision).

38. 384 U.S. 436 (1966).

39. Since *Miranda*, the Supreme Court has continued to reject *Escobedo*'s focus test and has confined the sixth amendment's right to counsel protection to cases in wbich the government has initiated adversarial judicial proceedings against the accused, " 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' " Brewer v. Williams, 430 U.S. 387, 398 (1977) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)); *see also* Moore v. Illinois, 434 U.S. 220 (1977); United States v. Ash, 413 U.S. 300 (1973). One commentator has criticized this limitation on the sixth amendment as overly formalistic. *See* White, Rhode Island v. Innis: *The Significance of a Suspect's Assertion of His Right to Counsel*, 17 AM. CRIM. L. REV. 53 (1979). Thus, although *Massiah* is still good law, the fifth amendment is the accused's primary source of protection during custodial interrogation because defense attorneys normally will be present during any custodial interrogation occurring after the initiation of adversarial judicial proceedings.

40. 384 U.S. at 439-42.

41. In *Miranda* the Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. Because the *Miranda* safeguards

that the government may not use incriminating evidence[43] elicited from the accused during custodial interrogation unless the government can show that it complied with specific procedural safeguards designed to assure the accused's privilege against compulsory self-incrimination.[44] The focus of these safeguards is on adequately ap-

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apply only when police interrogate a suspect while the suspect is in custody, *id.* at 477-78, the question of whether a defendant has been taken into custody is often critical in determining whether the *Miranda* procedures are required in a particular situation. *See, e.g.*, Orozco v. Texas, 394 U.S. 324, 327 (1969) (deeming accused to be in custody and holding *Miranda* warnings to be required because officer testified that accused, questioned in his bedroom in the early hours of morning with several police guns drawn on him, was under arrest and not free to leave); United States v. Lee, 699 F.2d 466, 467-68 (9th Cir. 1982) (per curiam) (deeming questioning undertaken by F.B.I. agents in a closed car for at least an hour to be custodial even though agents informed accused that he was free to leave); *cf.* Beckwith v. United States, 425 U.S. 341, 343-44, 347 (1983) (per curiam) (not requiring *Miranda* warnings when defendant, not under arrest, voluntarily talked to two special agents of the Internal Revenue Service).

Some of the factors that courts consider in determining whether custody exists include the person's status as a suspect or as an arrestee, *see* United States v. Ledezma-Hernandez, 729 F.2d 310, 313 (5th Cir. 1984) (holding tbat the defendant was not in custody because police had not focused the investigation on the defendant at time incriminating statements were made); United States v. Davis, 646 F.2d 1298, 1302 (8th Cir.) (holding that the defendant was not in custody, in part because police had not arrested the defendant prior to or during conversation with informant), *cert. denied*, 454 U.S. 868 (1981), and the duration of the suspect's detention, *see* United States v. Chamberlin, 644 F.2d 1262, 1267 (9th Cir. 1980) (holding that a suspect is in custody when held in police car for 20 minutes while his accomplice is sought), *cert. denied*, 454 U.S. 868 (1981); *see also* United States v. Lee, 699 F.2d 466, 467-68 (9th Cir. 1982) (per curiam). Other infiuential factors include the location at which the interrogation takes place, *see* United States v. Ross, 719 F.2d 615, 621-22 (2d Cir. 1983) (declaring that a suspect is not in custody when questioned at his place of business); United States v. Dennis, 645 F.2d 517, 523 (5th Cir.) (same), *cert. denied*, 454 U.S. 1034 (1981), the physical constraints placed upon the suspect, *see* United States v. Booth, 669 F.2d 1231, 1236 (9th Cir. 1981) (handcuffing a factor in determining if suspect in custody), and the authority of the law enforcement officials to make an arrest, *see* United States v. Jamieson-McKames Pharmaceuticals, Inc., 651 F.2d 532, 543 (8th Cir. 1981) (holding that the defendants were not in custody because FDA agents were without authority to make arrests), *cert. denied*, 455 U.S. 1016 (1982).

42. 384 U.S. at 467. The *Miranda* Court felt that, "without proper safeguards, [custody] contain[ed] inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.*; *see also* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

43. The fifth amendment privilege does not extend to all incriminating evidence obtained from the accused. Only testimonial or communicative evidence, if elicited involuntarily, is proscribed. *See, e.g.*, Washington v. Chrisman, 455 U.S. 1, 6 n.3 (1982) (concluding that the defendant's act of returning to his room to retrieve his identification following his arrest for possession of an alcoholic beverage by a minor was neither "incriminating" nor a "testimonial communication," even though age was an element of the offense); United States v. Wade, 388 U.S. 218, 222-23 (1967) (compelling the defendant to speak in lineup not testimonial because no compulsion to disclose knowledge); Schmerber v. California, 384 U.S. 757, 761 (1966) (holding compelled blood-alcohol content test not testimonial).

44. *Miranda*, 384 U.S. at 444. The *Miranda* procedures apply regardless of whether

prising the suspect of his rights, including the right to remain silent, the right to confer with counsel, and the right to have counsel appointed to represent him if he cannot afford to hire an attorney.[45]

A suspect voluntarily may waive his *Miranda* rights during custody.[46] To establish a waiver, the government must prove that the accused knowingly, intelligently, and voluntarily waived his *Miranda* rights prior to making a statement.[47] A *Miranda* waiver need not be express, but may be inferred from the suspect's words and actions.[48] To determine whether a waiver is valid, courts have considered the defendant's age,[49] education,[50] mental capacity,[51] physical condition,[52] and knowledge of the cause for the interrogation.[53]

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the police charge the person subjected to custodial interrogation with a misdemeanor or a felony. *See* Berkmeyer v. McCarty, 104 S. Ct. 3138, 3148 (1984). In *Berkmeyer*, however, the Court declined to decide whether an accused has a fifth amendment right to appointed counsel during interrogation if the suspected offense is so minor that he would not have a sixth amendment right to appointed counsel at trial. *Id.* at 3148, n.21.

45. 384 U.S. at 467-76. *See supra* text accompanying note 4 (discussing the complete *Miranda* warnings).

46. 384 U.S. at 475.

47. 384 U.S. at 444. The Court derived this standard from Johnson v. Zerbst, in which the Supreme Court defined the appropriate waiver standard for sixth amendment analysis. 304 U.S. 458 (1938). *See* Tague v. Louisiana, 444 U.S. 469, 471 (1980) (per curiam) (holding that government bears burden of establishing that defendant understood waiver).

48. *See* North Carolina v. Butler, 441 U.S. 369, 373, 375-76 (1979) (holding explicit waiver of right to counsel under *Miranda* not necessary; court may infer waiver from the defendant's words and actions); United States v. Melanson, 691 F.2d 579, 588-89 (1st Cir.) (holding that the defendant's statement at bail hearing for purpose of exculpating co-defendant constituted a waiver of his *Miranda* rights), *cert. denied*, 454 U.S. 856 (1981).

49. *See* United States v. White Bear, 668 F.2d 409, 413 (8th Cir. 1982) (per curiam) (holding 17-year-old defendant of average intelligence capable of making a valid waiver).

50. *See* United States v. Kiendra, 663 F.2d 349, 351 (1st Cir. 1981) (holding defendant with ninth grade education capable of making a valid waiver); Crisp v. Mayabb, 668 F.2d 1127, 1135, 1139 (10th Cir. 1981) (holding defendant's illiteracy relevant to waiver determination), *cert. denied*, 459 U.S. 827 (1982).

51. *See* Henry v. Dees, 658 F.2d 406, 411 (5th Cir. 1981) (invalidating waiver by defendant with low I.Q. when record showed that he could not comprehend the waiver procedure and police took no extra precautions in determining if the defendant understood his waiver).

52. *See* United States v. Phillips, 640 F.2d 87, 93-94 (7th Cir.) (determining the defendant capable of making a valid waiver although allegedly weakened by alcohol and drug withdrawal), *cert. denied*, 451 U.S. 991 (1981).

53. *See* United States v. Burger, 728 F.2d 140, 141 (2d Cir. 1984) (noting that lower court should have considered accused's ignorance of subject matter of interrogation as a factor in determining the validity of a waiver); Carter v. Garrison, 656 F.2d 68, 70 (4th Cir. 1981) (per curiam), *cert. denied*, 455 U.S. 952 (1982) (same); *see also* Note, *Constitutional Law—Custodial Interrogation—Should the Accused Have a Right to Know the Nature of His Suspected Offense?*, 35 MERCER L. REV. 935 (1974) (arguing that a suspect cannot make

When the suspect does not have counsel present, however, a heavy burden rests on the government to show a knowing and intelligent waiver.[54] Accordingly, courts have refused to presume a waiver from the accused's silence or confession.[55] Furthermore, in *Edwards v. Arizona*,[56] the Supreme Court held that even if law enforcement officers have advised an accused of his rights, once an accused invokes his right to counsel the government cannot prove a valid waiver of the right to an attorney merely by demonstrating that the defendant responded to further police-initiated questioning.[57]

Adherence to *Miranda* becomes crucial when the government seeks to take its case against the accused to trial. Generally, the government may not use evidence obtained in violation of *Miranda* in its case-in-chief.[58] The government, however, may introduce this evidence solely to impeach the defendant's testimony.[59] Federal appellate courts may refuse to overturn a conviction when a defendant's statements are improperly admitted at trial, but only if the court determines that the statements were made voluntarily and that their introduction into evidence constitutes harmless error.[60] Moreover, a trial court always may admit any freely volun-

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a knowing and intelligent waiver of his *Miranda* rights without knowing the offense with which he is charged).

54. 384 U.S. at 475.

55. *Id.*; *see* North Carolina v. Butler, 441 U.S. 369, 373 (1979) (holding that because burden is on prosecution to prove valid waiver, courts must presume that a defendant did not waive his rights); McDonald v. Lucas, 677 F.2d 518, 521-22 (5th Cir. 1982) (holding that when no evidence exists suggesting waiver, the defendant did not waive his *Miranda* rights).

56. 451 U.S. 477 (1981).

57. *Id.* at 484.

58. *Miranda*, 384 U.S. at 479.

59. *See* United States v. Havens, 446 U.S. 620, 627-28 (1980) (holding that government may use inadmissible evidence to impeach the defendant's statements during cross-examination); Oregon v. Hass, 420 U.S. 714, 722-24 (1975) (holding that government may use otherwise inadmissible evidence to impeach the defendant's statements made on direct examination); Harris v. New York, 401 U.S. 222, 224 (1971) (same). The use of statements taken in violation of *Miranda* for impeachment purposes often effectively bars the accused from taking the stand at trial. *See* Note, *Criminal Procedure—Testimony Obtained in Violation of Miranda Is Admissible in Evidence for Impeachment Purposes*, 10 TULSA L.J. 697 (1975); Comment, *The Impeachment Exception to the Constitutional Exclusionary Rules*, 73 COLUM. L. REV. 1476 (1973).

60. *See, e.g.*, United States v. Roper, 681 F.2d 1354, 1359 (11th Cir. 1982) (holding admission of the defendant's statement obtained in violation of *Miranda* harmless error because statement only proved a fact not in dispute at trial), *cert. denied*, 459 U.S. 1207 (1983); United States v. Wilson, 690 F.2d 1267, 1275 (9th Cir. 1982) (finding *Miranda* violation harmless error when evidence, excluding the evidence unconstitutionally obtained, establishes guilt beyond reasonahle doubt); United States v. Duncan, 693 F.2d 971, 979 (9th Cir. 1982) (upholding the defendant's conviction despite statements obtained in violation of

teered or spontaneous statements despite a violation of the *Miranda* procedural safeguards.[61] Appellate courts, however, must reverse a conviction based in whole or in part on an involuntary statement, even if the statement is reliable and other evidence fully supports the conviction.[62]

Under *Miranda* police must protect carefully the accused's right to confer with an attorney prior to questioning.[63] Interrogating officers may not imply that the offer of an appointed attorney applies only to some future time subsequent to interrogation.[64] Once a suspect invokes his right to counsel, the interrogation must cease immediately until an attorney is present,[65] or until the suspect gives a valid waiver of the previously invoked right,[66] or until the suspect "initiates further communication, exchanges, or conversations with the police."[67] In *Oregon v. Bradshaw*[68] the Supreme Court held that the defendant, after requesting counsel, initiated further conversation with police because the defendant showed "a willingness and a desire for a generalized discussion about the investigation."[69] The Court carefully pointed out that a

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Miranda because the government presented sufficient independent evidence of guilt).

61. Miranda v. Arizona, 384 U.S. 486, 478 (1966); *see, e.g.*, United States v. Castro, 723 F.2d 1527 (11th Cir. 1984); United States v. Baldwin, 644 F.2d 381 (5th Cir. 1981) (per curiam).

62. *See* Jackson v. Denno, 378 U.S. 368, 376 (1964). Courts exclude involuntary confessions to deter coercive law enforcement conduct. *Id.* at 385-86.

63. California v. Prysock, 453 U.S. 355, 360-61 (1981) (per curiam). In *Prysock* the Court held that the lower court had erred in finding that the *Miranda* warnings were insufficient simply because of the order in which they were given to the defendant. *Id. See* Comment, *Criminal Law: The Accused's Right to Miranda Warnings—or Their Functional Equivalent*, 21 WASHBURN L.J. 427 (1982).

64. 453 U.S. at 360; *see* United States v. Contreras, 667 F.2d 976, 979 (11th Cir.) (stating that although the defendant was not informed of his right to have counsel appointed immediately, no *Miranda* violation occurred because the defendant was informed of the right to consult with an attorney prior to questioning), *cert. denied*, 459 U.S. 849 (1982).

65. Miranda v. Arizona, 384 U.S. at 474. When an accused expresses a desire to cooperate with officers only through counsel, officers must cease further interrogation until the defendant confers with counsel. *Id.* at 484-85.

66. *Id.* at 475-76; *see supra* notes 46-57 and accompanying text (discussing waiver of the right to counsel).

67. Edwards v. Arizona, 451 U.S. 477, 485 (1981); *see* Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983) (holding that the defendant's question, "Well, what is going to happen to me now?," initiated further conversation); *see also* Wyrick v. Fields, 459 U.S. 42 (1982) (per curiam); Witt v. Wainwright, 714 F.2d 1069 (11th Cir. 1983); United States v. Gordon, 655 F.2d 478 (2d Cir. 1981).

68. 462 U.S. 1039 (1983).

69. *Id.* at 1045-46. The Court, however, observed that a routine request, such as dealing with a clerical matter, by either the defendant or the interrogating officers generally will not be considered an initiation of conversation. *Id.* at 1045.

suspect's initiation of discussions does not waive the previously invoked right to an attorney, but allows further interrogation in the absence of counsel only if police subsequently obtain a valid waiver from the suspect.[70]

Recently, in *Smith v. Illinois*,[71] the Supreme Court reiterated its rule that all questioning must cease when an accused invokes the right to counsel.[72] The Court further held that once a suspect has made an unequivocal demand for counsel, subsequent ambiguous statements regarding his desire for counsel may not be used to cast doubt on the clarity of the initial request.[73] The *Smith* Court recognized that lower courts had applied differing standards in determining whether an accused's ambiguous statements constituted an invocation of the right to counsel. Because the Court found that the defendant's requests for counsel were unequivocal,[74] however, the Court declined to resolve the conflict among the lower courts.[75] The cases that follow illustrate the three different approaches that various courts have developed in attempting to determine whether

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70. *Id.* at 1044-45. *See* Wyrick v. Fields, 459 U.S. 42 (1982). In *Wyrick* the Court indicated that once the police obtain a valid waiver, interrogation may continue until circumstances change to a degree that the interrogators can no longer consider the answers to be voluntary or until the defendant revokes his waiver. *Id.* at 47. The *Wyrick* Court held that by requesting a polygraph examination the defendant waived his right to counsel during the test and the interrogation that followed. *Id.*

71. 105 S. Ct. 490 (1984). *See supra* notes 15-23 and accompanying text.

72. 105 S. Ct. at 492.

73. *Id.* at 495. In *Smith v. Illinois* police arrested the defendant for armed robbery. As an officer informed the defendant of his *Miranda* rights and his right to have counsel appointed and present at the interrogation, the defendant replied, "*Uh, yeah, I'd like to do that.*" *Id.* at 491 (emphasis in original). The officer finished reading the *Miranda* warnings, then asked the defendant, "Do you wish to talk to me at this time without a lawyer being present?" Defendant answered: "*Yeah and no, uh, I don't know what's what, really.*" *Id.* at 491-92 (emphasis in original). After further questioning, the defendant agreed to talk to the officer and then admitted to the crime. *Id.* at 492. The trial court denied a motion to suppress the confession and subsequently convicted the defendant. The Illinois Court of Appeals affirmed the conviction, finding that although the defendant's first statement ("Uh,yeah. I'd like to do that.") appeared unambiguous, the defendant's statements as a whole indicated that the defendant had not intended to invoke his right to counsel. The Illinois Supreme Court also affirmed the conviction, noting that the defendant "did not *clearly assert* his right to counsel" and that the defendant's statements, "considered in total, were ambiguous, and did not effectively invoke his right to counsel." *Id.* (emphasis in original) (quoting People v. Smith, 102 Ill. 2d 365, 373, 466 N.E.2d 236, 240 (1984)).

The United States Supreme Court reversed. The Court refused to consider the defendant's later responses as evidence of a lack of intent to invoke the right to counsel because the Court found the defendant's initial response to be unequivocal. The Court beld that the government could not use suhsequent equivocal responses to "cast doubt on the clarity of [the accused's] initial request for counsel." 105 S.Ct. at 491.

74. 105 S.Ct. at 493, 495.

75. *Id.* at 493.

a defendant has invoked the right to counsel.

III. Determining What Constitutes an Invocation of the Right to Counsel

A. Threshold of Clarity Standard

In *People v. Krueger*[76] the Illinois Supreme Court held that an accused's references to an attorney must meet a threshold standard of clarity[77] before a court will consider the statements to be an invocation of the right to counsel.[78] In *Krueger* law enforcement officers arrested and charged the defendant with stabbing a man to death during a late night argument.[79] Before beginning the interrogation, police gave the defendant his full *Miranda* warnings.[80] The defendant stated that he understood his rights and signed a written "waiver of rights" form.[81] As the police began to question the defendant about the stabbing, the defendant accused the police of trying to "pin a murder" on him and stated that maybe he needed a lawyer.[82] A police detective replied that the news media, not the

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76. 82 Ill. 2d 305, 412 N.E.2d 537 (1980), *cert. denied*, 451 U.S. 1019 (1981). Prior to *Krueger*, a number of Illinois courts had held that almost any reference to an attorney would be considered an invocation of the right to counsel. *See, e.g.*, People v. Starling, 64 Ill. App. 3d 671, 381 N.E.2d 817 (1978) (considering the defendant's nodding of his head affirmatively to his father's warning that he consult with an attorney before answering any questions an invocation of the right to counsel); People v. Rafac, 51 Ill. App. 3d 1, 364 N.E.2d 991 (1977) (holding the defendant's inquiry into how he could obtain a lawyer to be an invocation of the right to counsel); *see also* Maglio v. Jago, 580 F.2d 202, 205 (6th Cir. 1978) (holding the defendant's statement, "[M]aybe [I] ought to have [an attorney]," to be an invocation of the right to counsel).

77. In Smith v. Illinois, 105 S. Ct. 490, 493, n.3 (1985), the United States Supreme Court cited *Krueger* as representing those courts that "have attempted to define a threshold standard of clarity . . . and have held that requests falling below this threshold do not trigger the right to counsel."

78. *Krueger*, 82 Ill. 2d at 311, 412 N.E.2d at 540.

79. *Id.* After his girlfriend submitted a sworn statement describing the incident, police charged the defendant with murder by stabbing his victim several times with a knife while the two struggled in a car. *Id.* at 307, 412 N.E.2d at 537.

80. *Id.* at 308, 412 N.E.2d at 538.

81. *Id.* The police first questioned the defendant about crimes unrelated to the murder. The defendant admitted to being involved in several burglaries, but stated that he had not been involved in any other criminal activities. *Id.*

82. The police officers present at the interrogation gave three slightly different versions of the defendant's exact statement. According to one detective, the defendant said, "Wait a minute. Maybe I ought to have an attorney. You guys are trying to pin a murder rap on me, give me 20 to 40 years." *Id.* Another detective testified that the defendant partially raised up out of his chair and stated, "Hey, you're trying to pin a murder on me. Maybe I need a lawyer." *Id.* The third police officer testified that the defendant said, "Just a minute. That's a 20 to 40 year sentence. Maybe I ought to talk to an attorney. You're trying to pin a murder rap on me." *Id.*

police, had said that the stabbing was murder and that of the two people who knew what had happened, one of them was dead.[83] Shortly thereafter, the defendant gave a written confession in which he admitted that he had stabbed the victim and described the circumstances surrounding the incident.[84] The next morning, the defendant, after stating that he still understood his rights, responded to further police questioning.[85] Before trial, the defendant sought to suppress the inculpatory statements that he had made to the police during his interrogation.[86] The defendant argued that the police had violated his *Miranda* rights by continuing to interrogate him following his request for counsel.[87] The circuit court denied the defendant's suppression motion and the defendant was subsequently convicted at trial.[88]

The Illinois Supreme Court affirmed the defendant's conviction.[89] Although recognizing that the "in any manner" language of *Miranda*[90] signifies that an invocation of the right to counsel need not be "explicit, unequivocal, or made with unmistakable clarity,"[91] the court refused to find that every reference to an attorney, no matter how ambiguous, constitutes an invocation of the right to

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83. *Id.*, 412 N.E.2d at 538-39.

84. *Id.*, 412 N.E.2d at 539.

85. *Id.*

86. *Id.* at 307, 412 N.E.2d at 538.

87. 82 Ill.2d at 307, 412 N.E.2d at 538.

88. *Id.* The circuit court found that the defendant voluntarily made the inculpatory statements, that the defendant understood his rights, and that the police did not violate his rights. *Id.* at 309, 412 N.E.2d at 540. On appeal, the defendant reiterated his contention that the police obtained his statements through an interrogation that was continued after he had invoked his right to counsel. People v. Krueger, 74 Ill. App. 3d 881, 393 N.E.2d 1283 (1979). In affirming the conviction, the appellate court held that the defendant's reference to a lawyer did not constitute a request for counsel under *Miranda*. *Id.* at 885-86, 393 N.E.2d at 1287. The appellate court placed some reliance on Frazier v. Cupp, 394 U.S. 731 (1969), a case in which the defendant was convicted prior to the *Miranda* decision.

In *Frazier* the defendant responded to some initial questioning, then told police "I think I had better get a lawyer before I talk any more. I am going to get in more trouble than I am in now." *Id.* at 738. The Supreme Court stated that the defendant had not made a request under the *Escobedo* standard, see *supra* notes 31-37 and accompanying text, sufficient to require a cessation of police interrogation. 394 U.S. at 739. The Court then noted that it was not determining whether the defendant's ambiguous comment would be a sufficient invocation of the right to counsel under *Miranda*. *Id.* at 738.

89. 82 Ill. 2d at 312, 412 N.E.2d at 541.

90. The Supreme Court stated in *Miranda*: "If [the accused] indicates *in any manner* and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." 384 U.S. at 444-45 (emphasis added); *see supra* notes 11-12 and accompanying text.

91. 82 Ill. 2d at 311, 412 N.E. 2d at 540.

counsel.[92] The court, therefore, required that the defendant meet a threshold standard of clarity for his remarks to constitute an invocation of the right to counsel.[93] In deciding that the defendant did not invoke the right to counsel, the court considered many factors as influential in determining the meaning of the defendant's equivocal remarks. These factors included the court's findings that the defendant possessed normal intelligence, fully understood his *Miranda* rights, and effectively waived his rights before questioning. Furthermore, the court noted that the interrogation lasted for only a brief time period and that the defendant was under no coercion or duress other than that inherent in any custodial setting.[94] The court also placed some importance on the interrogating officers' subjective belief that the defendant's remarks did not indicate that he wished to consult with an attorney.[95] Finally, the court discredited the defendant's testimony that he felt a more explicit request for an attorney would have been a wasted effort.[96] Instead, the

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92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* The court stated that the good faith conduct of the police helped to distinguish *Krueger* from a line of similar cases decided in other jurisdictions. *See, e.g.*, Maglio v. Jago, 580 F.2d 202 (6th Cir. 1978) (defendant thought attorney unnecessary because he had already confessed); State v. Nash, 119 N.H. 728, 407 A.2d 365 (1979) (police told the defendant he was sick and needed help that the police could provide); People v. Superior Court, 15 Cal. 3d 729, 542 P.2d 1390, 125 Cal. Rptr. 798 (1975), *cert. denied*, 429 U.S. 816 (1976) (police disregarded the defendants' statements about needing an attorney); People v. Munoz, 83 Cal. App. 3d 993, 148 Cal Rptr. 165 (1978) (police ignored the defendant's request for attorney). However, the *Krueger* court, citing *Miranda*, also warned against placing too mucb emphasis on the subjective belief of the officers. 82 Ill. 2d at 311, 412 N.E.2d at 540 (citing Miranda v. Arizona, 384 U.S. 436, 486 n.55 (1966)).

96. 82 Ill. 2d at 312, 412 N.E.2d at 540. At trial, the defendant testified that he had requested an attorney when the officers had questioned him about the stabbing. During the cross-examination of the defendant, the following dialogue took place:

Q. Why did you continue talking to [the police] after you say you said, 'I think I should have an attorney?'

A. Have you ever been interrogated by three Rockford Police Detectives?

Q. No, I haven't, but I want to know why you continued talking to them.

A. Because I believed it was self-defense. I still do. They wanted a statement of what happened to clear it up. I wanted to get it off my chest, so I gave them a statement.

Q. But you know you had a right to have an attorney there if you wanted one, didn't you?

A. Yes, I did.

Q. You ever insist on having an attorney contacted?

A. I asked for an attorney before I began the statement, and I saw that it was not going to get me anywhere, so I just ceased on that line, because I just knew I wasn't going to get an attorney anyways.

Q. Did it occur to you not to talk any further?

A. Yes, but it occurred to me I might be up all night and be badgered by these three

court found that the inculpatory statements resulted from the defendant's desire to tell his own story and to ease his conscience, undermining the defendant's assertion of a desire for an attorney prior to questioning.[97]

Since *People v. Krueger* several Illinois courts[98] have applied the threshold standard of clarity test set forth in *Krueger*.[99] In *People v. Harper*[100] an Illinois appellate court, citing *Krueger*,[101] held that the defendant's request, made while he was in custody, that a police officer retrieve a wallet from his car so that the defendant could obtain his lawyer's business card[102] was not an invocation of the right to counsel.[103] The court stressed that although the defendant was completely aware of his right to counsel and of his right to stop the interrogation at any time, the defendant never stated clearly that he desired to invoke those rights.[104] In *People v. Kendricks*[105] another Illinois appellate court applied the *Krueger* test and found the defendant's statement[106] too ambiguous to constitute an invocation of the right to counsel.[107] Disregarding the *Krueger* court's emphasis on an officer's subjective, good faith belief that the defendant did not mean to invoke his right to counsel,

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detectives.

Id. at 309, 412 N.E.2d at 539.

97. *Id.* at 312, 412 N.E.2d at 540.

98. *See, e.g.*, People v. Harper, 94 Ill. App. 3d 298, 418 N.E.2d 894 (1981) (holding the defendant's request for his attorney's business card not to be an invocation of the right to counsel); People v. Winston, 106 Ill. App. 3d 673, 435 N.E.2d 1327 (1982) (holding the defendant's statement that he would be requesting an attorney "eventually" not to be a present request for counsel); People v. Kendricks, 121 Ill. App. 3d 442, 459 N.E.2d 1137 (1984) (declaring the defendant's statement that he might need a lawyer not an invocation of right to counsel); People v. Wieland, 123 Ill. App. 3d 576, 462 N.E.2d 1256 (1984) (finding the defendant's statement that he did not know whether he should take polygraph test without consulting attorney not to be a request for counsel); Illinois v. Smith, 102 Ill. 2d 365, 466 N.E. 2d 236 (1984) (holding the defendant's statements too ambiguous to constitute an invocation of the right to counsel), *rev'd*, 105 S. Ct. 490 (1985).

99. *See infra* text accompanying note 113.

100. 94 Ill. App. 3d 298, 418 N.E.2d 894 (1981).

101. *Id.* at 300, 418 N.E.2d at 896.

102. The defendant testified concerning his conversation with the officer, "I wanted to call a lawyer by the name of Stan Pisani, but I didn't know the number by heart. The wallet was in the car and the card in my car . . . and I asked him if possibly he could get it for me and told him I had a lawyer's card in it and he told me it wouldn't be necessary." *Id.*

103. *Id.*, 418 N.E.2d at 897.

104. *Id.*, 418 N.E.2d at 896.

105. 121 Ill. App. 3d 442, 459 N.E.2d 1137 (1984).

106. The defendant's statement was expressed as either "You know, I kind of think I know [sic] a lawyer, don't I" or "I think I might need a lawyer," *Id.* at 445, 459 N.E.2d at 1140.

107. *Id.* at 447, 459 N.E.2d at 1141.

the *Kendricks* court found the defendant's statement too ambiguous even though his interrogators admittedly considered the defendant's statement to be an invocation of his right to counsel.[108] The court held that the inquiry should center on the objective meaning of a defendant's statements rather than the meaning attached to the statements by the interrogators.[109]

In jurisdictions other than Illinois, some courts specifically have rejected the threshold standard of clarity test articulated in *Krueger*,[110] while other courts have applied tests similar to the *Krueger* approach.[111] In *State v. Johnson*,[112] for example, the Iowa Supreme Court held that a defendant had not invoked his right to counsel although he asked his interrogators twice whether he should have his lawyer present.[113] Citing *Krueger*,[114] the Iowa court found that because the defendant had exhibited indecision concerning his desire for counsel, he had not made a statement sufficiently clear to invoke his right to counsel.[115] Generally, courts adhering to the *Krueger* approach have been reluctant to hold that ambiguous references to counsel are exercises of the right to counsel.[116]

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108. *Id.*

109. *Id.*

110. *See* State v. Moulds, 105 Idaho 880, 673 P.2d 1074 (1983).

111. *See* State v. Johnson, 318 N.W.2d 417 (Iowa 1982); *see also* Donovon v. State, 400 So. 2d 1306, 1310 (Fla. 1981) (finding no invocation of the right to counsel when a juvenile defendant inquired of police whether the defendant could obtain an attorney without cost to him); State v. Phillips, 563 S.W.2d 47, 50-54 (Mo. 1978) (finding no invocation of the right to counsel when the defendant stated that he did not know whether he should consult with an attorney); Commonwealth v. Weaver, 418 A.2d 565, 569 (Pa. 1980) (finding no invocation of the right to counsel when the defendant inquired of the officer whether the officer thought she needed an attorney and the officer told her that the decision was hers to make).

112. 318 N.W.2d 417 (Iowa 1982).

113. *Id.* at 430.

114. *Id.* at 431.

115. *Id.* at 430.

116. *See, e.g.*, People v. Harper, 94 Ill. App. 3d 298, 418 N.E.2d 894 (1981) (holding that the defendant's request for his billfold containing his lawyer's card was insufficient to constitute an invocation of the right to counsel); People v. Winston, 106 Ill. App. 3d 673, 435 N.E.2d 1327, 1330 (1982) (holding the defendant's statement, "I'm not sure whether I want to tell you ahout it. I mean I want to tell somebody, but if I tell you, you're going to use it against me. And if I tell my own lawyer, he'll use it for me," to be insufficient for invocation); People v. Smith, 102 Ill. 2d 365, 466 N.E.2d 236 (1984) (holding the defendant's statements not to be an invocation of the right to counsel because full context of statements expressed only indecisiveness about the desire for counsel), *rev'd*, 105 S.Ct. 490 (1984); People v. Wieland, 123 Ill. App. 3d 576, 462 N.E.2d 1256 (1984) (holding the defendant's expression of reluctance to take polygraph test without counsel being appointed not to be an invocation of the right to counsel because reference was too ambiguous). *But see* People v. Meyers, 109 Ill. App. 3d 862, 441 N.E.2d 397, 402 (1982) (holding defendant's statement,

B. Cessation of Interrogation Upon Any Reference to An Attorney Standard

Ochoa v. State[117] illustrates a second approach to the issue of what statements or conduct constitute an invocation of the right to counsel. In *Ochoa* a Texas criminal appeals court reversed a defendant's murder conviction on the grounds that the lower court improperly had admitted into evidence a confession obtained in violation of the *Miranda* requirements.[118] After arresting the defendant at the scene of the crime, the authorities read the defendant his *Miranda* rights in at least three separate locations before beginning interrogation.[119] As the questioning began, the defendant stated either that he thought he should talk to an attorney before answering any questions or signing anything[120] or that he might want to talk to an attorney.[121] The police then gave the defendant coffee and cigarettes and began talking about matters other than the shooting, returning to the subject of the murder after approximately one-half hour.[122] Three hours later, the defendant signed a written confession that the interrogating officers prepared.[123] During the subsequent interrogation, the defendant failed to make any references to an attorney.[124]

At trial the defendant brought a motion to suppress the confession.[125] The trial court denied the motion, finding that the de-

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"Do you think I should have an attorney?" or "Who do you recommend as an attorney?" to be an invocation of the right to counsel).

117. 573 S.W.2d 796 (Tex. Crim. App. 1978).

118. *Id.* at 801. The defendant shot and killed a police officer after the officer had stopped him for a traffic violation. *Id.* at 798-99. At trial, the defendant admitted shooting the officer, but claimed that the action was in self-defense. *Id.*

119. *Id.* at 799. After reading the defendant his *Miranda* warnings at the site of his arrest, police took the defendant before a magistrate and again read the defendant his *Miranda* rights. *Id.* The defendant stated that he understood his rights and signed a paper. *Id.* Shortly thereafter, police took the defendant to an interrogation room where they read the defendant his *Miranda* rights a third time. *Id.* The defendant initially indicated that he did not wish to speak to police at that time. He was taken to his jail cell, but was brought back for interrogation two hours later. *Id.*

120. *Id.* This statement represents the testimony of the defendant.

121. *Id.* This statement represents the testimony of the interrogating officer.

122. *Id.* at 800. The interrogating officer admitted that his purpose in discussing those other matters with the defendant was to "calm and relax him and to 'get on his good side,' and to thus get [defendant] to make a statement." *Id.*

123. *Id.* The defendant did not read the statement, but had the interrogating officer read it to him. This confession was taken at 6:20 a.m., approximately seven hours after police arrested the defendant and after almost three hours of continuous interrogation about the murder.

124. *Id.*

125. *Id.* at 798. The defendant also challenged the accuracy of the confession, contend-

fendant had given the confession voluntarily and knowingly. The trial court also held that the defendant knowingly and voluntarily had waived his right to counsel and his protection against self-incrimination.[126] The trial court subsequently convicted the defendant of murder.

The criminal appeals court reversed the defendant's conviction, concluding that the State had failed to meet the heavy burden, imposed by *Miranda v. Arizona*,[127] of demonstrating that the defendant knowingly and intelligently had waived his right to counsel.[128] Furthermore, noting that *Miranda* requires a cessation of all interrogation once a defendant invokes a *Miranda* right,[129] the court asserted that when "a defendant *indicates in any way* that he desires to invoke his right to counsel, interrogation must cease."[130] Finding that the defendant's statements to the police

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ing that several statements were false and that he had not made them. *Id.*

126. *Id.*

127. 384 U.S. 436, 475 (1966). *Miranda* holds that "[i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id. See supra* notes 46-57 and accompanying text.

128. 573 S.W.2d at 800.

129. *Id.* The court quoted from *Miranda*, "The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates *in any manner* and at any stage of the process that he wishes to consult with an attorney before speaking *there can be no questioning.*" *Id.* (quoting Miranda v. Arizona, 384 U.S. 436, 444-45 (1966)) (emphasis added by the *Ochoa* court).

130. 573 S.W.2d at 800. (emphasis added by the *Ochoa* court); *see also* Connecticut v. Barrett, 197 Conn. 50, 495 A.2d 1044 (1985), *cert. granted*, 54 U.S.L.W. 3761 (May 19, 1986). For cases which have indicated that ambiguous remarks should be encompassed by *Miranda's* "in any manner" language, see White v. Finkbeiner, 611 F.2d 186, 190 (7th Cir. 1979) (holding the defendant's statement, "I'd rather see an attorney," to be an invocation of the right to counsel); United States v. Clark, 499 F.2d 802, 808 (4th Cir. 1974) (holding the defendant's statement, "I had better talk to a lawyer," to be a request for counsel); United States v. Lilla, 534 F. Supp. 1247, 1279-80 (N.D.N.Y. 1982) (holding one suspect's request to his mother to reach his attorney by telephone to be an exercise of his right to counsel; second suspect "explicitly invoked his right to counsel by attempting to contact his attorney directly, and by arranging for his mechanic to reach his attorney"); United States v. DeLeon, 412 F.Supp. 89 (D. V.I. 1976) (holding the defendant's request to both make a statement and see a lawyer to be an invocation of the right to counsel); People v. Traubert, 199 Colo. 322, 327, 608 P.2d 342, 346 (1980) (recognizing that "[a]lthough the defendant's statement 'I think I need to see an attorney' was neither 'sophisticated' nor, perhaps, in a 'legally proper form,' it was sufficient . . . to put the police officers on notice that the defendant intended to exercise his constitutional rights to counsel"); Wentela v. State, 95 Wis. 2d 283, 292, 290 N.W.2d 312, 316 (1980) (finding "the defendant's statement, 'I think I need an attorney' is a sufficient request for counsel"); State v. Blakney, 605 P.2d 1093, 1097 (Mont. 1979) (holding the defendant's statement "maybe I should have an attorney" is "witbin the 'indicates in any manner' language set out in *Miranda* as the requirement for an effective assertion of the right to counsel"), *vacated on other grounds*, 451 U.S. 1013 (1981);

were an invocation of his right to counsel, the court held that the continued interrogation of the defendant violated his *Miranda* rights and that the confession obtained during the continued interrogation was inadmissible.[131] The court concluded that although the defendant did not unequivocally state his desire for counsel, the defendant nevertheless manifested a wish to see an attorney sufficient to require that the interrogation cease.[132]

In *People v. Superior Court*[133] *(Zolnay)* the California Supreme Court adopted a view similar to the *Ochoa* approach. The California court upheld a trial court's decision to suppress the defendants' confessions and certain evidence recovered following the confessions because they were taken in violation of the prescribed *Miranda* requirements.[134] In *Zolnay* police arrested the defendants and advised them of their *Miranda* rights.[135] During questioning of the defendants in a single room, the interrogating officers confronted the defendants with some of the evidence that the police had gathered and asserted their belief that the defendants were guilty.[136] One defendant then stated either, "I guess we need a lawyer" or "Do you think we need an attorney?"[137] One officer an-

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State v. Ayers, 16 Or. App. 300, 518 P.2d 190 (1974) (finding the defendant's statement, expressed as either "Maybe I should see an attorney" or "I should talk to an attorney," to constitute an invocation of the right to counsel).

131. 573 S.W.2d at 800-01. *But see* Palmes v. Wainwright, 725 F.2d 1511, 1517 (11th Cir.) (refusing "to turn [the] statement 'I will talk to you without counsel, but I won't sign a written waiver form,' into 'I want an attorney' "), *cert. denied*, 105 S. Ct. 227 (1984).

132. 573 S.W.2d at 800-01. Subsequent Texas cases have *not* followed closely the reasoning set forth in *Ochoa*. *See, e.g.*, Goodnough v. State, 627 S.W.2d 841, 844 (Tex. Ct. App. 1982) (allowing clarifying questions following ambiguous statements); Huff v. State, 678 S.W.2d, 236, 242 (Tex. Ct. App. 1984) (same); Beck v. State, 681 S.W.2d 825, 827 (Tex. Ct. App. 1984) (same); *see also* Bautista v. State, 632 S.W.2d 846, 849 (Tex. Ct. App. 1982) (applying a threshold standard of clarity test to find that the defendants had not invoked their right to counsel); Tanner v. State, 690 S.W.2d 96, 98 (Tex. 1985) (same). *But see* State v. Nash, 119 N.H. 728, 730, 407 A.2d 365, 367 (1979) (following *Ochoa*).

133. 15 Cal. 3d 729, 542 P.2d 1390, 125 Cal. Rptr. 798 (1975), *cert. denied*, 429 U.S. 816 (1976).

134. *Id.* at 731, 737, 542 P.2d at 1391, 1395, 125 Cal. Rptr. at 799, 803. The two defendants in *Zolnay* allegedly committed a burglary. The police first questioned the defendants in their hotel room after advising each defendant of his *Miranda* rights. Both defendants denied participating in the burglary. The next morning, the defendants appeared at the police station for further interrogation where the police fingerprinted them and questioned the two defendants separately. The police did not readvise the defendants of their *Miranda* rights prior to any of the interrogation conducted at the police station. *Id.* at 732-34, 542 P.2d at 1391-92, 125 Cal. Rptr. at 799-800.

135. 15 Cal. 3d at 731, 542 P.2d at 1391, 125 Cal. Rptr. at 799.

136. *Id.* at 732, 542 P.2d at 1392, 125 Cal. Rptr. at 800.

137. *Id.* The court noted that the record of the trial court contained varying accounts. *Id.*

swered affirmatively and the defendant asked that officer whether he could recommend an attorney.[138] The officer replied that he could not, but informed the defendants that they could call one of the local attorneys listed in the telephone directory.[139] After advising the defendants that the investigation would continue until the officers discovered the facts and that the defendants could make the officers' jobs " 'easy' or 'tough'," the officers left the defendants alone with a telephone directory.[140] A few minutes later, the officers returned and asked the defendants whether they had made any decisions. The defendants then confessed to the crime.[141]

The California Supreme Court held that the defendants had invoked their *Miranda* rights by their references to an attorney and, as a result, that the confessions procured during the subsequent interrogation were inadmissible.[142] The court emphasized that no particular form of words or conduct is necessary for a defendant to invoke the fifth amendment privilege against self-incrimination.[143] To resolve ambiguities against a defendant, the court held, "would subvert *Miranda's* prophylactic intent"[144] to attach procedural safeguards to an accused's fifth amendment rights.[145] The court found that, under these particular circumstances, the references by one of the defendants to an attorney served as an assertion of both defendants' *Miranda* rights.[146] The court asserted that the defendants' specific request to the officers regarding recommendation of a lawyer demonstrated that their in-

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138. *Id.* Two Illinois appellate courts have held that a defendant may invoke his right to counsel hy requesting that an officer recommend an attorney. *See* People v. Meyers, 109 Ill. App. 3d 862, 441 N.E.2d 397 (1982); People v. Rafae, 51 Ill. App. 3d 1, 364 N.E.2d 991 (1972).

139. 15 Cal. 3d at 732, 542 P.2d at 1392, 125 Cal. Rptr. at 800.

140. *Id.*

141. *Id.* Subsequently, the defendants signed written statements of confession. *Id.*

142. *Id.* at 737, 542 P.2d at 1394, 125 Cal. Rptr. at 803.

143. *Id.* at 736, 542 P.2d at 1394-95, 125 Cal. Rptr. at 802-03.

144. The Supreme Court has characterized the *Miranda* warnings as "prophylactic" because the warnings are nonconstitutional safeguards to constitutionally-protected privileges. *See* New York v. Quarles, 467 U.S. 649, 671 (1984) (O'Connor, J., dissenting in part); Michigan v. Tucker, 417 U.S. 433, 444 (1974).

145. 15 Cal. 3d at 736, 542 P.2d at 1395, 125 Cal. Rptr. at 802-03 (quoting People v. Randall, 1 Cal. 3d 948, 955, 464 P.2d 114, 118, 83 Cal. Rptr. 658, 662 (1970)).

146. 15 Cal. 3d at 736, 542 P.2d at 1395, 125 Cal. Rptr. at 803. The court emphasized that the defendants "were interrogated jointly and that the officers' questions regarding their desire to speak with or to consult an attorney were addressed to both." *Id.* The court, therefore, dismissed the government's contention that hoth defendants could not rely upon one defendant's statement to the officers as constituting an invocation of both of their *Miranda* rights.

terest in obtaining counsel was a present desire instead of a future concern about the need for an attorney.[147]

California courts since *Zolnay* have adopted its per se rule that interrogation must cease when an accused refers to an attorney, regardless of the ambiguity of the words used.[148] In *People v. Duran*,[149] for instance, a California court held that the defendant's statements indicated a present unwillingness to speak with the interrogating officers without first consulting an attorney.[150] The court stated that, regardless of whatever uncertainty the defendant expressed, "[a]mbiguous statements are to be construed as invocations" of *Miranda* rights.[151] The court concluded that because the defendant invoked his right to counsel, all questioning should have ceased and the trial court should not have admitted the subsequently obtained confession.[152]

In *People v. Russo*[153] a California appellate court stated that police may ask clarifying questions to determine whether an ac-

147. *Id.* at 736, 542 P.2d at 1394-95, 125 Cal. Rptr. at 803.

148. *See* People v. Hinds, 154 Cal. App. 3d 222, 201 Cal. Rptr. 104 (1984) ("Tell me the truth, wouldn't it be best if I had an attorney with me?" held to have invoked the defendant's *Miranda* rights); People v. Duran, 140 Cal. App. 3d 485, 189 Cal. Rptr 595 ("Well then I think it's better that I have an attorney here, but other than that, I'll give you my version of it, you know" or "I'll just tell you what, you know, what I did and, you know but I mean, or have you got an attorney right here present, close?" held to have invoked the defendant's *Miranda* rights), *cert. denied*, 464 U.S. 991 (1983); People v. Russo, 148 Cal. App. 3d 1172, 196 Cal. Rptr. 466 (1983) ("I don't know if I should have a lawyer here or what?" held to have invoked the defendant's *Miranda* rights); People v. Quirk, 129 Cal. App. 3d 628, 181 Cal. Rptr. 301 (1982) (defendant's question of a government appointed psychiatrist concerning whether his wife had hired an attorney invoked the defendant's *Miranda* rights); People v. Munoz, 83 Cal. App. 3d 993, 148 Cal. Rptr. 165 (1978) ("Well, maybe I should talk to an attorney" invoked the defendant's *Miranda* rights). *But see* People v. Bestelmeyer, 166 Cal. App. 3d 520, 212 Cal. Rptr. 605 (1985) ("I just thinkin', maybe I shouldn't say anything without a lawyer and then I thinkin' ahh" held to be insufficiently clear to invoke the defendant's *Miranda* rights).

149. 140 Cal. App. 3d 485, 189 Cal. Rptr. 595, *cert. denied*, 464 U.S. 991 (1983). In *Duran* the court convicted the defendant of second degree murder for stabbing his wife's suitor. *Id. See supra* note 148.

150. *Id.* at 492, 189 Cal. Rptr. at 599. The defendant stated, "I'll just tell you what, you know, I did and, you know but I mean, or have you got an attorney right here present, close?" The interrogating officer responded: "It will take quite a while to get one . . . go ahead." *Id.*

151. *Id.* The court, quoting an earlier California Supreme Court case, stated: "A principal objective of [the *Miranda*] decision was to establish safeguards that would liberate courts insofar as possible from the difficult and troublesome necessity of adjudicating in each case whether coercive . . . influences had been employed to secure admissions or confessions." *Id.* (quoting People v. Ireland, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969)).

152. 140 Cal. App. 3d at 492, 189 Cal. Rptr. at 599.

153. 148 Cal. App. 3d 1172, 196 Cal. Rptr. 466 (1983).

cused understands his *Miranda* rights or the waiver of those rights, but may not ask the accused whether his ambiguous statements are an invocation of the right to counsel.[154] According to the court in *Russo*, questioning should have ceased as soon as the defendant stated, "I don't know if I should have a lawyer here or what."[155] Citing previous California decisions,[156] the court asserted that ambiguous statements amount to an invocation of the right to counsel.[157] The court observed that a policy of requiring unequivocal statements in order to constitute an invocation of the right to counsel effectively would penalize the less experienced defendant whose ambiguous statements would not invoke the *Miranda* protections; a more experienced criminal, on the other hand, would state precisely his desire for counsel and require the interrogation to cease.[158]

C. *Immediate Narrowing of Questioning to Clarify Reference Standard*

The United States Court of Appeals for the Fifth Circuit established a third approach for determining when an accused invokes his right to counsel. In *Nash v. Estelle*[159] the Fifth Circuit stated that when an accused makes an equivocal reference to an attorney, police may inquire further to clarify the accused's wishes.[160] In *Nash* the police arrested the defendant pursuant to a warrant and brought him before a magistrate who read the defendant the *Miranda* warnings.[161] A few days later, the assistant district attorney interviewed the defendant concerning the defendant's impending murder charge.[162] The assistant district attorney

154. *Id.* at 1177, 196 Cal. Rptr. at 469.

155. *Id.* The court felt that this statement demonstrated that the defendant was not presently willing to discuss the case freely and completely. *Id.*

156. See cases cited *supra* note 148.

157. 148 Cal. App. 3d at 1177, 196 Cal. Rptr. at 469.

158. 148 Cal. App. 3d at 1177, 196 Cal. Rptr. 469; *accord* People v. Duran, 140 Cal. App. 3d 485, 189 Cal. Rptr. 595, *cert. denied*, 464 U.S. 991 (1983).

159. 597 F.2d 513 (5th Cir.), *cert denied*, 444 U.S. 981 (1979). In *Nash*, the defendant was convicted of murder after a jury trial. *Id.* at 514. The federal district court granted the defendant's petition for writ of habeas corpus on grounds that the trial court improperly had admitted a written confession obtained in violation of the defendant's *Miranda* rights. *Id.* The Fifth Circuit Court of Appeals reversed the district court's grant of habeas corpus relief. *Id.*

160. *Id.* at 517.

161. *Id.* at 514.

162. *Id.* at 515. The defendant previously had confessed orally to the murder. Because, however, the prosecution did not introduce this confession at the state trial, the Fifth Circuit did not have occasion to consider the admissibility of the confession. *Id.*

readvised the defendant of his *Miranda* rights, inquiring after reading each right whether the defendant understood it.[163] After the assistant district attorney again informed the defendant that he could have a lawyer present during the interrogation, the defendant stated, "Well, I don't have the money to hire one, but I would like, you know, to have one appointed."[164] The government's attorney inquired: "You want one to be appointed for you?"[165] After the defendant replied affirmatively, the government's attorney agreed to the defendant's request and stated that the interview would have to cease immediately.[166] The defendant indicated that he wanted to talk presently about the murder and stated, "I would like to have a lawyer, but I'd rather talk to you."[167] After further questioning to determine the defendant's wishes, the government's attorney requested that the defendant sign a written waiver card and then proceeded to procure a confession from the defendant.[168]

The district court ruled that the confession should have been

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163. *Id.* at 515-516.

164. *Id.*

165. *Id.* at 516; *see infra* note 188.

166. 597 F.2d at 516.

167. *Id.* at 516.

168. *Id.* at 517. The pertinent section of the conversation between the defendant (Nash) and the government's attorney (Files) is as follows:

FILES: Please just tell us about it. Any time we are talking and you decide that you need somebody else here, you just tell me about it and we will get somebody up here.

NASH: Well, I don't have the money to hire [an attorney], but I would like, you know, to have one appointed.

FILES: You want one to be appointed for you?

NASH: Yes, sir.

FILES: Okay, I had hoped that we might talk about this, but if you want a lawyer appointed, then we are going to have to stop right now.

NASH: But, uh, I kinda, you know, wanted, you know, to talk about it, you know, to kinda, you know, try to get it straightened out.

FILES: Well, I can talk about it with you and I would like to, but if you want a lawyer, well, I am going to have to hold off. I can't talk to you. It's your life.

NASH: I would like to bave a lawyer, but I'd rather talk to you.

FILES: Well, what [the waiver form] says there is, it doesn't say that you don't ever want to have a lawyer, it says that you don't want to have a lawyer here, now. You got the right now, and I want you to know that. But if you want to have a lawyer bere, well, I am not going to talk to you about it.

NASH: No, I would rather talk to you.

FILES: You would rather talk to me? You do not want to have a lawyer here right now?

NASH: No, sir.

FILES: Are you absolutely certain of that?

NASH: Yes, sir.

FILES: Go ahead and sign that thing.

Id. at 516-517.

suppressed at trial because the defendant asked for an attorney to be present during the questioning, thus mandating a cessation of interrogation until the government provided an attorney to the defendant.[169] The Fifth Circuit reversed, holding that the mere mention of the word "lawyer" is not always an invocation of the right to counsel.[170] The court concluded that the defendant never invoked his right to counsel, but merely sought reassurance that he would not waive his right to counsel at a future date by presently discussing the circumstances of the murder with the assistant district attorney.[171] In the immediate situation, the court found that requiring the interrogation to cease after the defendant's initial request for a lawyer would have deprived the defendant of his "true desire" to relate his story.[172] The court, therefore, held that when an accused expresses both a desire for counsel and a desire to continue the interview without counsel, police may clarify the preferred course that the accused seeks to follow.[173]

Three judges dissented from the majority opinion in *Nash*. The dissent criticized the majority's permission of clarifying questions as creating too much uncertainty for police and prosecutors and increasing the possibility of coercion by police officers to induce the suspect to waive the right to counsel.[174] Furthermore, the

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169. *Id.* at 518.

170. *Id.* To hold otherwise, the court stated, would have required the government's attorney to order the defendant "removed from his office without another word when 'lawyer' fell from [the defendant's] lips." *Id. See* United States v. Jardina, 747 F.2d 945, 949 (5th Cir. 1984) (noting that the defendant's comment that he would be interested to know what deal his attorney works out with the government did not invoke his right to counsel; "[t]he word 'attorney' has no talismanic qualities"); *see also* United States v. McKinney, 758 F.2d 1036, 1044-45 (5th Cir. 1985) (holding that refusal to sign waiver of rights form is not an invocation of right to counsel nor does it require limitation of questioning to clarification of desire respecting counsel); Palmes v. Wainwright, 725 F.2d 1511, 1517 (11th Cir.) (same), *cert. denied*, 105 S. Ct. 227 (1984); Gorel v. United States, 531 F.Supp. 368, 372 (S.D. Tex. 1981) (holding that the defendant's request of his wife to contact an attorney constituted neither an indication of a present desire for counsel nor an equivocal request for counsel).

171. 597 F.2d at 518. In holding that the defendant never invoked his right to counsel during the interview, the court emphasized the sensitivity with which the government's attorney treated the defendant's rights. Approving of this sensitivity, the court observed that the government's attorney repeatedly informed the defendant that he could cut off questioning during any point of the interview and consult an appointed lawyer. *Id.* at 519.

172. *Id.* at 519.

173. *Id.* at 517. The court, however, warned that the police should not attempt to "utilize the guise of clarification as a subterfuge for coercion or intimidation." *Id.* at 517-18. *See* Daniel v. State, 644 P.2d 172, 177 (Wyo. 1982) (holding that interrogating officers "may seek clarification of the suspect's desires, as long as he does not disguise the clarification as a subterfuge for coercion or intimidation").

174. 597 F.2d at 526. The dissent feared that the majority opinion would encourage

dissent criticized the majority's application of its own standard, finding no equivocalness in the defendant's initial request for counsel.[175] Finally, the dissent concluded that the statements should not have been admitted in the absence of any government proof of a knowing and intelligent waiver.[176]

In *Thompson v. Wainwright*[177] the Fifth Circuit reaffirmed its *Nash* decision by holding that police may ask clarifying questions following an accused's equivocal references to an attorney. The court, however, qualified the *Nash* ruling by holding that police must restrict further questioning to ascertaining whether the accused intends to invoke his right to counsel.[178] In *Thompson* police arrested the defendant for murder and then took the defendant

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police "to find, even to create, equivocalness where there is none and in so doing force the suspect constantly to reassert his right to counsel." *Id.* The dissent also feared that the majority's rule would tempt the police to elicit equivocal statements from a suspect. *Id.*

175. The dissent stated:

> What is, of course, wrong with [the district attorney's inquiry] at the threshold is that [the defendant's] statements concerning his desire to continue without a lawyer were the fruits of continued questioning by [the district attorney] after [the defendant] requested counsel. The supposed need for clarification arose from interrogation continued after it was bound to cease. The opinion neither suggests nor even addresses any justification for [the district attorney's] continuing the interrogation in the first instance but employs the fruits of the continued questioning to find that [the defendant's statement] was equivocal.

Id. at 523 (Godbold, J., dissenting) (emphasis deleted). The Supreme Court in 1984, prohibited the use of later ambiguous statements to challenge a defendant's initial unequivocal request for counsel. Smith v. Illinois, 469 U.S. 91 (1984). *See supra* notes 71-75 and accompanying text. The dissent also found that the interrogating officer had not limited his questioning to clarifying the accused's request for counsel, but had exerted subtle pressures on the defendant to encourage him to waive the right to counsel. 597 F.2d at 524-25.

176. 597 F.2d. at 527.

177. 601 F.2d 768 (5th Cir. 1979)

178. *Id.* at 771. The court noted that when a defendant makes an equivocal request for counsel, "*[f]urther questioning thereafter must be limited to clarifying that request* until it *is clarified* . . . . [Once] clarified as a present desire for the assistance of legal counsel, *all* interrogation must cease until that is provided, just as in the case of an initial, unambiguous request for an attorney." *Id.* (emphasis original). *See also* United States v. Cherry, 733 F.2d 1124 (5th Cir. 1984) (noting that police should have limited interrogation to clarifying the defendant's desires regarding counsel after the defendant stated, "Maybe I should talk to an attorney before I make a further statement," followed a few minutes later by, "Why should I not get an attorney?"); United States v. Prestigiacomo, 504 F.Supp. 681, 683-84 (E.D.N.Y. 1981) (although allowing clarification following an equivocal request for counsel, court found further police questioning did not comprise an effort to clarify the suspect's statement, "maybe it would be good to have a lawyer"); Connecticut v. Barrett, 197 Conn. 50, 495 A.2d 1044 (1985) (holding that after the suspect stated that he would not give a written statement without an attorney but would answer questions orally, police failed to limit questioning to clarification of the suspect's wishes), *cert. granted*, 54 U.S.L.W. 3761 (May 19, 1986); State v. Cody, 293 N.W.2d 440, 446 (S.D. 1980) (finding that further police questioning after the suspect's equivocal reference was not limited to clarification).

into an interview room for questioning.[179] After the officers advised the defendant of his rights, the defendant signed a waiver card.[180] The defendant then announced his desire to make a statement, but only after consulting with an attorney.[181] An officer responded that an attorney would counsel him not to say anything and, therefore, the police would be unable to obtain the defendant's side of the story.[182] The defendant then gave a written confession.[183]

In reversing the district court's denial of a habeas corpus petition,[184] the Fifth Circuit held that the interrogating officers violated the per se rule, established in *Miranda*,[185] that requires a cessation of all custodial interrogation once the accused requests an attorney.[186] The Fifth Circuit compared the fact situation

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179. 601 F.2d. at 769.

180. *Id.*

181. *Id.*

182. *Id.* The record discloses the following exchange between the defendant's trial attorney and the interrogating officer:

Q: Did he at any time request that the interview cease?

A: No, sir. The only thing he said was he would like to tell his attorney first and we told him he could tell us just as well and that his attorney would not be able to tell us what he said so he wanted to tell us himself.

Q: Officer Cunningham, you indicated just a few seconds ago something about Mr. Thompson wanted to tell his attorney first?

A: Yes, sir.

Q: He indicated that to you?

A: Yes, sir.

Q: An then what did you tell him?

A: I advised him if he told you that he would not be able to tell us what happened.

Q: And then he went ahead and told you?

A: Yes, sir.

Q: But he did ask for an attorney? He wanted to tell an attorney first?

A: Yes, sir, and we advised him if he told an attorney first he would not be able to talk to us and tell us his side of the story.

Id. at 769-70.

183. *Id.* The defendant's attorney sought to suppress his client's confession at a pretrial hearing and during the trial. *Id.* at 770. The state trial court denied both motions to suppress. The state court held that the defendant had understood fully the *Miranda* rights and voluntarily had waived them. *Id.* The state trial court noted that the defendant signed a waiver of rights card, demonstrated an understanding of his rights to the interrogating officers, and testified at the suppression hearing that he understood his rights at the time of the interrogation. After the Florida Supreme Court affirmed the conviction, *see* Thompson v. State, 328 So.2d 1 (Fla. 1976), the defendant sought a writ of habeas corpus in federal district court. The district judge also concluded that the defendant voluntarily and intelligently had waived his *Miranda* rights. 601 F.2d at 770.

184. *See supra* note 203 and accompanying text.

185. Miranda v. Arizona, 384 U.S. 436, 474 (1966); *See* Michigan v. Mosley, 423 U.S. 96, 109 (1975) (White, J., concurring) (stating that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present").

186. 601 F.2d at 770-71.

presented in *Thompson* to that presented in *Nash*[187] and noted that the difference between the two cases existed in the responses interrogating officers made after the defendants expressed equivocal requests for attorneys. The interrogating officers in *Thompson*, unlike the officers in *Nash*, failed to limit their questioning to clarifying the defendant's request.[188] The court found that the interrogating officers in *Thompson* violated the defendant's *Miranda* rights by seeking to dissuade the defendant from consulting with an attorney, rather than limiting their questioning to clarifying the defendant's equivocal request for an attorney.[189] The court emphasized that the purpose of clarification was to discern whether the accused desired an attorney, not to deter him from seeking one.[190]

Thompson and *Nash* reflect the Fifth Circuit's view that the word "attorney" does not assume "talismanic qualities" every time the accused speaks the word. When the defendant makes an ambiguous reference to an attorney, however, clarifying the defendant's request protects the defendant's right to counsel by determining the defendant's desires.[191] Thus, the Fifth Circuit has established the rule that once an accused makes an ambiguous reference to counsel, interrogating officers must immediately limit further questioning to clarifying the accused's desires. If and when the interrogators clarify the reference as a present desire for legal counsel, all interrogation must cease until the government provides the accused with the opportunity to confer with counsel. Any statements taken after the interrogators determine that the defendant's reference to an attorney is a request for counsel violate the *Miranda* requirements.[192]

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187. *Id.* at 771. *See supra* notes 159-68 and accompanying text.

188. 601 F.2d at 770.

189. *Id.* at 771-72. To make explicit what was implicit in *Nash*, the court stated:

> [T]he limited inquiry permissible after an equivocal request for legal counsel may not take the form of an argument between interrogators and suspect about whether having counsel would be in the suspect's best interests or not. Nor may it incorporate a presumption by the interrogator to tell the suspect what counsel's advice to him would be if he were present.

Id. at 772.

190. *Id.* The court noted that the officer's explanation of the probable consequences of the defendant's proposed conference with counsel might have been harmless had the explanation been correct. The conviction, however, required reversal because the officer gave an incorrect explanation. The court observed that the interrogating officers persuaded the defendant to waive the right to counsel by stating that "if he told his attorney he could not tell his side of the story." *Id.*

191. *Id.*

192. *Id.* Several courts have specifically adopted the reasoning set forth in *Nash* and *Thompson*. *See, e.g.*, Gorel v. United States, 531 F. Supp. 368 (S.D. Tex.) *rev'd on other*

IV. ANALYSIS

Courts that have considered whether an accused's equivocal reference to an attorney constitutes an invocation of the right to counsel have taken three different positions. The first view states that ambiguous references to counsel do not constitute invocations: references to an attorney must meet a threshold standard of clarity to be deemed a request for counsel. The second view maintains the opposite stance and considers any equivocal reference to an attorney to be an invocation of the right of counsel. Under this approach, all interrogation must cease until the suspect has an opportunity to confer with counsel and have that counsel present during all further questioning. The third view, adopting a middle position, treats an ambiguous reference to an attorney as a possible invocation of the right to counsel. The interrogating officers may clarify whether the accused's statement was an attempt to invoke the right to counsel. The Supreme Court needs to properly resolve these conflicting approaches because the approach adopted will determine, in part, the degree of protection afforded to the accused during custodial interrogation. To determine the proper resolution, the three positions must be evaluated in light of three considerations: (1) judicial precedent, (2) everyday application of custodial interrogation procedures, and (3) the need for stringent protection of every individual's constitutional rights.

A. Judicial Precedent

The "in any manner" language[193] of *Miranda* indicates that no magical words are necessary for an accused to invoke his right to an attorney. The *Miranda* court placed great emphasis on the protections that the government should afford each individual's right to counsel during custodial interrogation.[194] Thus, any proposed standard must accommodate the variety of statements and conduct by which an accused may attempt to exercise an actual desire to consult with an attorney. Requiring a formal request for counsel

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grounds 659 F.2d 1073 (5th Cir. 1981); State v. Acquin, 187 Conn. 647, 448 A.2d 163 (1982) *cert. denied* 463 U.S. 1229 (1983); Waterhouse v. State, 429 So.2d 301 (Fla. 1983); State v. Moulds, 105 Idaho 880, 673 P.2d. 1074 (1983); State v. Robtoy, 98 Wash. 2d 101, 653 P.2d 284 (1982); United States v. Prestigiacomo, 504 F.Supp. 681 (E.D.N.Y. 1981); State v. Barrett, 197 Conn. 50, 495 A.2d 1044 (1985), *cert. granted*, 54 U.S.L.W. 3761 (May 19, 1986); Daniel v. State, 644 P.2d 172 (Wyo. 1982); Giacomazzi v. State, 633 P.2d 218 (Alaska 1982); Mallott v. State, 608 P.2d 737 (Alaska 1980); State v. Cody, 293 N.W.2d 440 (S.D. 1980).

193. *See supra* note 11 and accompanying text.

194. *See generally* 384 U.S. at 469-75.

would favor those defendants whose sophistication or prior experience with the law enables them to evade a trap that would prove unavoidable to the inexperienced or unsophisticated.[195]

The threshold of clarity standard does not provide an accused with the protection mandated by *Miranda*'s "in any manner" language. Requiring an accused to meet a threshold standard of clarity may deny protection to the inarticulate, who fail to state clearly a desire for counsel; to the nervous, who cannot maintain sufficient composure to determine what is in their best interests or to ensure that police are truly receptive to their desires; and to the inhibited, who out of fear or ignorance fail to press their desire for counsel strongly enough. Any of these denials of protection, if not in direct violation of *Miranda*'s "in any manner" language, would be contrary to the prophylactic intent of *Miranda*.[196]

The second approach, requiring a cessation of interrogation upon any equivocal "request" for an attorney, best ensures that *Miranda*'s "in any manner" language is given the broadest interpretation. This approach protects the accused's rights by construing any equivocal statement or conduct by the accused that could be conceived, in any possible manner, as a desire for counsel to be a request for counsel. This approach, like the third approach, parallels *Miranda* by creating a per se rule. The second and third standards use objective criteria to determine whether a court should exclude the evidence automatically.[197] The *Miranda* Court believed that only objective safeguards could protect an accused's rights during custodial interrogation.[198] The primary difficulty with the second approach, however, is that the police must treat any ambiguous reference as an invocation, even if the accused did not mean to invoke his right to counsel. Thus, to avoid possible suppression of evidence, interrogating officers must immediately halt their questioning if the accused makes any reference to counsel, unless the officers are able to establish that the accused subsequently made a knowing and intelligent waiver.[199] This result is

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195. *See id.* at 471. (noting that "[t]o require the request [for counsel to be unambiguous] would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it.") (quoting People v. Dorado, 62 Cal. 2d 338, 351, 398, P.2d 361, 369-70, 42 Cal. Rptr. 169, 177-78 (1965)); *see also* People v. Duran, 140 Cal. App. 3d 485, 189 Cal. Rptr. 595, *cert. denied* 464 U.S. 991 (1983).

196. *See supra* note 164.

197. 384 U.S. at 457-63.

198. *Id.* at 478-79.

199. *See supra* notes 46-57 and accompanying text.

also contrary to the intent of *Miranda*.[200]

The third approach, which allows clarifying questions following an accused's equivocal reference to counsel, best realizes *Miranda*'s intent. By treating an ambiguous reference as merely a possible invocation until clarified, this approach protects only the true desires for counsel that *Miranda* sought to safeguard. This approach also creates an objective rule that would provide police with guidance in interrogating suspects: once an accused makes an equivocal reference to counsel, questioning must immediately focus on whether the accused intends to invoke the right to counsel.

Arguably, this approach actually is subjective and places too much discretion in the hands of the interrogating officers to interpret whether a suspect's request for counsel was equivocal and, thus, to determine whether subsequent questioning is permitted. Furthermore, this approach arguably encourages police to continue questioning of an accused in hopes of eliciting an equivocal statement or confession after an accused unambiguously has invoked the right to counsel.[201] The Supreme Court, however, has held that if a court finds the initial request for counsel was unambiguous, any subsequent statements or responses would not be admissible, absent the government's showing of waiver.[202] This ruling guards against the possibility that police will attempt to characterize unequivocal invocations as equivocal and protects those defendants who make clear requests for counsel by suppressing any subsequent responses. In addition, the *Thompson v. Wainwright* ruling protects those defendants who make equivocal references to counsel, but later allow police to dissuade or intimidate them from maintaining the right to counsel.[203]

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200. *See* 384 U.S. at 478. The court stated:

> Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. . . . There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make.

Id. (footnote omitted); *see also supra* notes 215, 238, and accompanying text.

201. *See* Nash v. Estelle, 597 F.2d 513-523 (5th Cir.) (Godbold, J., dissenting), *cert. denied*, 444 U.S. 981 (1979). *See also supra* notes 194-196 and accompanying text.

202. Smith v. Illinois, 469 U.S. 91 (1984). *See supra notes* 91-95 and accompanying text.

203. 601 F.2d 768 (5th Cir. 1979).

B. Practical Law Enforcement Considerations

A second consideration in analyzing these competing standards is the impact each standard may have on the normal operations of police interrogation. The proper approach should provide police with clear guidelines and not unduly hamper legitimate criminal investigations. The threshold of clarity standard fails to accomplish these goals. Under the threshold of clarity approach, police may disregard an accused's reference to counsel if the interrogating officers find the reference too ambiguous to discern the accused's wishes. Unscrupulous officers may decide that a particular reference is ambiguous enough to convince a court that they were unaware that the accused desired an attorney even though they did realize that the accused wished to consult with an attorney.[204] This approach also leaves conscientious police wondering when an equivocal reference has met the minimum standard. In some instances, the approach may tempt police to raise the standard to avoid having the interrogation cease.

The second approach, which requires cessation of an interrogation upon any reference to counsel, provides police with a "bright line rule."[205] In an area riddled with uncertainty and fraught with the consequences of suppressed evidence, any approach that provides an objective rule is attractive. The second approach, however, unduly restricts legitimate criminal investigations by requiring questioning to halt upon any equivocal reference to counsel, even if the accused does not wish to invoke his right to counsel. This approach, therefore, may inadvertently frustrate both legitimate police investigations and the actual desire of the accused to continue the interrogation without the aid of counsel.

The third approach, which allows police to ask clarifying questions after an accused makes an equivocal reference to counsel, satisfies law enforcement concerns. The approach provides clear guidelines for interrogating officers. When an accused makes an equivocal reference to counsel, the interrogating officer *must* immediately limit further questioning to clarifying the accused's wishes regarding counsel. At the same time, this approach does not unduly burden legitimate criminal investigations. The approach mandates a cessation of interrogation only after the accused's re-

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204. *See* People v. Kendricks, 121 Ill. App. 3d 442, 459 N.E.2d 1137 (1984); *supra* notes 125-129 and accompanying text.

205. *See* New York v. Quarles, 467 U.S. 649, 662 n.4 (1984) (O'Connor, J., dissenting in part).

sponses to clarifying questions reveal that the accused wishes to consult with an attorney. The approach allows police to continue their interrogation if the accused voluntarily expresses a desire to continue the interrogation without the aid of counsel.

C. *Individual Rights Concerns*

The final factor in analyzing the various approaches is the need for stringent protection of an accused's right against self-incrimination. Of all the considerations discussed, this requirement is the most important in determining the proper approach to be taken in resolving the issue. The optimal approach should ensure that an accused is afforded the right to counsel during interrogation whenever the accused so desires. Giving an accused the opportunity to confer with counsel best ensures that the accused's right against self-incrimination will be protected.

The threshold of clarity standard fails to ensure adequately an accused's right to counsel for several reasons.[206] Foremost among these reasons is that equivocal references through which the accused truly wishes to invoke his right to counsel may not meet the threshold. By failing to set forth any clear guidelines concerning when an equivocal reference will constitute an invocation, courts adopting this approach violate the spirit of *Miranda*. This approach lessens the protections inherent in *Miranda*'s "in any manner" language and fails to provide objective criteria to determine whether evidence is admissible. In addition, courts may develop differing threshold standards for each application of the approach and add more confusion and uncertainty to an already ambiguous area.

The second approach protects an accused's right to counsel, but is too strict in its application and consequences. By requiring an immediate halt to all questioning upon any reference to an attorney, this approach places the state in a paternalistic relationship with the accused. Under this approach, the state effectively invokes the right to counsel for the accused upon any reference to an attorney, regardless of whether the accused actually wishes to invoke the right to counsel. Although police should clearly inform an accused of his right to have counsel present during interrogation, the accused should make the decision whether to waive or to invoke that right. This absolutist approach can become a pretext that detracts from the deference that interrogators and courts

206. *See supra* text accompanying notes 196-204.

should accord to an accused's decision. By interjecting an attorney after any reference to counsel, the state forces a decision on the accused that the accused has not necessarily reached or may not desire.

The third approach provides constitutionally adequate safeguards to an accused's right to counsel and ensures that the decision whether to invoke the right to counsel rests with the accused. This approach rejects the notion that the state should thrust an attorney upon an accused without first ascertaining the accused's true desire. Through clarification, law enforcement officials can determine the actual desire of the accused. By focusing on the desire of the accused, this procedure provides the time needed for the accused to make a decision and helps to emphasize the importance that interrogators and the accused should attach to the decision. Furthermore, this approach excludes evidence that police obtain through their failure, either in bad faith or by inadvertance, to discern and honor possible invocations of an accused's right to counsel.

The United States Supreme Court recently has declined to resolve the conflict among the courts concerning whether an equivocal reference to an attorney constitutes an invocation of the right to counsel.[207] Having decided that the government may not use statements that an accused makes after an unequivocal request for counsel to cast doubt on the original invocation,[208] the Court must soon face the need to resolve the conflicting approaches discussed in this Note.[209] The Court should adopt the third approach, which treats an equivocal reference to an attorney as a possible invocation of the right to counsel until the government clarifies that reference. Once police have clarified the reference as a desire for counsel, all interrogation should immediately cease until the police have afforded the accused an opportunity to confer with counsel. In adopting this approach, the Court will recognize that every mention of the word "lawyer" does not trigger the need for clarification. Only those references which raise some inference, no matter how small, that the accused desires an attorney should cause an immediate narrowing of questioning to clarify the accused's wishes.

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207. Smith v. Illinois, 469 U.S. 91 (1984); *see supra* notes 14-16, 91-95 and accompanying text.

208. 469 U.S. 91, 96 (1984).

209. *See* Connecticut v. Barrett, 197 Conn. 50, 495 A.2d 1044, *cert. granted*, 54 U.S.L.W. 3761 (May 19, 1986). The *Barrett* case may give the court the opportunity to resolve this conflict.

Requiring clarifying questions after any utterance of the word "lawyer" potentially creates nonsensical situations in which officers are required to badger the accused with technical questions when the accused obviously has no desire to consult with an attorney. By adopting an approach that limits questioning to clarification upon any reference to an attorney that police conceivably could consider as an expression of some desire for an attorney, the Supreme Court would provide lower courts with an objective standard to determine the admissibility of incriminating statements, interrogating officers with simple and clear procedures to follow, and, most importantly, individuals with strict, yet sensible, protection of their constitutional right against self-incrimination.

V. Conclusion

Courts have adopted three approaches to determining whether an accused's ambiguous reference to an attorney consitutes an invocation of the right to counsel. The first approach requires that an accused's reference to an attorney must meet a threshold standard of clarity before courts will consider the statement to be an invocation of the right to counsel. The second approach states that interrogation must cease whenever an accused alludes to counsel, regardless of the ambiguity of his statement. The final approach holds that when an accused has made an equivocal reference that reasonably could be regarded as a request for counsel, the police must immediately restrict their questioning to clarifying whether the accused intends to invoke his right to counsel.

The lower courts' conflicting approaches refiect the difficulty associated with developing the proper safeguards that courts should apply to an accused's right against compelled self-incrimination. Resolution of the current conflict among courts will help provide and maintain the proper balance between the preservation of individual rights and law enforcement officials' important need to pursue legitimate criminal investigations. This Note argues that the proper resolution of what statements or conduct should constitute an accused's invocation of the right to counsel stems from a careful examination of the dictates of *Miranda*, the routine operation of criminal investigations, and the need for stringent protection of the right against compelled self-incrimination. This Note concludes that a moderate approach, the application of which seeks to clarify the accused's actual desire concerning counsel whenever police can reasonably infer that desire from the accused's conduct or statements, best serves *Miranda*'s goals by providing

interrogating officers with objective guidelines and by protecting the accused's right against self-incrimination.

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