How Do You Get a Lawyer Around Here? The Ambiguous Invocation of a Defendant's Right to Counsel Under Miranda v. Arizona

Adam G. Finger

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I. INTRODUCTION

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." In the landmark case of *Miranda v. Arizona*, the United States Supreme Court established procedural safeguards to protect an accused's Fifth Amendment rights from the coercive effects of custodial interrogations.

1. The Fifth Amendment states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.  


2. 384 U.S. 436 (1966). In *Miranda*, the police arrested the defendant and placed him into a special interrogation room where a subsequent confession was obtained. The police, during this interrogation, failed to give the defendant notice of his right to consult with and have an attorney present during questioning. *Id.* at 491.

3. *Id.* at 444. The Supreme Court's first concern in *Miranda* was that the atmosphere created by a police interrogation would coerce the defendant and "subjugate the individual to the will of the examiner." *Id.* at 457. The Supreme 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. Consequently, a crucial question when confronted with a *Miranda* problem is whether a defendant has been placed into custody. See, e.g., Orozco v. Texas, 394 U.S. 324, 327 (1969) (holding that the defendant was in custody, thus requiring *Miranda* warnings, when he was questioned in his bedroom with officers' guns drawn on him and told that he was not free to leave). Some elements to be considered when determining if an accused is in custody are: whether the person is considered a suspect or an arrestee, see United States v. Davis, 646 F.2d 1298, 1302 (8th Cir.) (holding that the defendant was not in custody because police had not arrested the defendant prior to or during a conversation with an informant), cert. denied, 454 U.S. 868 (1981); the period of a suspect's detention, see United States v. Chamberlin, 644 F.2d 1262, 1267 (9th Cir. 1980) (holding that a suspect is in custody for a period of twenty minutes in the back of a police car while other members of the criminal operation were being chased by other members of the police), cert. denied, 453 U.S. 914 (1981); and constraints placed upon
Prior to 1994, the Supreme Court had declined to address the issue of what constituted an invocation of the Fifth Amendment right to counsel when an accused is in custody. As a result, both state and federal courts were left to decide that issue as well as the problem of ambiguous or otherwise unclear statements made by a criminal defendant. Consequently, three approaches were developed by courts to tackle this problem. Although the Supreme Court in *Davis v. United States* stated that an invocation, in order to be valid, must be unambiguous, it failed to officially mandate a procedure to determine what constituted an "unambiguous invocation." Thus, the courts (and law enforcement officials) are still faced with this problem.

This Comment will trace the evolution of the right to counsel under *Miranda* and examine the three different approaches taken by the lower courts to address the ambiguity problem. This Comment will also analyze the Court’s decision in *Davis*, its ramifications upon this Fifth Amendment issue, the problems still facing the lower courts, and the effects upon defendants in a custodial interview. Finally, this Comment will analyze the effect of a defendant’s culture on his or her ability to invoke the right to counsel.

II. THE HISTORY OF THE RIGHT TO COUNSEL UNDER THE FIFTH AMENDMENT

A. General Background

Under *Miranda*, law enforcement officials must inform a suspect prior to the initiation of questioning that: (1) he has the right to remain silent; (2) any statements made by the defendant may be used against him at trial; (3) he has the right to have an attorney present during questioning; and (4) an attorney will be provided if he cannot afford one. The suspect during or prior to questioning, see United States v. Booth, 669 F.2d 1231, 1236 (9th Cir. 1981) (holding that a determining factor in deciding custody issue is whether the suspect was handcuffed).


7. Id. at 2356-57.

8. Miranda v. Arizona, 384 U.S. 436, 444, 478-70 (1966). The *Miranda* Court stated: Prior to any questioning, the person must be warned that he has a right to remain
ruling in *Miranda* does not require law enforcement officials to utilize
the exact warnings set forth in *Miranda*, but requires that the procedures
are "at least as effective in apprising accused persons of their right of
silence and in assuring a continuous opportunity to exercise it." 9
Consequently, the language used by police merely has to convey the
fundamental message of the *Miranda* warnings to be effective. 10

An accused's right to counsel furthers three objectives: (1) it protects
the accused from unwittingly incriminating himself; 11 (2) it affords
assistance to the accused when dealing with the convoluted criminal
process; 12 and (3) it allows the accused protection from any compelled
or otherwise involuntary confessions. 13 The right of an accused to
counsel is fundamental and absolute. 14 Consequently, courts must
exclude any confession or statement, given by an accused during a
custodial investigation, that violates *Miranda*, unless the accused has
been advised of his right to have counsel present and has voluntarily,
knowingly, and intelligently waived this right. 15

However, the *Miranda* warnings are not constitutionally mandated. 16
Thus, a violation of *Miranda* is not necessarily a violation of the Fifth

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silent, that any statement he does make may be used as evidence against him, and
that he has a right to the presence of an attorney, either retained or appointed. 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.* at 444-45. For a complete analysis of *Miranda*, see Stephen J. Schulhofer, *Reconsidering


10. *Id.* ("[W]e cannot say that the Constitution necessarily requires adherence to any
particular solution of the inherent compulsions of the interrogation process."). See also
*Duckworth v. Eagan*, 492 U.S. 195, 203-04 (1989) (warning that "we have no way of giving you
a lawyer, but one will be appointed for you, if you wish, if and when you go to court," accompanied with other unambiguous language, satisfactorily informed the accused of his right to
counsel before interrogation). For a complete examination of *Duckworth v. Eagan*, see


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


safety exception to the *Miranda* requirements).

rights protected by the Constitution but [are] instead measures to insure that the right against
compulsory self-incrimination [is] protected”).
Amendment. While in some situations a violation of Miranda will preclude the prosecution from introducing evidence, in other situations the violation will merely be considered harmless error. Finally, Miranda dictates that if at any point during the interrogation, the accused "indicates in any manner . . . that he wishes to consult with an attorney before speaking[,] there can be no questioning." Consequently, even if there has been a prior waiver by the accused, the interrogation must stop if at any point he indicates his desire for counsel.

B. Before Miranda: Conflicting and Confusing Standards

Prior to Miranda v. Arizona, the Supreme Court had decided the admissibility of a defendant's custodial confession based on its "voluntariness." Although the Supreme Court never articulated a clear and predictable definition, the test for "voluntariness" was whether the confessions had been obtained free of any threats or inducements. When using this test, the Court looked to the subjective state of mind of the defendant and the creditability of the statement given, rather than the procedures utilized to obtain the statement.

This test was modified in Brown v. Mississippi. The Court's attention focused on the police conduct used to elicit the confession in

17. See Quarles, 467 U.S. at 655 n.5 (Supreme Court rejected the argument that a statement made during a custodial interrogation must be considered to be compelled if obtained in violation of Miranda).
18. Miranda, 384 U.S. at 479 (evidence that is procured in violation of Miranda during a custodial interrogation is inadmissible at trial if there is not proof that warnings were properly given and there was a waiver of those rights by the accused).
19. See, e.g., United States v. Lenfesty, 923 F.2d 1293, 1298 (8th Cir.) (confession obtained in violation of Miranda harmless error when there was overwhelming evidence to support the conviction), cert. denied, 499 U.S. 968 (1991).
24. Id. at 585. The Supreme Court stated that the presumption that the confession was obtained fairly falls when "the confession appears to have been made either in consequence of inducements . . . or because of a threat or promise . . . operating upon the fears and hopes of the accused . . . depriv[ing] him of that freedom of will or self control essential to make his confession voluntary. . . ." Id. See also Charles J. Ogletree, Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda, 100 HARV. L. REV. 1826, 1831 (1987); James J. Tomkovicz, Standards for Invocation and Waiver of Counsel in Confession Contexts, 71 IOWA L. REV. 975 (1986).
25. See Ogletree, supra note 24, at 1831.
order to determine the confession's admissibility and its "voluntaryness." In Brown, the police whipped and hung the defendants repeatedly between interrogation sessions to secure their confessions. The Court held that the Due Process Clause in both the Fifth and Fourteenth Amendments forced the Court to decide on an *ad hoc* basis whether a confession had been obtained through compulsion, therefore making it inadmissible.

Under the due process test in Brown, the primary focus was on the circumstances under which the defendant had been interrogated. This limited but did not overrule Hopt v. Utah, which looked to the defendant's state of mind and credibility of his statement. Consequently, the result was a test that merged these two components in deciding the admissibility of a statement. However, this modified approach was plagued by many of the same problems that had surfaced under the previous applications of the two tests, such as: (1) a lack of uniform application of factors to be considered in the decision; (2) a lack of clear guidelines for the lower courts to follow in deciding the admissibility of statements; and (3) a lack of clear procedural standards for police interrogations. Because of the lack of any clear uniform standards, unconstitutional police interrogation procedures continued to be used to obtain confessions that were later deemed admissible despite the violations.

The analysis subsequently changed as a result of two later cases that addressed the problem of constitutionally challenged confessions. In Massiah v. United States, and Escobedo v. Illinois, the Court's previous due process analysis was rejected, and another based on the

27. *Id.* at 286.
28. *Id.* at 281-83. See also Anne E. Link, Fifth Amendment-The Constitutionality of Custodial Confessions, 82 J. CRIM. L. & CRIMINOLOGY 878, 879 (1992).
29. *Brown*, 297 U.S. at 286. The *Brown* Court stated that:

The due process clause requires that state action ... be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

*Id.* (citations omitted).
30. 110 U.S. 574 (1884).
34. 377 U.S. 201 (1964).
Sixth Amendment right to counsel was substituted. The Supreme Court held in *Massiah* that "surreptitious interrogations" were included within the activities prohibited by the Sixth Amendment, because a defendant who does not know that he is under interrogation by a government agent is "seriously imposed upon." In *Escobedo*, the Court announced that the use of a preindictment statement, secured by law enforcement officials after they falsely informed an accused that his lawyer did not wish to see him, was a violation of the Sixth Amendment. The *Escobedo* Court stated that the right to counsel provided by the Sixth Amendment attaches when the focus of the interrogation shifts from "investigatory to accusatory," and when the interview is used as a vehicle to secure a confession. However, this switch of analytical schemes did not cure the problem concerning the unclear standards applied in confession cases. Both state and federal courts struggled to apply this nebulous "focus" standard and came up with conflicting results.

C. *The Miranda Decision*

In *Miranda v. Arizona*, the Supreme Court addressed the problem outlined above, and attempted to both settle the law concerning the

36. The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. See also Matthew D. Bowman, *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*, 39 VAND. L. REV. 1159, 1164-65 (1986).

37. 377 U.S. at 206 (quoting United States v. Massiah, 307 F.2d 62, 72-73 (2nd Cir. 1962), rev'd, 377 U.S. 201 (1964) (Hays, J., dissenting)). After his arraignment and subsequent release, Massiah had an incriminating conversation, which was secretly taped by the police and later attempted to be admitted at trial, with a codefendant. *Id.* at 202-03.


39. *Id.* at 492. The Supreme Court stated:

[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.


admissibility of custodial confessions and announce a uniform standard. The Court sought to do this by making three major rulings in the opinion. First, the Supreme Court found that the informal pressures inherent in custodial interrogations can rise to the level of compulsion under the Fifth Amendment. Second, the Court ruled that any custodial hearing, no matter how brief, will involve enough inherent pressure upon an accused to speak that it would constitute compulsion. Finally, the Miranda Court held that in order to dispel these inherent compulsions, the police must inform an accused of his rights in clear and unequivocal terms prior to the initiation of questioning. The Court stated that the defendant must be apprised that: (1) he has the right to remain silent during questioning, (2) anything said by the defendant can and will be used against him in a court of law, (3) he has the right to have counsel present during questioning, and (4) an attorney will be provided to the accused if he cannot afford one.

The Miranda Court also reiterated that there was a heavy burden placed upon the government to prove that the defendant knowingly, intelligently, and voluntarily waived his privilege against self-incrimination and right to counsel. A waiver cannot be presumed by a defendant's silence, and the courts will not recognize it as such when evaluating the admissibility of a subsequent confession. Finally, the Supreme Court stated that should the accused invoke either his right to counsel or his right to remain silent, all questioning of the defendant must cease.

42. Id. at 467.
43. Id. The Supreme Court stated: "[T]he process of in-custody interrogation of persons suspected or accused of crime contains 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 . . . ." Id.
44. Id.
45. Id.
46. Id. at 468. Chief Justice Warren opined that "such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere." Id.
47. Id. at 469. This warning was needed to make an accused aware of the consequences should he forego this right to silence. Id.
48. Id. at 469-70 ("our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process").
49. Id. at 473. The Court stated that without this additional warning, indigent defendants would believe that the right to counsel would only be applicable to those who could afford one, thus negating the purpose of warning the defendant of his right to have counsel present. Id.
50. Id. at 475 (citing Escobedo v. Illinois, 378 U.S. 478, 490 n.14 (1964)).
51. Id. at 475.
52. Id. at 444-45.
D. Modifications and Interpretations of Miranda

The Supreme Court has held that if a defendant waives his right to counsel under the Fifth Amendment after being apprised of his Miranda rights, the police are free to question him. However, "a valid waiver of that right cannot be established by showing only that [the defendant] responded to further police-initiated custodial interrogation even if he has been advised of his rights." Furthermore, once an accused has invoked his right to counsel, he is not subject to further interrogation by law enforcement officials regarding any offense until counsel had been made available to him, unless the defendant initiates any further interaction or communication by himself. This second level of protection regarding the right to counsel is to prevent the police from harassing a defendant into waiving his previously asserted Miranda rights. The remedy for a violation of Miranda is firmly established—any statement given in violation of the rules announced by these cases cannot be introduced into evidence in the State's case-in-chief. However, the statement may be used for the purposes of impeachment.

When a court is faced with the problem of determining the admissibility of a statement, it must look to whether the accused actually invoked his right to counsel and whether the defendant initiated further discussions after a knowing and intelligent waiver of his rights. In Smith v. Illinois, the Court expressly refused to answer the question of what was a valid and binding invocation of the right to counsel. Consequently, this question was left to the courts below and differing standards emerged. Thus, the constitutionality (and therefore admissibility) of an accused's statement depends upon the jurisdiction in which it was given.


54. Butler, 441 U.S. at 376.


60. Id. at 95.
III. THE STANDARDS USED TO DETERMINE AN INVOCATION OF THE RIGHT TO COUNSEL PRIOR TO UNITED STATES V. DAVIS

A. The Threshold of Clarity Standard

When faced with the difficult problem of an accused's ambiguous reference to an attorney, some courts have held that the statement must reach a certain threshold of clarity for it to be effective. Under this analysis, the statement made by an accused must be a clear and unequivocal invocation of his right to counsel in order to trigger the protections afforded by the Fifth Amendment. This type of analysis was first announced by the Illinois Supreme Court in People v. Krueger. In Krueger, while the defendant was being questioned by the police in relation to a stabbing death, he stated, "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." The officers conducting the interrogation did not consider this to be a request for counsel and continued to question Krueger further. A short time later, the defendant confessed to stabbing the victim. At trial, Krueger moved to have his statements and confession suppressed on the grounds that the police had obtained them after he had invoked his right to counsel, thus violating the rules announced in Miranda and Edwards. The trial court denied Krueger's suppression motion and the defendant was convicted at trial.

The Illinois Supreme Court upheld the defendant's conviction and

63. Id. at 538. There were discrepancies at trial as to exactly what the defendant said at this point. One officer stated that the defendant jumped "out of his chair and said, 'Hey you're trying to pin a murder on me. Maybe I need a lawyer.'" Id. Another officer testified that the defendant said, "'Just a minute. That's a 20 to 40 years sentence. Maybe I ought to talk to an attorney. You're trying to pin a murder rap on me.'" Id.
64. Id. at 539.
ruled that Krueger’s *Miranda* rights had not been violated.\(^6\) In its opinion, the *Krueger* court stated that although it was cognizant of the “in any manner” language used in *Miranda*, it did not believe *Miranda* demanded that any reference to an attorney be accorded the legal significance of an invocation of the right to counsel.\(^9\) Consequently, in order to trigger the protections afforded by *Miranda*, a reference to an attorney must meet a certain threshold of clarity to give it legal effect.\(^7\) The *Krueger* court held that the defendant’s remarks did not reach the threshold of clarity necessary to invoke his right to counsel.\(^1\) The *Krueger* court also stated that other elements should be considered when deciding the meaning of the defendant’s statements. These elements included the defendant’s intelligence, comprehension of his *Miranda* rights, and a valid waiver of those rights prior to the initiation of questioning.\(^2\) Finally, the Illinois Supreme Court stated that it did not give credit to the defendant’s position that he believed at the time that any further requests for counsel would have been futile.\(^3\)

Under this standard, a defendant who is intimidated by the interrogation room atmosphere may not voice his desire to obtain counsel in a way that will be legally recognizable. The defendant, although earnestly desiring counsel, is unlikely to know that he must assert his right in this

\(^6\) *Id.* at 540.
\(^9\) *Id.*
\(^7\) *Id.*
\(^1\) *Id.*
\(^2\) *Id.*
\(^3\) *Id.*

73. *Id.* at 539. The defendant’s cross examination at trial in pertinent part is as follows:

Q: Why did you continue talking to them [the police] after you say you said, “I think I should have an attorney?”

A: Have you ever been questioned 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 that 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 detectives.

*Id.*
fashion in order for it to be effective. Consequently, defendants may view any subsequent questioning by interviewing agents as a denial of their request or operate under the belief that they are not entitled to counsel at the present questioning, regardless of what they have been told. Thus, it seems that this standard is contrary to the spirit of Miranda and further limits a defendant's right to counsel under the Fifth Amendment.

B. The Per Se Standard

A second approach used by the courts to address the problem of an ambiguous invocation of the right to counsel is the per se standard. Of the three standards, the per se standard is the most defendant-oriented approach. Under this analysis, even the most ambiguous or equivocal request for an attorney is treated as an invocation of the Fifth Amendment right to counsel, demanding the cessation of any further police questioning. Courts, utilizing this standard, apply a per se bar to any further questioning after an ambiguous reference to the right to counsel is made by an accused.

The Sixth Circuit formulated this standard in Maglio v. Jago. In Maglio, the defendant was a 16-year-old suspect in a murder case. After police read him his Miranda rights, Maglio stated, "Maybe I should have an attorney." In response, the interrogating officer stated that

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75. 580 F.2d 202 (6th Cir. 1978).
76. Id. at 203.
77. Id. The full exchange between the two parties is as follows:
Q: All right, do you further understand that before you, you would talk with us that you could have a lawyer here present with you, do you understand that?
A: Yea, but I have to get a lawyer when I go to court. I can't afford it.
Q: Well, let's go back up here. Let me ask you this question again. Do you understand that before you would talk to me or talk to the officers that you have a right to have a lawyer present with you before you talk to us. Do you understand that you have that constitutional right?
A: Yea, I know I got it.
Q: Do you understand that?
A: Yea.
Q: Okay, the next question is this. Do you further understand that if you want a lawyer but didn't feel that you could afford one, that we would have to appoint one for you before you talked to us. Do you understand that?
A: Before I did talk to you?
he was unable to have an attorney appointed for Maglio until the following day in court. The officer further informed him, however, that he was not required to respond to any more questioning without his lawyer present. Despite the officer's warning, Maglio later admitted to the murder in a taped confession.

The court of appeals rejected the argument that Miranda requires a defendant to expressly and unequivocally assert his right to an attorney before that right is triggered, and held that Maglio's Fifth Amendment rights had been violated. The court reached this conclusion by looking to the language used in Miranda that stated "in any manner" in referring to a defendant's invocation. Additionally, the court looked to the language utilized in the Supreme Court decision in Michigan v. Mosley that "strongly suggest[s] a per se rule barring custodial interrogation of a suspect after a request for counsel has been made." The Maglio court held that when there is a request for counsel, all interrogations by the law officials must cease immediately if the defendant, at any stage, "indicates in any manner . . . that he wishes to consult with an attorney before speaking." The court then concluded that the defendant's constitutional rights had been violated when the officer continued questioning Maglio after he made an ambiguous statement regarding an attorney. The court further found that the subsequent questioning by the police officer was an attempt to have

Q: Yea, do you understand that—duly appointed for you?  
A: I understand it now. It's not the way it seemed before, but it doesn't matter.  
Q: Well, do you understand that right?  
A: Yea.  
Q: Now, do you understand that if you would decide to talk with us that you could stop talking at any time that you want to, that you can just cease and be quiet? That's your constitutional right. Do you understand that?  
A: Yes, sir.

Id.

78. Id.  
79. Id.  
80. Id.  
81. See supra note 8. The court also specifically relied on the following part of Miranda: If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

Maglio, 580 F.2d at 205 (citing Miranda v. Arizona, 384 U.S. 436, 474 (1966)).  
82. 423 U.S. 96, 110 n.2 (1975).  
83. Maglio, 580 F.2d at 205.  
84. Id. (citing Miranda, 384 U.S. at 445).
Maglio recant his earlier request for counsel in order to obtain a confession. As a result, the confession was suppressed. 85

In addition to federal circuits, many states have adopted this approach to requests for counsel. 86 In Ochoa v. State, 87 the defendant was convicted for capital murder as a result of, inter alia, a confession that he made to officers after the shooting of a police officer. 88 According to the testimony at trial, the defendant was arrested at the scene of the shooting and immediately given his Miranda rights. He was then taken to the jailhouse, brought before a justice of the peace, and reread his Miranda rights. 89 When asked if he understood his rights, the defendant answered affirmatively. During the following four hours, the defendant was questioned about the shooting and eventually confessed. At trial, the primary issue was whether the confession had been obtained after the defendant had invoked his right to counsel. 90

Under questioning by defense counsel, the interrogating officer stated:

He [the defendant] said that he probably ought to talk to a lawyer or something to this effect or didn't want to sign anything until he talked to a lawyer, if I recall correctly. He then said something to the effect, "Well, I will talk to you, but I don't want to sign anything." 91

The Supreme Court of Texas, sitting en banc, ruled that the defendant had in fact invoked his right to counsel, and that the officers had violated this right by not stopping the interrogation in order to secure counsel for the defendant. 92 The Ochoa court, like the court in Maglio, relied upon the "in any manner" language used in Miranda, in addition to the United States Supreme Court's decision in Michigan v.

85. Id. The Maglio court further stated:
In any case, Captain Traub [the interrogating police officer] clearly interpreted the comment as a request for an attorney, since he immediately said the questioning would have to stop, and qualified his earlier offer of counsel by telling Maglio he would have to wait until the next day to have a lawyer appointed for him. Unfortunately, the Captain did not honor his own recognition of the law but continued to probe until he obtained a confession. The only plausible object of Traub's continued questioning was to break down the suspect's attempt to assert his rights and elicit a confession.

Id.

86. See supra note 73.
87. 573 S.W.2d 796 (Tex. Crim. App. 1978) (en banc).
88. Id. at 798-99.
89. Id.
90. Id. at 799.
91. Id.
92. Id. at 800-01.
Mosley, to support its conclusion of a per se rule. The court stated that "[w]e read this language in Miranda literally; where a defendant indicates in any way that he desires to invoke his right to counsel, interrogation must cease."

Thus, the per se standard used by courts to evaluate an ambiguous statement regarding counsel is the polar opposite of the threshold of clarity standard. Where the threshold of clarity standard only gives legal effect to direct and clear invocations of a defendant's right to counsel, the per se standard indicates that any statement, whether ambiguous or not, is a valid invocation of the Fifth Amendment right to counsel. Moreover, where the threshold of clarity standard infringes upon a defendant's right to counsel, the per se standard unduly burdens law enforcement officials by precluding them from further questioning when a defendant ambiguously refers to an attorney but does not have a present desire to invoke that right. Consequently, these two standards represent both ends of the spectrum of court decisions attacking this problem.

C. The Clarification Standard

The third standard used to evaluate a defendant's unclear statement regarding counsel is the clarification standard. This examination represents the middle ground between the per se and threshold of clarity standards. Under this analysis, if a defendant makes an ambiguous reference to counsel, the interrogating official must limit any further questions to those that are designed to clarify whether the defendant has in fact voiced a present desire to have counsel during questioning.

93. Id. See also supra note 80; Michigan v. Mosley, 423 U.S. 96, 100 (1975).
94. Ochoa, 573 S.W.2d at 800.
95. Id.; see also Maglio, 580 F.2d at 207.
97. United States v. Gotay, 844 F.2d 971, 975 (2d Cir. 1988). For a complete discussion of United States v. Gotay, see Ada Clapp, The Second Circuit Adopts a Clarification Approach
This approach is in direct contradiction to the per se rule, which mandates that all questioning must cease after such a reference, and modifies the threshold of clarity standard, which does not limit at all the subsequent questioning of a defendant if the request for counsel is not direct and clear.98

The Fifth Circuit announced this standard in *Nash v. Estelle.*99 In *Nash,* the defendant had been convicted of killing a taxi cab driver based on a taped confession obtained during an interview with the district attorney prosecuting the case.100 The taped confession was the primary issue of the petitioner's writ of habeas corpus, which was granted by the district court and subsequently reversed by a three judge panel of the Fifth Circuit. The Fifth Circuit, en banc, upheld the panel's ruling reversing the grant of habeas corpus relief.101

Nash was first arrested by the police pursuant to a warrant issued on the basis of a witness who had placed the accused in the cab of the murdered driver.102 Nash was then taken before a magistrate who advised him of his *Miranda* rights. After being held for two days, the defendant was interviewed by the district attorney in charge of the case. Prior to the initiation of the interview, the district attorney again advised Nash of his rights, but upon reaching the portion regarding the appointment of counsel, Nash stated, "Well, I don't have the money to hire one, but I would like, you know, to have one appointed." The district attorney responded, "You want one to be appointed for you?" and Nash replied, "[y]es, sir."103 Following this exchange, the govern-

98. See supra note 60.
99. 597 F.2d 513 (5th Cir. 1979).
100. Id. at 515.
101. Id.
102. Id.
103. Id. at 517. A more complete record of the conversation (Files being the name of the district attorney) is as follows:

F: 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.
N: Well, I don't have the money to hire one [an attorney], but I would like, you know, to have one appointed.
F: You want one to be appointed for you?
N: Yes sir.
F: Okay. I had hoped we could talk about this, but if you want a lawyer appointed, then we are going to have to stop right now.
N: 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.
F: 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.
ment lawyer stated that he must cease all further discussion regarding the murder if the defendant wanted to have a lawyer present.¹⁰⁴ Nash responded that although he wanted to have an attorney appointed for him, he would prefer to discuss the murder with the district attorney.¹⁰⁵ The prosecutor then questioned Nash if he was certain that this was what he desired to do. Nash responded affirmatively, and the prosecutor then had Nash sign a written waiver of his *Miranda* rights.¹⁰⁶ During the course of the subsequent interview, Nash confessed to the murder of the cab driver.¹⁰⁷

The Fifth Circuit held that Nash's invocation was equivocal as he expressed both a desire to have counsel appointed and a desire to speak with the district attorney.¹⁰⁸ The court further ruled that Nash's confession was admissible because it was revealed by the taped conversation that he did not intend to presently invoke his right to counsel during the interview, but wanted to be reassured that counsel would be appointed for him in the future.¹⁰⁹ In its ruling, the Fifth Circuit relied on the *Miranda* decision, which supposedly addressed this particular problem.¹¹⁰ The *Nash* court further opined that it is sound constitutional practice to clarify a defendant's request when faced with

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N: I would like to have a lawyer, but I'd rather talk to you.
F: Well, what that [a waiver form of Nash's *Miranda* rights] 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 here, well, I am not going to talk to you about it.
N: No, I would rather talk to you.
F: You would rather talk to me? You do not want to have a lawyer here right now?
N: No, sir.
F: You are absolutely certain of that?
N: Yes, sir.
F: Go ahead and sign that thing [the waiver form].

*Id.* at 516-17 (emphasis added).

¹⁰⁴ *Id.* at 516.
¹⁰⁵ *Id.*
¹⁰⁶ *Id.* at 517.
¹⁰⁷ *Id.*
¹⁰⁸ *Id.* at 518.
¹⁰⁹ *Id.* Four judges on the panel hearing the case upheld the clarification standard employed by the majority, but dissented upon its application to these facts. The dissenters stated that Nash had invoked his right to counsel prior to the confession and therefore found that the confession should have been excluded. *Id.* at 520-534.
¹¹⁰ *Id.* at 517. "If [a suspect] is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing Agent." *Id.* (citing *Miranda* v. Arizona, 384 U.S. 436, 485 (1966)).
an ambiguous statement regarding counsel. The Fifth Circuit warned, however, that this clarification process could not be used "as a subterfuge for coercion or intimidation." The majority of the federal circuits and state supreme courts have adopted this approach to the ambiguity problem. These courts have faced statements such as: "Why don't I have an attorney here now?", "Shouldn't I have an attorney so you don't ask me any illegal questions?", and "When will I be able to go to court on this here and talk to a lawyer or something?" Officers faced with these dilemmas should be afforded the opportunity to question the accused to see if he in fact does presently desire to have counsel present. The clarification standard minimizes the risk that a statement or confession obtained after an ambiguous statement regarding counsel will later be deemed inadmissible. Furthermore, the clarification approach also benefits an accused. It provides the defendant the opportunity to respond to a question directly aimed at her intention to invoke her Fifth Amendment rights. As such, an intimidated defendant may more readily recognize her right to counsel when it is addressed directly, and affords her a direct opportunity to invoke that right. Thus, it seems that this standard works to the benefit of both parties in a custodial interrogation and represents a workable solution to a fundamental problem.

IV. THE SUPREME COURT'S APPROACH TO AMBIGUOUS STATEMENTS: THE \textit{DAVIS} DECISION

A. \textit{The Facts of} Davis v. United States

The United States Supreme Court recently addressed the issue of an ambiguous reference to counsel in the case of \textit{Davis v. United States}. In \textit{Davis}, the defendant was a member of the United States Navy stationed at Charleston Naval Base. On the night of October 2, 1988, Davis and another sailor, Keith Shackleford, were involved in a

\begin{itemize}
  \item[111.] \textit{Id.}
  \item[112.] \textit{Id.} at 517-18.
  \item[113.] \textit{See supra} note 95.
  \item[115.] State v. Doughty, 472 N.W.2d 299, 301 (Minn. 1991).
  \item[116.] Kuykendall v. State, 585 So. 2d 773, 775 (Miss. 1991).
  \item[117.] 114 S. Ct. 2350 (1994).
  \item[118.] \textit{Id.}
\end{itemize}
dispute over a pool bet at a club on the base.\textsuperscript{119} The next morning Shackleford's body was discovered severely beaten on a loading dock behind the club.\textsuperscript{120} An investigation into Shackleford's murder was instituted by the Naval Investigative Service ("NIS") and the defendant became a prime suspect in the case.\textsuperscript{121}

On November 4, 1988, Davis was interviewed by several NIS agents regarding the Shackleford incident.\textsuperscript{122} Prior to questioning, the NIS agents told Davis that he was a suspect in the case, that he was not required to give a statement, that anything that he said could be used in a subsequent court-martial proceeding, and that he had the right to have counsel present during the questioning.\textsuperscript{123} Davis then waived his rights both orally and in writing.\textsuperscript{124} A short time into the interview with the agents, Davis stated, "Maybe I should talk to a lawyer."\textsuperscript{125} The NIS agents asked whether Davis wanted a lawyer, or if he was just making a comment about a lawyer.\textsuperscript{126} Davis replied that he was not asking for a lawyer and he didn't want one.\textsuperscript{127} After the questioning continued for another hour, the defendant said, "I think I want a lawyer before I say anything else."\textsuperscript{128} At that time, the NIS agents stopped questioning the defendant.\textsuperscript{129}

At the court-martial, the defendant moved to suppress his statements made to the NIS agents during the November interview.\textsuperscript{130} The motion was denied and the defendant was convicted of unpremeditated murder and sentenced to confinement for life.\textsuperscript{131} The United States Court of

\textsuperscript{119} Id.

\textsuperscript{120} Id.

\textsuperscript{121} Id.

\textsuperscript{122} Id. at 2351.

\textsuperscript{123} Id.

\textsuperscript{124} Id.

\textsuperscript{125} Id.

\textsuperscript{126} Id.

\textsuperscript{127} Id. One of the interviewing NIS agents stated:

[W]e made it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, "No, I'm not asking for a lawyer," and then he continued on, and said, "No, I don't want a lawyer."

\textsuperscript{128} Id.

\textsuperscript{129} Id.

\textsuperscript{130} Id.

\textsuperscript{131} Id. The military judge ruled that "the mention of a lawyer by [Davis] during the course of the interrogation [was] not in the form of a request for counsel and . . . the agents properly determined that [Davis] was not indicating a desire for or invoking his right to coun-
Military Appeals affirmed the trial court's judgment, and the Supreme Court granted certiorari to determine whether Davis' initial statement constituted an actual invocation of his right to counsel.

B. The Court's Ruling

Justice O'Connor, writing for the Court, first restated the inherent differences that exist between a defendant's Sixth Amendment right to counsel and the Fifth Amendment right to counsel under Miranda. The Supreme Court traced the history and holdings of Miranda and its progeny, and reiterated that the "invocation of the Miranda right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." The Court then stated that the jurisprudence under Miranda did not require the cessation of all questioning when an ambiguous reference to an attorney is made. Rather, Justice O'Connor opined, a defendant must articulate his desire to have counsel present with sufficient clarity such that a reasonable police officer in the circumstances would understand the statement to be an invocation of the defendant's right to counsel. If that level is not reached, an interviewing officer is not bound to cease questioning.

The Supreme Court declined to extend the ruling in Edwards (precluding any further questioning when an accused has invoked the right to counsel) to apply to ambiguous statements, stating that such an

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132. Id. The Court of Military Appeals stated in its opinion:
   Some jurisdictions have held that any mention of counsel, however ambiguous, is sufficient to require that all questioning cease. Others have attempted to define a threshold standard of clarity for invoking the right to counsel and have held that comments falling short of the threshold do not invoke the right to counsel. Some jurisdictions . . . have held that all interrogation about the offense must immediately cease whenever a suspect mentions counsel, but they allow interrogators to ask narrow questions designed to clarify the earlier statement and the [suspect's] desires respecting counsel.

Id. at 2353 (citing Davis v. United States, 36 M.J. 337, 341 (1993), aff'd, 114 S. Ct. 2350 (1994)).

133. Id. at 2352.

134. Id. at 2354. While the Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings, a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and the police must explain this right to him before questioning begins. Id.

135. Id. at 2355. (citing McNeil v. Wisconsin, 501 U.S. 171, 178 (1991)).

136. Id.

137. Id.

138. Id.
extension "'would transform the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity.'" Justice O'Connor also stated that such an extension would muddle the bright line rule established in Edwards that questioning must cease if an accused requests an attorney. However, the Davis court recognized that it would be good practice for interviewing agents to clarify a defendant's statement if it seems to be an ambiguous reference to an attorney. Consequently, it seems that the Supreme Court has adopted the threshold of clarity standard to apply to vague references to an attorney, while also recommending that interrogating law officials adopt the clarification approach in order to insure the constitutionality of any statements made after that defendant's ambiguous reference.

V. EFFECTS OF THE DAVIS DECISION AND THE ASSERTION OF A RIGHT TO COUNSEL

Under the ruling announced in Davis, it is evident that a request for an attorney, in order to be legally valid, must be clear and unequivocal. However, what constitutes a request according to one person may not be considered as such by another. The Supreme Court recognized this danger when it stated, "We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present." The "variety of other reasons" that the court alludes to may have a much stronger inhibition upon a defendant's assertion than those named. Two such reasons that have been addressed by legal commentators are gender and race. A third possible reason much akin to race is the defendant's cultural background. Thus, the method and location of a person's upbringing

139. Id. at 2355-56 (citation omitted).
140. Id. at 2356.
141. Id. at 2356-57.
142. Id. at 2356.
143. Two other groups that manifest an indirect mode of speaking, thus affecting their assertion of a right to counsel, are women and African-Americans. See Janet E. Ainsworth, In a Different Register: The Pragmatics of Powerlessness in Police Interrogation, 103 YALE L.J. 239 (1993) (advocating the adoption of the per se rule); Thurmon Garner, Cooperative Communication Strategies: Observations in a Black Community, 14 J. BLACK STUD. 233 (1983). For a complete discussion of speech communication and the differences between the sexes in the workplace, see DEBORAH TANNEN, TALKING FROM 9 TO 5: HOW WOMEN'S AND MEN'S CONVERSATIONAL STYLES AFFECT WHO GETS HEARD, WHO GETS CREDIT, AND WHAT GETS DONE AT WORK (1994).
may have a profound effect upon their invocation of the right to counsel.

Of the many societies that differ from the Anglo-European structure, Asian societies display the greatest conflict with the assumptions regarding the assertion of individual rights.\textsuperscript{144} While individuality, and assertion of that individuality, is stressed and looked upon with favor in American society, the reverse is true in Asian society. Members of an Asian community, whether in the country of origin of that culture or within American society, are taught to respect and favor the good of the group over the good of the individual.\textsuperscript{145} This aspect translates into a greater deference to authority and a greater propensity to maintain silence when faced with a problem.\textsuperscript{146} As one Japanese linguist observed:

Each American individual has rights, expresses these rights, and expects others to listen to such requests. When a right is abused, it is equally as important for the abused to "stand up for his or her rights," as it is for others to try to correct the unjustified situation. Thus rights are a critical criteria for individuality. . . . For Japanese, the proverb, "the nail that sticks out gets hammered back in" reflects how [a person] should not stand out. In fact, translating the compliment in English, "She's a real individual!" to Japanese becomes an insult: "What a person with strong individuality!"\textsuperscript{147}

Consequently, a member of an Asian society would be much less likely to assert his rights in the face of authority. To do so would be in contravention of a societal standard that is firmly ingrained within the Asian culture.

Another aspect of the cultural differences that affects a person's assertiveness in requesting counsel is the mode of speech used. While Americans are noted for their direct manner of speech and consider directness logical and aligned with power, many cultures utilize varieties of indirectness as the norm in communication.\textsuperscript{148} The use of an indirect method of speech is preferred in Asian society and is considered sophisticated.\textsuperscript{149} Furthermore, a greater value is placed on silence than

\begin{footnotes}
\item[145] Id. at 29-33.
\item[147] Yamada, supra note 143, at 29-30.
\item[148] Tannen, supra note 142, at 85.
\item[149] Id. at 96.
\end{footnotes}
speech in Asian societies, and ideas are believed best communicated without being explicitly stated.\textsuperscript{150} Transferring this idea into a context similar to \textit{Davis}, it is easy to see how this cultural pressure and indirect method of speech would inhibit a direct and unequivocal invocation of the right to counsel.

A final aspect that must be taken into account in this context is the importance of authority in the Asian culture.\textsuperscript{151} Nowhere else in the world is authority, whether familial or societal, more respected and promoted than in the Asian cultures.\textsuperscript{152} One sociologist stated, “Altho

ugh Asians have traditionally tended to crave stronger authority . . . [t]he West has . . . an enthusiasm for checking authority.”\textsuperscript{153} As a result, this respect for authority would compel an Asian-American defendant to answer questions posed by police to a greater degree than a non-Asian-American defendant. Therefore, although an Asian-American may not directly assert his Fifth Amendment right to counsel because of societal influences, he will nevertheless answer questions from an authoritative figure because of those same influences.

Aggregating the three societal elements discussed above and examining the possible effects that they would place on a defendant, it is clear that the clarification approach to an ambiguous statement is the best solution to this problem. It alleviates the problems that arise under the threshold of clarity standard, while not overburdening police officers in their pursuit of effective law enforcement. Consequently, it is the compromise best suited to address the problem of an ambiguous statement made in reference to an attorney during a custodial interrogation.

VI. CONCLUSION

For many years, the lower courts have struggled to formulate a process to evaluate a defendant’s ambiguous reference to an attorney during a custodial interrogation. The split among the lower courts represents the three different possible interpretations of the language and intent of \textit{Miranda}. However, it must not be forgotten that the \textit{Miranda} decision was in response to the many abuses of defendants’ rights perpetrated by overzealous law enforcement officials. Chief

\textsuperscript{150} Id.
\textsuperscript{151} LUCIEN W. PYE, ASIAN POWER AND POLITICS: THE CULTURAL DIMENSIONS OF AUTHORITY 31-54 (1985).
\textsuperscript{152} Id. at 38.
\textsuperscript{153} Id.
Justice Earl Warren stated that the *Miranda* decision represented a critical balance between an accused's rights secured by the Constitution and the societal interest in effective law enforcement. It seems that this critical balance has been overlooked.

This Comment has illustrated how the current law regarding the invocation of the right to counsel under the Fifth Amendment has failed to recognize the inherent problems associated with a multi-cultural society. Of the three standards considered, it is evident that the clarification standard is the only process that adequately recognizes the cultural diversity of the American society while allowing effective law enforcement. It permits further inquiry of a defendant who, for whatever reason, has not directly invoked his right to counsel, while not overburdening police officials in the execution of their duties. Thus, it represents the modern day application, message, and spirit of *Miranda*.

ADAM GEOFFREY FINGER

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