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Judicial Approaches to the Ambiguous Request for Counsel
Since *Miranda v. Arizona*

In *Miranda v. Arizona*, the Supreme Court interposed the attorney between a criminal suspect and law enforcement officials. To protect a suspect's fifth amendment right against self-incrimination, the Court required that police inform the suspect of the right to consult with an attorney. While *Miranda* guaranteed the right to counsel during police interrogations, subsequent decisions have limited *Miranda*’s broad scope. This note is not a comment on the health of that decision. Instead, it studies one segment of *Miranda* jurisprudence—the ambiguous invocation of a suspect’s right to counsel.

The most recent Supreme Court decisions analyze a defendant’s right to counsel during interrogation as a two-tiered question. First, courts determine whether the defendant invoked the right to counsel. Second, courts determine whether the defendant waived the right to counsel. This latter question, independent of the first, must be addressed whether or not the accused invoked the right to counsel.

The Court has, over the past twenty years, restricted some of the generous language of *Miranda*. By narrowing *Miranda*, the Court has created new questions. For instance, the Court has not yet defined the factors which replace *Miranda*’s broad assurances of the right to counsel during interrogation. More important, the Court has not yet determined the effect of an ambiguous request on a suspect’s fifth amendment right. Lower courts have taken three different positions on this question. The position currently most popular with courts requires that the police, when confronted with an equivocal request, must limit their questions to clarifying that request. This position is consistent with the Supreme Court’s current interpretation of *Miranda*. However, it also opens the suspect to the very police manipulation which *Miranda* was intended to protect against.

Part I of this note provides a brief review of *Miranda*, focusing on the language relevant to an ambiguous request for counsel. Part II reviews the relevant Supreme Court decisions after *Miranda* to trace the Court’s changing view with respect to the right to counsel. Part III analyzes the

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2 Consistent with this position, the Court stated that if the suspect “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.
5 For instance, the right to counsel must now be “clearly asserted.” A request in any manner may no longer be sufficient. See infra notes 29-37 and accompanying text.
three approaches which lower courts have developed to guide law enforcement officials when a suspect's request for counsel is ambiguous. Part IV compares these approaches. Finally, Part V concludes that the clarification approach represents the best balancing of society’s interest in effective law enforcement and the suspect’s fifth amendment rights. Courts adopting this approach have determined that once a suspect has made an ambiguous reference to counsel, a law enforcement officer must limit his questioning to clarifying that reference. Substantive questioning may resume only if the officer determines that the suspect does not wish to speak with counsel.

I. Miranda v. Arizona

The Supreme Court focused on the fifth amendment privilege against self-incrimination in the Miranda cases. The decision considered “whether the privilege [against self-incrimination] is fully applicable during a period of custodial interrogation.” In the landmark holding, the Court determined that “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”

The Court reasoned that the psychological pressure inherent in a custodial interrogation was too great for the suspect to assert effectively the privilege against self-incrimination. Thus, the Court relieved this pressure by requiring law enforcement officials to offer the presence of counsel to the suspect. The Court considered the right to counsel “indispensable to the protection of the Fifth Amendment privilege.”

The Court formulated a broad standard for determining invocation of the right to counsel, stating that a request “in any manner and at any stage of the process” must terminate the interrogation. The plain meaning of “in any manner” suggests that any mention of counsel, no

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6 The fifth amendment provides, in pertinent part, that “[n]o person... shall be compelled in any criminal case to be a witness against himself...” U.S. Const. amend. V. This note deals with the fifth amendment right to counsel, i.e., the protection necessary to guard the privilege against self-incrimination. All references to the right to counsel refer to the fifth amendment right to counsel. See Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (1980).

7 “The constitutional foundation underlying the privilege [against self-incrimination] is the respect a government—state or federal—must accord to the dignity and integrity of its citizens.” Miranda, 384 U.S. at 460.

8 Miranda v. Arizona involved four cases of confessions, garnered during custodial interrogations, which led to convictions at the respective trial courts. Three of those convictions were affirmed on appeal, and the Supreme Court granted the defendants’ petitions for certiorari. In the fourth case, the State of California challenged the California Supreme Court’s reversal of the conviction below.

9 Miranda, 384 U.S. at 460-61. 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. In Rhode Island v. Innis the Court concluded “that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.” 446 U.S. at 300-01.

10 Miranda, 384 U.S. at 444.

11 Id. at 469.

12 Id. at 444-45.
matter how ambiguous, would cut off questioning. This position is consistent with the Court’s fundamental goal of counterbalancing the psychological pressure of the custodial interrogation. That pressure makes the suspect less likely to assert his privilege against self-incrimination. It also makes him less likely to stand up for his right to an attorney. The pressure of interrogation tends to make any of the suspect’s requests more tentative. In a less coercive setting, the request would be clearer.

The Court’s position on waiver of the right to counsel was consistent with its “in any manner” invocation language. A waiver would be effective only if “specifically made” after the Miranda warnings had been issued. Thus, a suspect could not waive this right by failing to ask for a lawyer; silence could not equal waiver. The Miranda decision placed the burden of clarity squarely on the prosecution. The State was required to offer some statement of waiver. The defendant was not required to prove that he asserted the right. Accordingly, any uncertainty would weigh in favor of the defendant.

II. Post-Miranda Supreme Court Cases

Justice Powell, in a 1976 speech before the American Bar Association, commented that “[a] more traditional, and, in my view, a sounder balance is evolving between the rights of accused persons and the rights of a civilized society to have a criminal justice system that is effective as well as fair.” Whether that evolution indeed reflects a “sounder balance” is unresolved. However, the controversy arising from decisions delineating the clarity necessary for a suspect to invoke the right to counsel provides an illustrative case study of this shift. No Supreme Court decision has directly addressed the question of an equivocal request for counsel after Miranda. Several cases indicate, however, that the burden of clarity has been shifting from the prosecution to the defendant.

13 Justice Clark’s dissent supports this interpretation. “When at any point during an interrogation the accused seeks affirmatively or impliedly to invoke his rights to silence or counsel, interrogation must be foregone or postponed.” Id. at 500 (Clark, J., dissenting) (emphasis added).

14 Id. at 470.

15 “[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.” Id. at 475.

16 Id. As Justice Harlan stated in his dissent, “To forgo these rights, some affirmative statement of rejection is seemingly required.” Id. at 504 (Harlan, J., dissenting).

17 Powell Finds High Court Showing Sounder Balance, N.Y. Times, Aug. 12, 1976, at 18, col. 3.

18 The Supreme Court has clarified its Miranda holding on many occasions. The cases analyzed in the text of this note are those which are most relevant to the issue of an equivocal request for counsel. The following cases are also related to this issue. In Frazier v. Cupp, 394 U.S. 731 (1969), the defendant-petitioner made an equivocal request for counsel—“I think I had better get a lawyer before I talk anymore”. Id. at 738. The police ignored this request. He confessed, and was later convicted. He was tried after Escobedo v. Illinois, 378 U.S. 478 (1964), but before Miranda. Because Miranda did not apply to post-Escobedo, pre-Miranda trials (Johnson v. New Jersey, 384 U.S. 719 (1966)), the Court did not apply the rule in Miranda. However, the Court indicated, citing the “in any manner” language from Miranda, that if Miranda had been applicable, the Court might have agreed with the petitioner’s contention that “his statement about getting a lawyer was sufficient... and that the police should immediately have stopped the questioning and obtained counsel for him.” Frazier, 394 U.S. at 738.

In Michigan v. Mosley, 423 U.S. 96 (1975), the Court dealt with Mosley’s request to remain silent. The right to counsel was not at issue because Mosley never requested an attorney. Officers had waited two hours between his request to remain silent and the resumption of questioning. The
In *Fare v. Michael C.*, \(^{19}\) the Court focused on the "in any manner"\(^{20}\) language from *Miranda*. Respondent, a juvenile\(^{21}\) with a prior record, asked to see his probation officer after police informed him of his right to an attorney. Police refused this request.\(^{22}\) At trial, he was convicted of murder. The California Supreme Court, honoring the respondent's request for assistance by adhering to the strict language of *Miranda*, reversed the decision.\(^{23}\)

The Supreme Court viewed the California Supreme Court's decision as an improper extension of the *Miranda* per se invocation rule.\(^{24}\) The Court noted that a probation officer does not play the same pivotal role as a lawyer,\(^{25}\) thus distinguishing a request for counsel from the respondent's request for a probation officer.\(^{26}\) The Court, therefore, held that "it was error to find that the request by respondent to speak with his probation officer *per se* constituted an invocation of respondent's Fifth Amendment right to be free from compelled self-incrimination."\(^{27}\) The Court upheld the per se rule of *Miranda*, but limited it to an explicit request for an attorney. A request for any other counselor would not in-

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\(^{19}\) Id. at 710.

\(^{20}\) "The Court [in *Miranda*] specified, among other things, that if the accused indicates in any manner that he wishes to remain silent or to consult an attorney, interrogation must cease . . . ." Id. at 709 (citing *Miranda*, 384 U.S. at 444-45, 473-74).

\(^{21}\) Even though the respondent was a juvenile, the Court assumed "without deciding that the *Miranda* principles were fully applicable to the present proceedings." Id. at 717 n.4.

\(^{22}\) Respondent did not ask for an attorney because he did not trust the police to provide legitimate counsel. His exact words were, "How I know you guys won't pull no police officer in and tell me he's an attorney?" Id. at 710.

\(^{23}\) "[A]ny conduct which 'reasonably appears inconsistent with a present willingness on the part of the suspect to discuss his case freely and completely with police at that time' amounts to an invocation of the Fifth Amendment privilege." *In re Michael C.*, 21 Cal. 3d 471, 475, 579 P.2d 7, 9, 146 Cal. Rptr. 358 (1978) (emphasis in original).

\(^{24}\) Id. at 718. "[A]n accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease." Id. at 719.

\(^{25}\) Id. "[T]he lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation." Id. The lawyer's role is the same "[w]hether it is a minor or an adult who stands accused." Id.
voke the right to counsel.  

In Edwards v. Arizona, police arrested defendant Edwards and informed him of his Miranda rights. Edwards answered a few questions and then sought to “make a deal.” After some negotiation, Edwards demanded an attorney before continuing. The officer ceased questioning. The next morning, two detectives came to see him. Edwards told the guard that he did not want to talk to anyone. The guard, however, told him that he had to talk to the detectives. Edwards met with the detectives, who informed him of his Miranda rights. During this round of questioning, Edwards made inculpatory statements. These statements were admitted at trial, and he was convicted. The trial court found that Edwards had waived his Miranda right to counsel before confessing. The Arizona Supreme Court upheld the trial court’s finding.

The Supreme Court reversed Edwards’ conviction. The Court began by summarizing the relevant portions of Miranda. After glossing over Miranda’s strict invocation language, the Court stated that a suspect must “clearly assert[]” the right to counsel. The Court found that Edwards’ statement was a “sufficient invocation” of his right to counsel. It held that “an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication . . . with the police.”

The Court next focused on the “standard for determining waiver where the accused has specifically invoked his right to counsel.” The

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28 After holding that the respondent had not invoked the right to counsel, the Court determined whether he had waived his right to counsel. The Court held that “waiver remains a question to be resolved on the totality of the circumstances surrounding the interrogation.” Id. at 728. Applying the totality of circumstances test, the Court found that the respondent had waived his right to counsel. The Court focused its inquiry on circumstances—age, experience, education, background, and intelligence—and on “whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.” Id. at 725. The Court concluded that “respondent voluntarily and knowingly waived his Fifth Amendment rights.”

Id. at 727.

The respondent’s statements to the police prior to consenting to questioning strongly suggest that he did not understand his right to counsel. In particular, his statement that the police would not provide him with a trustworthy attorney indicates that he did not understand the lawyer’s “unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation.” Id. at 719. In evaluating waiver, however, the suspect’s words should carry more weight than his background or experience. A request for counsel, no matter how equivocal, says more about the suspect’s understanding of his rights than any assumptions a court may make about the suspect’s understanding implied from his background.

30 Id. at 479.
31 Id.
33 451 U.S. at 480.
34 The “in any manner” language of Miranda was conspicuously absent from this summary. “If the accused indicates that he wishes to remain silent, ‘the interrogation must cease.’ If he requests counsel, ‘the interrogation must cease until an attorney is present.’” Id. at 482 (quoting Miranda, 384 U.S. at 474).
35 Id. at 485.
36 Id. at 487.
37 Id. at 484-85.
38 Id. at 482. The Court noted that “additional safeguards are necessary when the accused asks
Arizona Supreme Court had applied the totality of circumstances test. But the United States Supreme Court determined that the stricter “knowing and intelligent waiver” standard was appropriate. According to the Court, “neither the trial court nor the Arizona Supreme Court undertook to focus on whether Edwards understood his right to counsel and intelligently and knowingly relinquished it.” Applying the stricter standard, the Court held that Edwards had not waived his previously invoked right to counsel by responding to further police questioning.

Edwards did not address the question of waiver when the right to counsel has not been invoked. Seemingly, Fare’s less rigorous totality of circumstances test would apply in this situation. Under this test, a suspect’s response to further police questioning may be used in assessing the totality of the circumstances. Thus, a subsequent confession carries more weight when the fifth amendment right to counsel has not been clearly asserted.

Edwards shifted the burden of clarity in invocation cases toward the defendant. For the first time, the Court required that the right to counsel be clearly asserted. The “in any manner” language of Miranda was all but overruled. The language of Edwards, however, created a new definitional problem. The Court did not define the characteristics of a clearly asserted right to counsel. The Court in a footnote did comment on the Fifth Circuit’s analysis of this issue. Despite this acknowledgment, the Court has yet to define the characteristics which make an equivocal request tantamount to waiver.

In Oregon v. Bradshaw, the Court refined the two-step invocation and waiver analysis. Defendant Bradshaw had clearly asserted his desire for the assistance of counsel before initiating further conversation. After Bradshaw’s comment, an officer made sure that he wanted to talk. They discussed Bradshaw’s situation. The officer then suggested that he take a polygraph test. After taking the test, Bradshaw admitted his role in the crime.

The trial court denied Bradshaw’s motion to suppress the inculpa-
tory statements and rendered a judgment of guilty. The Oregon Court of Appeals reversed the conviction, holding that Bradshaw's comment was not an initiation of further communication under Edwards. Applying the Edwards rule, the court required suppression of the statements.

The United States Supreme Court reversed the Oregon decision. According to the Court, the Oregon court had incorrectly reasoned that initiation of a conversation by a suspect after he had asserted the right to counsel would both satisfy the Edwards rule, allowing further questioning by the authorities, and also show a waiver of the previously asserted right to counsel. The Supreme Court pointed out, however, that waiver is a separate inquiry. The initiation by the suspect of further conversation opens the door for renewed police questioning, but, by itself, does not indicate a waiver of the previously asserted right to counsel.

The Supreme Court found, first, that Bradshaw had initiated further conversation with the authorities. The Court then reinstated the trial court's finding that Bradshaw's inculpatory statements were made after a knowing waiver of his previously asserted counsel right.

Smith v. Illinois focused on the first tier issue—whether the right to counsel had been invoked. In Smith, a detective arrested the defendant on suspicion of armed robbery. The detective read Smith his Miranda rights. After informing Smith of his right to counsel, the detective asked Smith if he understood. Smith responded affirmatively. The officer finished reading the Miranda rights to Smith, and then questioned him about the crime. Smith eventually confessed, and was later convicted.

The Illinois Supreme Court affirmed the conviction, noting that "Smith's statements, considered in total, were ambiguous, and did not effectively invoke his right to counsel." In reaching its holding, the Illinois court also considered statements made by Smith after he requested counsel. Picking up on language from Edwards, the court concluded that "Smith did not clearly assert his right to counsel."
The Supreme Court labeled the Illinois decision "unprecedented and untenable." According to the Court, the Illinois court had confused the analysis by using statements made subsequent to the defendant's request for counsel to cast doubt on the original request. The Court then defined the two tiers of analysis, noting that only the first tier was at issue in this case.

The Court reversed Smith's conviction and remanded the case. In a narrow holding, the Court rejected the use of subsequent statements to cast doubt on a clear request for counsel. Subsequent statements, the Court held, are relevant to the second tier question of waiver.

The Court implied that the question of Smith's waiver should have never been considered. Smith asserted his right to counsel, and, before an attorney was provided, the officers initiated further questioning. The accused did not initiate any further communication after the request. Because Smith's request had not been ambiguous, the Court did not "decide the circumstances in which an accused's request for counsel may be characterized as ambiguous or equivocal as a result of events preceding the request or of nuances inherent in the request itself."

However, the Court did note the principal positions taken by lower courts on the issue of ambiguity.

III. Current Positions Regarding an Equivocal Request

The current judicial uncertainty over how to handle ambiguous requests has arisen because of the Supreme Court's consistent narrowing of Miranda, particularly the striking of the "in any manner" language. If, consistent with the letter of Miranda, a request "in any manner" is effective to invoke the right to counsel, then an ambiguous reference to counsel satisfies this standard. The burden of clarity weighs lightly upon the suspect. However, since Edwards, the operative language is "clearly asserted." Thus, the burden of clarity has shifted to the defendant, thereby clouding whether an ambiguous request triggers the suspect's fifth amendment rights.

The Supreme Court, in a footnote to Smith v. Illinois, provided the

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58 469 U.S. at 97.
59 "Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together." Id. at 98.
60 The two tiers of the analysis are:
First, courts must determine whether the accused actually invoked his right to counsel. . . .
Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions . . . . and (b) knowingly and intelligently waived the right . . . .
Id. at 95 (citations omitted).
61 "We hold only that . . . an accused's postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself." Id. at 100 (emphasis in original).
62 "Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease." Id. at 98.
63 Id. at 100.
64 Id. at 99-100.
65 Id. at 96 n.3. See infra note 67 and accompanying text.
three current approaches to equivocal requests for counsel under *Miranda*:

Some courts have held that all questioning must cease upon any request for or reference to counsel, however equivocal or ambiguous. . . . Others have attempted to define a threshold standard of clarity for such requests, and have held that requests falling below this threshold do not trigger the right to counsel. . . . Still others have adopted a third position, holding that when an accused makes an equivocal statement that "arguably" can be construed as a request for counsel, all interrogation must immediately cease except for narrow questions designed to "clarify" the earlier statement and the accused's desires respecting counsel. 67

The first position gives the benefit of the doubt to the accused on an ambiguous reference to counsel. The second position tends to create a presumption against the accused's invocation of counsel when the reference is ambiguous. The third position fills the middle ground, not making every reference to counsel an invocation, yet shifting the burden to law enforcement officials to clarify the suspect's reference to counsel. Each of these positions will be evaluated in Part IV.

A. **Equivocal Assertion Sufficient**

Decisions holding that an equivocal request is sufficient to invoke the fifth amendment right to counsel draw heavily on *Miranda*. In *Maglio v. Jago*, 68 for example, a sixteen year-old runaway was arrested on suspicion of murder. A police officer read Maglio his *Miranda* rights. Maglio responded by equivocally requesting an attorney. 69 The officer told Maglio that he could not have an attorney until the next day in court. The questioning continued, and Maglio confessed. The circuit court in *Maglio* concluded that his statement, even though ambiguous, was sufficient to invoke the counsel right under *Miranda*. The court's holding relied specifically on *Miranda*’s "in any manner" language. 70 The court also found that Maglio had not waived his right to counsel. 71 The defendant's age and his apparent confusion regarding his rights were key factors. 72 Thus, the court tracked the holding and rationale of *Miranda*.

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67 469 U.S. at 96 n.3 (citations omitted).
68 580 F.2d 202 (6th Cir. 1978).
69 Maglio stated, "Maybe I should have an attorney." *Id.* at 203.
70 *Miranda* "mandate[d] that questioning must stop if the defendant 'indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking.'" *Id.* at 205 (quoting *Miranda*, 384 U.S. at 445) (emphasis in original). The court found that the defendant had sufficiently invoked the right to counsel, observing that the officer "clearly interpreted the comment as a request for an attorney." 580 F.2d at 205.
71 580 F.2d at 206.
72 "A request for counsel followed quickly by a waiver suggests confusion at best . . . ." *Id.* A taped conversation with the prosecutor made shortly after Maglio's confession indicated that he had previously not understood the right to counsel. In response to a question from the prosecutor regarding appointed counsel, Maglio said "I understand it now. It's not the way it seemed before, but it doesn't matter." *Id.* at 203.
B. Threshold Standard of Clarity

According to the second approach, which is also called the "totality of circumstances" approach,\(^7\) the defendant's request for an attorney must reach a threshold standard of clarity for a court to find that the defendant has invoked the right to counsel.\(^7\) In Kapoci v. State,\(^7\) the appellant argued that he had made an equivocal request for counsel when the police read him his rights.\(^7\) The police continued the interrogation without counsel. During interrogation, the appellant made a statement which was later used to convict him. On appeal, the Oklahoma Court of Criminal Appeals found that the police had not violated the appellant's right to counsel. The court based its finding on the appellant's subsequent desire to talk with the detectives, and on his statement during cross-examination that he was actually requesting an attorney for trial, not for the interrogation.\(^7\) The Kapoci court concluded, based on the surrounding circumstances, that an otherwise ambiguous reference to counsel was not a present request for an attorney.

Similarly, in Clausen v. State,\(^7\) the defendant had told a police officer that he was trying to contact an attorney. Using "totality of circumstances" language, the Texas Court of Appeals held that the defendant had not invoked his right to counsel.\(^7\) The court cited Gorel v. United States\(^8\) for the proposition that "what is certain and clear to all present at the time may be made to appear equivocal only because of the manner in which it is recounted."\(^8\) This approach implies a presumption against equivocal requests and frees courts to use the "totality of circumstances" to support the presumption.

C. Officers Limited to Clarifying Questions

The third approach provides that, once the suspect has made a potentially equivocal request for counsel, the interrogating officer must limit questions to clarifying the suspect's putative request for counsel.\(^8\)

74 Referring to Miranda's "in any manner" language, the Illinois Supreme Court, in People v. Krueger, 82 Ill. 2d 305, 412 N.E.2d 537 (1980), cert. denied, 451 U.S. 1019 (1981), stated: "We do not believe . . . that the Supreme Court intended by this language that every reference to an attorney, no matter how vague, indecisive or ambiguous, should constitute an invocation of the right to counsel." \(\text{Id. at 311, 412 N.E.2d at 540.}\)
76 Kapoci said, "I'm thinking I will need a lawyer." \(\text{Id. at 1159 n.1.}\)
77 \(\text{Id. at 1159-60.}\)
79 "The court should not presume that any effort to contact an attorney represents the invocation of the right to counsel if the totality of circumstances rebuts the presumption. . . . All of the circumstances surrounding appellant's questioning indicate that he . . . did not want counsel at that time." \(\text{Id. at 931 (emphasis in original).}\)
80 531 F. Supp. 368 (S.D. Tex. 1981) (petitioner's reference to an attorney was held to be a request for legal representation at some future time).
81 682 S.W.2d at 331 (citing Gorel, 531 F. Supp. at 372).
82 "[W]henever even an equivocal request for an attorney is made by a suspect during custodial interrogation, the scope of that interrogation is immediately narrowed to one subject and one only. Further questioning thereafter must be limited to clarifying that request until it is clarified." Thompson v. Wainwright, 601 F.2d 768, 771 (5th Cir. 1979) (emphasis in original).
In *Thompson v. Wainwright*, the police arrested the petitioner on suspicion of murder and advised him of his *Miranda* rights. The petitioner signed a waiver and added that he wanted to tell his story to an attorney before making a statement. After the officers dissuaded him from contacting an attorney, the petitioner made a statement which the State later used to convict him.

The Fifth Circuit panel held that the police obtained the petitioner's incriminating statement in violation of *Miranda* because "he was misled into abandoning his equivocal request for counsel." The court noted that "the purpose of clarification . . . is not to persuade but to discern." The Ninth Circuit adopted the *Thompson* rule in *United States v. Fouche*. In *Fouche*, the police arrested the defendant on suspicion of bank robbery. After a FBI agent read Fouche his *Miranda* rights, Fouche signed a form waiving his right to counsel. Fouche had previously indicated some interest in talking to an attorney. After rereading the *Miranda* rights, the agent asked Fouche if he wanted to make a statement. Fouche then confessed to two bank robberies.

The panel found that Fouche's statement was an equivocal request for counsel. Therefore, the FBI agent was "immediately required to cease all questioning except that necessary to clarify Fouche's equivocal request." The court noted that "the police questions [must be] fairly designed to clarify the ambiguity." The Ninth Circuit directed the lower court regarding its options on remand. The court opined that if the questioning went beyond clarifying his request, Fouche's confession must be suppressed. If the questioning was within permissible limits, however, the court "must determine whether, under all the circumstances, Fouche succeeded in reclaiming his right to counsel."

IV. Analysis

The first position, that an equivocal request is sufficient to invoke the suspect's right to counsel, is tied to language in *Miranda* which the Supreme Court has rejected sub silentio. The Court is evidently unwilling to resurrect that language in order to adopt this position. How-

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83 601 F.2d 768 (1979).
84 Id. at 769.
85 "Officer Cunningham responded, essentially, that an attorney could not relate Thompson's story to the police, and [Officer] Latham explained that an attorney would probably advise him to say nothing." Id.
86 Id. at 772.
87 Id. Interrogators may not argue with the suspect "about whether having counsel would be in the suspect's best interests or not." Id.
88 776 F.2d 1398 (9th Cir. 1985).
89 After being told that he had been identified as the robber, Fouche "stated that he might want to speak to a lawyer, and wanted to make a phone call." He called his wife. The agent knew that he had called his wife, not a lawyer, but the agent did not ask if Fouche still might want an attorney. Id. at 1401.
90 Id. at 1405. The court remanded the case for further findings because the record did not provide enough information on whether the agent had complied with these restrictions. Id.
91 Id.
92 Id.
93 See supra notes 33-35 and accompanying text.
ever, the *Maglio* court's comments on waiver may be helpful to the Court. A request for counsel followed quickly by a waiver suggests confusion, not a knowing waiver. If a particular reference to counsel is held not to be an invocation of the right to counsel, then a suspect's ambiguous expression still should be considered when a court analyzes the second tier question of waiver. The waiver must be knowing and intelligent under the "totality of the circumstances." Thus, an ambiguous request should be a significant circumstance in tipping the scale against a knowing and intelligent waiver.

The second position, akin to the "totality of circumstances" test for waiver, has been severely undermined by *Smith v. Illinois*. In *Smith*, the Court held that "postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself." The only legitimate factors are "events preceding the request or . . . nuances inherent in the request itself." The prerequisite events and the request itself are admittedly ambiguous, and so do not lend themselves to "totality of circumstances" analysis.

A second problem with the threshold standard of clarity approach is its use to undermine the clarification approach. Both *Clausen v. State* and *Gorel v. United States* were decided in jurisdictions which have adopted the clarification approach. Essentially, *Clausen* and *Gorel* used "totality of circumstances" analysis to reach the conclusion that the suspect's ambiguous reference to counsel was not actually a request. Therefore, officers were not required to ask clarifying questions. Consequently, the officer's failure to ask clarifying questions did not prevent the State from using the defendant's postrequest statements.

The *Clausen-Gorel* analysis bypasses the *Miranda* protections afforded by limiting officers to clarifying questions. An officer is not required to clarify an ambiguous reference to counsel unless he believes that a court, reviewing the "totality of the circumstances," will find that the suspect's statement was actually a request for counsel.

The third position forces law enforcement officials to clarify the suspect's reference to counsel before continuing the interrogation. By requiring proof of clarification, this position shifts some of the burden of clarity back to the State. Given the pressures inherent in a custodial interrogation, law enforcement officials should expect to carry some of this burden. The term "attorney" or its synonyms becomes almost a shibboleth which, once uttered, compels clarification. A statement which is arguably ambiguous should be enough to limit the interrogating officer to clarifying questions. "[B]ecause the right to counsel is so fundamen-

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94 See supra note 51.
95 469 U.S. at 100. See also supra notes 54-65 and accompanying text.
96 Id.
97 See supra notes 78-81 and accompanying text.
98 See supra note 80 and accompanying text.
99 See *United States v. Cherry*, 733 F.2d 1124 (5th Cir. 1984) and *Goodnough v. State*, 627 S.W.2d 841 (Tex. Ct. App. 1982).
100 "Some response seems in order whenever an individual engages in behavior that a reasonable person would conclude might indicate a present desire for counsel." *Tomkovicz, Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 1015 (1986).
tal, an equivocal request for an attorney is to be interpreted in the light most favorable to defendant.\(^{101}\)

The problem with this position lies in the additional opportunity given to law enforcement officials to dissuade subtly the suspect from asserting his right to counsel.\(^{102}\) The statements of fact from the cases on ambiguous invocation of counsel are the best textbook for an officer who wants to dissuade a suspect from asking for counsel. To counterbalance the potential for using clarifying questions to dissuade, courts should allow police to resume substantive questioning "[o]nly if the suspect makes clear that he is not invoking his *Miranda* rights."\(^{103}\)

V. Conclusion

Courts develop certain presumptions to guide their inquiry when seeking to clarify, after the fact, an ambiguous situation. Courts evaluating the effectiveness of ambiguous references to counsel have developed the necessary presumptions.

Courts adopting the first approach, following the "in any manner" language of *Miranda*, presume that the defendant invoked his right to counsel when the request was ambiguous. This is not a viable position given the Supreme Court's rejection of *Miranda*'s more generous language. The second approach—totality of circumstances—establishes a presumption against invocation. Courts adopting this approach tend to give more weight to those circumstances which point to waiver of the right to counsel. This position has been weakened by the Supreme Court's refusal to consider postrequest statements when evaluating an equivocal request.

Most courts have adopted the third position—the clarification approach.\(^{104}\) This approach represents a reasonable balancing of interests between the individual defendant and society. The ambiguous reference to counsel is presumed to be an invocation of the right to counsel. The state can overcome this presumption by showing that the defendant's response to clarifying questions indicated that the defendant did not have a present desire for the assistance of counsel.

Courts adopting the clarification approach should reject the *Clausen-Gorel* effort to transform equivocal requests into nonrequests. The courts in *Clausen* and *Gorel* used "totality of circumstances" language to shift the weight of the evidence from an ambiguous request to a nonrequest,

\(^{101}\) State v. Wright, 97 N.J. 113, 119, 477 A.2d 1265, 1268 (1984) (defendant invoked right to counsel by stating, "I won't sign any more deeds without a lawyer present.")(defendant invoked right to counsel by stating, "I won't sign any more deeds without a lawyer present.")

\(^{102}\) "The potential to erode *Miranda* by allowing unceasing interrogation under the guise of clarification cautious against permitting clarifying questions too freely." Anderson v. Smith, 751 F.2d 96, 104 n.9 (2d Cir. 1984).

\(^{103}\) United States v. Riggs, 537 F.2d 1219, 1222 (4th Cir. 1976).

thereby eliminating the police officer’s duty to ask clarifying questions. The defendants’ postrequest responses to further interrogation were included as circumstances which cast doubt on the clarity of the original requests. This is precisely the type of analysis which the Supreme Court rejected in *Smith v. Illinois*.105

The clarification approach shifts some of the pressure of a custodial interrogation from the suspect to law enforcement officials. Given the pressure inherent in such interrogations, it is reasonable to expect the state to carry some of the burden placed on the suspect to clearly invoke the right to counsel.

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105 See *supra* notes 59 & 95 and accompanying text.