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NOTES

Oregon v. Bradshaw: Waiver Standard Emasculated

INTRODUCTION

It is axiomatic that an accused is entitled to certain protections once he is taken into custody and subjected to our system of criminal justice. From the moment initial interrogation begins, the United States Constitution provides an individual with the right to be free from compelled self-incrimination and with the right to the assistance of counsel in order to preserve that right. Of course, an individual is free to waive these rights and proceed without the assistance of counsel. However, in light of the serious ramifications a waiver of the right to counsel can have on an individual’s defense, the United States Supreme Court has cloaked the accused with additional safeguards to protect against involuntary waivers made without the assistance of counsel. Paramount among these is

1. In Miranda v. Arizona, 384 U.S. 436, 467 (1966), the Court stated: “there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.” Thus, in Miranda the Court invoked the fifth amendment privilege against self-incrimination and extended an accused’s right to the presence of an attorney to the preindictment stage. This filled in the gap left by the decision in Massiah v. United States, 377 U.S. 201 (1964), which held that once criminal proceedings have begun, an accused’s sixth amendment right to counsel protected him against statements surreptitiously elicited from him by government agents while the defendant was free on bail. See also Michigan v. Mosley, 423 U.S. 96 (1975), where the Court reaffirmed an arrestee’s precharge fifth amendment right to counsel while distinguishing between the right to remain silent and the right to counsel. Cf. North Carolina v. Butler, 441 U.S. 369 (1979). In Butler, while conceding that an accused is entitled to the fifth amendment right to counsel once in custody, the Court held that an express waiver is not an absolute prerequisite to the finding of a waiver of this right; see also Edwards v. Arizona, 451 U.S. 477 (1981) and Rhode Island v. Innis, 446 U.S. 291 (1980).

2. The fifth amendment to the Constitution states in part: “No person 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...” U.S. CONST. amend. V.

3. Miranda v. Arizona, 384 U.S. at 469 “the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege...”


5. Zerbst, 304 U.S. at 464; see also Von Moltke v. Gillies, 332 U.S. at 723, where the Court states that the duty to protect against involuntary waivers “imposes the seri-
the right of an accused in custody to cut off questioning until an attorney is present. In Edwards v. Arizona, the Supreme Court further strengthened the accused's shield against involuntary and uncounseled confessions. Under Edwards, once an accused invokes his right to counsel during custodial interrogation, police may not question him again, and a valid waiver of that right cannot be found, unless the accused himself initiates conversation with the authorities. In Oregon v. Bradshaw, the Court attempted to clarify the concept of initiation of conversation, holding that an accused must, in his statement, evince a willingness to discuss the interrogation. However, what the Supreme Court gave with its right hand when it enunciated this standard, the Court took away with its left when it applied it.

This Note will first trace the development of the standard for waiving one's right to counsel and present a brief review of the Court's strict adherence to this standard. Following this is an analysis of Edwards v. Arizona and the requirement that an accused initiate conversation with the authorities before a waiver of the right to counsel can be found. Under Edwards, a response to a subsequent interrogation, regardless of its voluntariness, is inadmissible absent such initiation. This Note will then focus on Oregon v. Bradshaw, and examine the consequences of the Court's attempt in Bradshaw to define initiation of conversation.

*Id. at 301 (footnotes omitted).*

8. Rhode Island v. Innis, 446 U.S. at 298 (quoting Miranda v. Arizona, 384 U.S. at 444) (emphasis added by the Court) "by custodial interrogation, we mean 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." However, interrogation refers not only to express questioning but also to its functional equivalent, that is, "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301 (footnotes omitted).
11. *Id.* at 2835.
12. Although the Court in Bradshaw announced a fairly specific standard, the Court applied this standard too loosely. Thus, a waiver is more easily found and the protections erected around the fifth amendment right to counsel are diluted.
14. *Id.* at 485-87.
I. PRIOR LAW

The standard for determining whether one has waived a constitutional right was first enunciated in Johnson v. Zerbst\textsuperscript{16} where Justice Black, writing for the majority, stated: "'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights, and . . . we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intelligent relinquishment or abandonment of a known right or privilege."\textsuperscript{17} The Court then formulated the test to determine whether a waiver has in fact been made. It is to be judged by the totality of circumstances, "including the background, experience and conduct of the accused."\textsuperscript{18} Although forty-five years old, the Zerbst totality of circumstances test continues to be endorsed by the Court.\textsuperscript{19}

Only a decade later in Von Moltke v. Gillies,\textsuperscript{20} a four judge plurality emphasized that the inquiry into whether a waiver has been made entails a "penetrating and comprehensive examination of all the circumstances under which such a plea is tendered."\textsuperscript{21} This strong presumption against a waiver was reaffirmed again in Carnley v. Cochran\textsuperscript{22} in which the Court refused to make the waiver issue depend on whether an accused affirmatively requested counsel.\textsuperscript{23}

In Miranda v. Arizona,\textsuperscript{24} the significance of an accused's fifth amendment right to counsel\textsuperscript{25} made applicable to the states via the

\textsuperscript{16} 304 U.S. 458 (1938). In Zerbst, both defendants were arraigned, tried, convicted, and sentenced for feloniously uttering and possessing counterfeit money. Both were tried without counsel having been made available.

\textsuperscript{17} Id. at 464 (footnotes and citation omitted).

\textsuperscript{18} Id.

\textsuperscript{19} See supra note 4 and accompanying text.

\textsuperscript{20} 332 U.S. 708 (1948).

\textsuperscript{21} Id. at 724. In Gillies, the accused signed a waiver form expressly waiving her right to counsel and subsequently pleaded guilty. The defendant later alleged that she neither understandingly waived the benefit of the advice of counsel nor was provided with the assistance of counsel as required by the sixth amendment. The Court stated that "to be valid such waiver must be made with an apprehension of the nature of the charges, . . . and all other facts essential to the broad understanding of the whole matter." Id.

\textsuperscript{22} 369 U.S. 506 (1962).

\textsuperscript{23} In Cochran, the defendant, an illiterate, was tried without counsel and was convicted of serious noncapital offenses. The Court held that the deprivation of the assistance of counsel violated defendant's fourteenth amendment due process rights. The Court stated: "where the assistance of counsel is a constitutional requisite, the right to be furnished with counsel does not depend on a request. . . . Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not waiver." 369 U.S. at 513, 517.

\textsuperscript{24} 384 U.S. 435 (1966).

\textsuperscript{25} Johnson v. Zerbst, 304 U.S. 458 (1983) and its progeny dealt with violations of the sixth amendment right to counsel stemming from the denial of the assistance of
due process clause of the fourteenth amendment of the United States Constitution, was once again acknowledged and the duty to scrupulously honor this right was again mandated.26 The Court examined a number of psychological ploys used by police interrogators to elicit incriminating statements from suspects during custodial interrogation.27 Based on this inquiry, the Court concluded that the period between arrest and trial is a most crucial one and that the presence or absence of counsel during these intervals can be determinative at trial.28

The Supreme Court in Miranda then proceeded to outline the proof necessary to establish a waiver of a suspect’s right to counsel during custodial interrogation. If a suspect makes a statement in the absence of counsel “a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived . . . his right to retained or appointed counsel.”29 More specific

counsel once criminal proceedings had begun. Miranda v. Arizona, 384 U.S. 436 (1966), and its progeny address the implications of the fifth amendment right to counsel as it relates to the privilege against self-incrimination resulting from a denial of counsel in a custodial setting often before criminal proceedings have begun. The difference between the protections afforded by each constitutional amendment is the point at which the protections of each amendment attach. Significant here is that regardless upon which amendment a claim is founded, the standard for a waiver of the constitutional right involved is the same: that of a knowing, voluntary and intelligent waiver.

26. Miranda v. Arizona, 384 U.S. at 467; “the accused must be adequately and effectively apprised of his rights and the exercise of these rights must be fully honored.”

27. The Court first stated that since interrogation takes place in privacy, a gap is left in our knowledge as to what really goes on in the interrogation rooms. The Court examined various police manuals and texts which documented successful procedures used in the past and which recommended procedures for the future. Based on this inquiry the Court drew the following picture of a custodial interrogation.

To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must “patiently maneuver himself on her quarry into a position from which the desired objective may be obtained.” When normal procedures fail to produce the needed result, the police may resort to deceptive strategems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick or cajole him out of exercising his constitutional rights. 384 U.S. at 449.

28. Id. at 455, 467.

[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals. . . . [W]ithout proper safeguards the 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 freely.

In order to combat this inherently coercive atmosphere of custodial interrogation the holding in Miranda requires that a suspect or accused be apprised, at the inception of police custody, of the right to have counsel present before or during any interrogation. 29. Id. at 475.
cally, the Court stated that an express statement by an accused that he is willing to talk without an attorney present may constitute a waiver, if followed by a statement. However, the Court emphasized that “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.”

Most recently, the Court has reiterated that the presence of a waiver of the right to counsel is predicated on a knowing relinquishment rather than a mere showing of voluntariness. In Brewer v. Williams the Court stated that, “it is true that Williams [the defendant] had been informed of and appeared to understand his right to counsel. But waiver requires not merely comprehension but relinquishment, and Williams’ consistent reliance upon the advice of counsel in dealing with the authorities refutes any suggestion that he waived such right.”

Proving that an accused has waived his right to counsel entails more than the mere showing that an accused understands he has a right to counsel. A knowing and intentional decision to forego the assistance of an attorney must be shown if the parameters of the waiver standard are not to be exceeded. However the waiver need not be express. “The question [of whether one has decided to proceed without counsel] is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights . . . mere silence is not enough. . . . The courts must presume that a defendant did not waive his rights, the prosecution’s burden is great . . . .”

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30. Id.
31. Id.
32. 430 U.S. 387 (1977). In Brewer, the defendant Williams was suspected of abducting a ten-year old girl in Des Moines, Iowa. The suspect surrendered himself to authorities in Davenport. Both his Des Moines lawyer and his lawyer at the Davenport arraignment advised the defendant not to make any statements until returning to Des Moines and consulting with his attorney. The police officers who were to accompany Williams on the drive back to Des Moines agreed not to question him during the trip. However, one of the police who knew that the defendant was a former mental patient and deeply religious, delivered what has become known as the “Christian burial” speech. The officer told Williams that he felt they should stop and locate the girl’s body immediately in order to ensure her parents an opportunity to give their daughter a decent Christian burial. Williams eventually made incriminating statements in the course of the drive and finally directed the officers to the body. In response to a suppression motion for the incriminating evidence obtained during the trip, the prosecution sought to establish that the defendant had waived his right to counsel by voluntarily cooperating with the police officers. Id. at 391-41.
33. Id. at 404.
34. North Carolina v. Butler, 441 U.S. 369, 373 (1979). In Butler, the defendant was arrested, advised of his Miranda rights, and presented with a waiver form. Butler agreed to talk but refused to sign the waiver form. His statements to police were subsequently used against him at trial and he was convicted. The North Carolina Supreme Court reversed the conviction holding that defendant’s refusal to sign the waiver form...
The preceding analysis is set forth in order to emphasize the heavy burden of proof that the Supreme Court has consistently imposed on the prosecution in establishing a waiver of one’s right to counsel, whether it be pursuant to the fifth amendment or the sixth amendment. To follow is an analysis of *Edwards v. Arizona* in which the Court further developed the waiver doctrine, thereby strengthening a suspect’s shield against interrogations conducted without the presence of an attorney. The knowing and voluntary relinquishment principle was reaffirmed in *Edwards*, but the Court added a new component to the waiver standard. The additional element is the necessary finding that an accused, having once invoked his right to counsel, initiated further conversation with the police.

A. Edwards v. Arizona: Suspect’s Shield Strengthened

On January 19, 1976, Edwards was arrested pursuant to a sworn complaint charging him with robbery, burglary, and first degree murder. While en route to the station the officers read him his rights as required by *Miranda v. Arizona*. At the station the police read him those same rights again. Edwards was questioned until he invoked his right to counsel. At this point questioning ceased. The next morning two detectives went to the jail and asked to see Edwards. When the detention officer informed Edwards that the detectives wished to speak with him, Edwards replied that he did not want to talk to anyone. The officer told Edwards “he had” to talk to him, and again informed Edwards of his *Miranda* rights.

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35. See supra notes 1 and 25.
37. Id. at 482.
38. Id. at 485. Under Edwards once a suspect invokes his right to counsel, he must affirmatively reopen dialogue with authorities in order to waive this right.
40. 451 U.S. at 478.
41. Pursuant to *Miranda v. Arizona*, “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.” 384 U.S. at 474.
42. 451 U.S. at 479. The fact that Edwards was read his *Miranda* rights on several occasions was of no value to the government because Edwards had invoked his right to counsel as distinguished from his right to remain silent. In *Michigan v. Mosley*, 423 U.S. 96 (1975), the Court noted that *Miranda* had “distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney” and directed that “the interrogation must cease until an attorney is present only if the individual states that he wants an attorney.” Id. (quoting *Miranda v. Arizona*, 384 U.S. at 474). The Court in *Mosley* held that reinterrogation may occur under certain circum-
Edwards was willing to make a statement as long as it was not tape recorded. The detectives told Edwards that it did not matter whether his statement was recorded or not since they could testify in court as to any statement made. Edwards replied, “I'll tell you anything you want to know, but I don’t want it on tape.” Shortly thereafter, Edward confessed.

Subsequently, Edwards made a pretrial motion to suppress the confession he had made during the second interrogation. The trial court granted the motion to suppress holding that Edwards had invoked his right to the assistance of counsel prior to making any statement and that the police failed to scrupulously honor the accused’s assertion of his rights by questioning him in the absence of counsel. This finding was reversed the following day, however, when the court was presented with a supposedly controlling decision of a higher Arizona court. The trial court then held that Edwards’ statements to the detectives were voluntary, and that the officer’s testimony as to those statements was credible. Following a mistrial Edwards was again tried and finally convicted. Evidence concerning his confession was admitted at both trials.

On appeal, the Arizona Supreme Court held that Edwards did invoke his right to counsel during the initial interrogation and

stances upon the invocation of the right to remain silent. The Court focused on the lapse of time between the two interrogation sessions involved and the failure of defendant to reassert his right to remain silent after being re-Mirandized. Had he reasserted his desire to be silent the police would have had to honor that reassertion.

By contrast, once a suspect has invoked his right to counsel, failure to do so again at a subsequent interrogation without counsel is not fatal as to the initial invocation. An invocation of the right to counsel is therefore to be interpreted as a request for counsel and as a request to remain silent until and only until counsel is present. See also Fare v. Michael, 442 U.S. 707, 719 (1979) where the Court refers to Miranda’s “rigid rule that an accused’s request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease.” Rhode Island v. Innis, 446 U.S. 291, 298 (1980), where the Court alluded to the “ undisputed right” under Miranda that one in custody is to be free from interrogation “until he had consulted with a lawyer.”

43. 451 U.S. at 479.
44. Edwards was arrested on January 19, 1976. During questioning on January 19, he invoked his right to counsel. The second interrogation, during which he made his confession, was on the morning of January 20, 1976.
45. In Miranda v. Arizona, 384 U.S. at 474, the Court stated: “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.” Police officers failed to scrupulously honor Edward’s fifth amendment right to counsel by returning to his cell, after he had invoked his right to counsel. Edwards, 431 U.S. at 479. See supra note 42.
47. The case brought to the attention of the court was State v. Travis, 26 Ariz. App. 24, 545 P.2d 986 (1976).
49. The jury in the first trial was unable to reach a verdict.
50. At the police station, on January 19, 1976, Edwards was informed of his Miranda rights, and questioned. He denied involvement and presented an alibi defense. Edwards then sought to make a deal. The interrogating officer gave Edwards the
then focused on whether Edwards subsequently waived that right.\textsuperscript{51} The court determined that Edwards had waived both rights during the January 20 meeting when, after having again been informed of his rights to remain silent and have counsel present, he voluntarily made a statement to the detectives.\textsuperscript{52}

The United States Supreme Court, in an opinion authored by Justice White, reversed Edwards’ conviction on the ground that his fifth and fourteenth amendment rights, as construed in \textit{Miranda v. Arizona},\textsuperscript{53} were violated. The Court held that the Arizona Supreme Court focused only on the voluntariness of the consent\textsuperscript{54} and failed to properly inquire into “whether Edwards understood his right to counsel and intelligently and knowingly relinquished it.”\textsuperscript{55} The Supreme Court reemphasized the long accepted standard of waiver\textsuperscript{56} and concluded that once a suspect invokes his right to counsel “additional safeguards” are necessary to ensure that this invocation is honored by the authorities.\textsuperscript{57} The Court stated:

we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if

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\item number of a county attorney, Edwards made the call, but hung up after a few moments. Edwards then asked the interrogating officer for an attorney before making a deal. 122 Arizona at 209, 594 P.2d at 75. The court stated that although equivocal, the statement was “sufficiently clear” within the context of the interrogation that it “must be interpreted as a request for counsel and as a request to remain silent until counsel was present.” 122 Ariz. at 211, 594 P.2d at 77.
\item The manner in which the Arizona court interpreted Edwards’ invocation of his right to counsel is significant. Although ambiguous, the invocation was interpreted in favor of the defendant. Due to the importance of a suspect’s constitutional right to the presence of an attorney these ambiguities should be interpreted as such. A contrary interpretation can deprive a suspect of a crucial constitutional right at a most crucial interval. \textit{See Oregon v. Bradshaw}, 103 S. Ct. 2830 (1983), and \textit{infra} notes 89-98 and accompanying text.
\item 51. 122 Ariz. at 212, 594 P.2d at 78. The Arizona Supreme Court cited Schneckloth v. Bustamonte, 412 U.S. 218 (1973), which dealt with the voluntariness of a consent to search. The Court focused its review of the lower court’s opinion on whether Edwards’ confession was voluntary.
\item There exists no dispute that voluntariness is indeed at issue in the waiver inquiry; however, in and of itself it is not conclusive. A waiver must be a \textit{knowing}, \textit{voluntary} and \textit{intelligent} relinquishment.
\item 52. 122 Ariz. at 212, 594 P.2d at 78.
\item 53. 384 U.S. 436. \textit{See supra} note 45.
\item 54. \textit{See supra} note 51.
\item 55. 451 U.S. at 484; “the voluntariness of a consent or an admission on the one hand, and a knowing and intelligent waiver on the other, are discrete inquiries. . . . It is thus apparent that the decision below misunderstood the requirement for finding a valid waiver of the right to counsel, once invoked.”
\item 56. \textit{Id.} at 482.
\item 57. \textit{Id.} at 484. Although an accused can be questioned under certain circumstances after invoking his or her right to remain silent, a waiver of the right to counsel demands “additional safeguards” which come into play upon the accused’s request to have counsel present. \textit{See supra} note 42.
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he has [again] been advised of his rights. We further hold that an accused, such as Edwards, 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, exchanges, or conversations with the police.58

The Supreme Court then held that since Edwards had not requested the detectives’ return on January 20, he had not initiated conversation with the police, and therefore could not have waived his right to counsel.59

The Supreme Court thus inserted a new and indispensable element60 into the finding of a valid waiver of counsel, once invoked by an accused. The import of the decision is that once an accused is taken into custody and invokes his right to counsel,61 the inquiry into whether a waiver of that right was subsequently made involves a two-step process. First, the accused must be found to have initiated conversation with the police, and second, it must be found that under the totality of circumstances the accused knowingly, voluntarily and intelligently waived his right to counsel.62 The critical point in the two step process is that the need for the second inquiry is contingent upon an affirmative finding of the first. 63 Absent a finding that the accused initiated the conversation under Edwards there must not be an inquiry into the totality of circumstances surrounding the accused’s statements.64 Most importantly, absent a finding that the accused, and not the police, re-opened the conversation, the number of times the Miranda warning is administered is irrelevant.65

In order to give effect to the holding of Edwards v. Arizona and the “additional safeguards”66 intended by the majority of the Court, the issue of what constitutes initiation of conversation is para-

58. Id. at 484-85.
59. Id. at 487.
60. 451 U.S. at 486 n.9 (emphasis added). “To establish a waiver, it would thus be a necessary fact that the accused, not the police reopened the dialogue.”
61. See supra note 57. The “additional safeguard” of initiation of conversation is triggered by the accused’s invocation of his right to counsel.
62. 451 U.S. at 484-85. Relevant factors under the totality of circumstances are (1) whether the accused was initially advised of his Miranda rights; (2) whether the accused understood his rights; and (3) whether the accused’s conduct in making a statement was indicative of the accused’s desire to forego his rights, i.e., by stating he did not need an attorney.
63. This is the additional safeguard afforded once having invoked his right to counsel. Unless the accused manifests a change of heart by initiating a conversation, he is shielded from any methods used by police to elicit incriminating statements from him.
64. See supra note 60.
65. 451 U.S. at 484 (footnote omitted), “a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has [again] been advised of his [Miranda] rights.”
66. See supra note 63.
mount. The Edwards Court, however, did not address this issue, there being no statement by the defendant for the Court to construe. Therefore, the Court did not provide guidelines to determine whether a statement made by an accused is within the Edwards holding. Consequently, the determinative factor in the new waiver standard was left undefined. The potential for misconstruing the initiation of conversation requirement was predicted in the concurring opinion of Justice Powell. To follow is an analysis of Oregon v. Bradshaw in which this prediction proved true. There, due to an overbroad interpretation of the initiation of conversation requirement, the Supreme Court in fact emasculated the waiver standard. Consequently, a waiver of the right to counsel during custodial interrogation is now easily found and the accused is left susceptible to the evils which the Constitution—as interpreted by Miranda v. Arizona and Edwards v. Arizona—sought to protect against.

B. Oregon v. Bradshaw: Initiation of Conversation Defined

The defendant in Oregon v. Bradshaw was questioned at the police station regarding an automobile accident in which a young man was killed. The defendant, Bradshaw, was advised of his Miranda rights and subsequently arrested for furnishing liquor to the victim, a minor. At the station, Bradshaw acknowledged furnishing the victim Reynolds with liquor but denied any other involvement. A

67. Resolving this issue poses much difficulty, as is illustrated in Oregon v. Bradshaw, 103 S. Ct. 2830 (1983). An easy way to interpret initiation is by simply asking who spoke first? This, however, contravenes the waiver standard in that all a suspect need do to open the door to reinterrogation and a possible waiver of his right to counsel is say anything, and say it before the police speak. Such a course of events cannot amount to a knowing and intelligent waiver.

68. See supra notes 42-43 and accompanying text. The facts of Edwards did not require finding that Edwards had not initiated conversation. Edwards said nothing. Therefore, he could not have waived his right to counsel. What is made clear by Edwards is that the initiation of conversation issue is to be addressed at the outset of the waiver determination. If no initiation is found, the inquiry is complete and the decision is that no waiver has been made by an accused regardless of the voluntariness with which an accused spoke or acted.

69. 451 U.S. at 488-89. Both Justice Powell and Justice Rehnquist agreed that the judgment of the Arizona Supreme Court must be reversed. However, Justice Powell states, "I do not join the Court's opinion because I am not sure what it means. . . . In view of the emphasis placed on 'initiation,' . . . I find the Court's opinion unclear." Id. (Powell and Rehnquist, J.J., concurring) (citations omitted).

70. 103 S. Ct. 2830 (1983).
73. 103 S. Ct. at 2833. At this point, the investigation was at its initial stages and the death of Reynolds, the minor, was not yet characterized as a homicide. The pick-up truck left the road, struck a tree, then an embankment and came to rest on its side in a shallow creek. Reynolds died from traumatic injury, coupled with asphyxia by drowning.
police officer then told Bradshaw his version of the death, which placed Bradshaw behind the wheel of the pick-up. Bradshaw again denied any involvement and said, "I do want an attorney before it goes very much farther." The officer immediately terminated the interrogation.

Shortly thereafter Bradshaw was driven approximately ten or fifteen miles to a jail. Just before, or during the trip, he inquired of a police officer, "Well, what is going to happen to me now?" The officer responded, "You do not have to talk to me... You have requested an attorney and I don't want you talking to me unless you so desire because anything you say—because—since you have requested an attorney, you know, it has to be at your own free will." Bradshaw stated that he understood and a conversation ensued between Bradshaw and the officer concerning where Bradshaw would be taken and the offense that he would be charged with. The officer then suggested it may be beneficial to take a polygraph test and Bradshaw agreed to submit to the examination. The next day, after another reading of his Miranda rights, Bradshaw took the lie detector test. The examiner informed Bradshaw that the test indicated he was lying. Bradshaw then admitted that he had been at the wheel of the vehicle in which Reynolds was killed, and that he had passed out due to intoxication. At his subsequent trial for first degree manslaughter, driving while under the influence of intoxicants, and driving with a revoked license, Bradshaw's post polygraph test statement was admitted into evidence. The state appellate tribunal, however, held that the admission of the confession violated the Edwards standard and reversed Bradshaw's conviction.

74. Id. This invocation of Bradshaw's right to counsel brings the doctrine into play. A waiver of this right can only be found if (1) Bradshaw is found to have initiated conversation, and if he did (2) under the totality of circumstances Bradshaw waived his right to counsel. Most significant, however, is that under Edwards, unless Bradshaw initiated conversation, the totality of circumstances inquiry is not relevant.

75. State v. Bradshaw, 54 Or. App. 949, 951, 636 P.2d 1011, 1011 (1981). Bradshaw asked the question only moments after he unequivocally invoked his right to counsel. It is this question that the Supreme Court had to interpret in deciding whether Bradshaw had initiated conversation with the police.

76. 103 S. Ct. at 2833.

77. Id. Bradshaw had not consulted with counsel at this point.

78. Note the similarity here to the psychological ploys described in Miranda which are used to elicit incriminating statements from an accused. First, the officer suggests that the accused take a lie detector test—for the accused's benefit—and then suggests the accused is lying. Such aploy is effective in that an accused can be convinced that the police already know something and the accused cannot avoid confirming what the police already know. As the lower court stated, "Though a conversation ensued, the police officer clearly took advantage of the opening to reinterrogate defendant about his culpability and suggest the lie detector test..." 54 Or. App. at 953, 636 P.2d at 1013. See supra note 27.

79. Id. "We do not construe defendant's question about what was going to happen
The Supreme Court of the United States reversed the decision of the Oregon court in a plurality opinion authored by Justice Rehnquist. Justice Rehnquist stated that the Oregon Court of Appeals "misapprehended" the Edwards opinion as requiring an initiation of conversation as the sole criterion on which to judge whether a waiver of one's right to counsel, once invoked, had been made. The opinion then reiterated that under Edwards v. Arizona the standard for a waiver of the right to counsel entailed a finding of initiation of conversation, followed by an inquiry into the totality of circumstances to determine whether the waiver was knowingly and voluntarily made. In applying the two step inquiry the Court held that:

Although ambiguous, [Bradshaw's] question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. It could reasonably have been interpreted by the officer as relating generally to the investigation.

Finding no violation of the first step of the Edwards rule, the Court held that under the totality of circumstances, Bradshaw had waived to him . . . [as] anything other than a normal reaction to being taken from the police station and placed in a police car, obviously for transport to some destination." Thus, the state court in Bradshaw interpreted defendant's statement as incident to being taken into custody. Having so found, the court then concluded that the administration of the lie detector test and subsequent interrogation of defendant were not at Bradshaw's suggestion but at the authorities' request.

This analysis by the Oregon appellate court illustrates the proper focus in deciding what constitutes initiation of conversation. The critical inquiry is with respect to the substance of the statement by the accused. If it is merely a normal reaction to being placed in custody, then the statement should not be construed as an initiation of conversation and thereby a renunciation of an accused's desire to proceed only in the presence of counsel.

80. Forming the majority were Justices Rehnquist, O'Connor, White, and Chief Justice Burger. Dissenting were Justices Marshall, Brennan, Blackmun, and Stevens. Justice Powell concurred in the judgment.
81. 103 S. Ct. at 2834.
82. 451 U.S. 477.
83. 103 S. Ct. at 2834 (citations omitted) (emphasis added).
84. In Edwards we held that after the right to counsel had been asserted by an accused, further interrogation of the accused should not take place "unless the accused himself initiates further communication, exchanges or conversations with the police." . . . But even if a conversation taking place after the accused has "expressed his desire to deal with the police only through counsel" where reinterrogation follows, the burden remains on the prosecution to prove that the purported waiver was knowing and intelligent and found to be so under the totality of circumstances.

However, the confusion does not lie in the interpretation of Edwards. Edwards is potentially a two prong test. The second prong, the inquiry into the totality of circumstances, is relevant only if it is found that the suspect initiated conversation with police. The Oregon state tribunal, having found that Bradshaw had not initiated conversation with police properly did not address the second prong of the Edwards test for a waiver.

84. Id. at 2835.
his right to counsel asserted only moments before he inquired of the police officer, "Well, what is going to happen to me now." The United States Supreme Court in Oregon v. Bradshaw attempted to define the term initiation of conversation by an accused in custody. However, while the Court in Bradshaw enunciated a seemingly specific standard—that a statement by an accused must evince a desire for a more generalized discussion about the investigation—its application served only to further obfuscate the inquiry.

C. Initiation of Conversation Defined: Suspect’s Shield Weakened

Once a suspect invokes his right to counsel while in police custody, all interrogation must cease. At this point, the suspect has exercised his right to cut off questioning until his attorney is present in order to prevent a coerced incriminating statement without the benefit of legal counsel. Both the Edwards and Bradshaw decisions make clear that once the accused invokes his right to counsel, a subsequent waiver of that right may be found only if the accused initiates conversation with the police.

Under Bradshaw, an accused initiates conversation if his statement "evince[s] a willingness and a desire for a more generalized discussion about the investigation." However, a finding of initiation of conversation by itself does not constitute a waiver. The government must then demonstrate that the totality of circumstances indicate a knowing, intelligent and voluntary relinquishment of the fifth amendment right to counsel. Crucial to the defendant’s position is, that once he initiates conversation with the

85. Id. at 2834. The Supreme Court therefore reversed the state court’s finding on initiation of conversation. Having found that Bradshaw did initiate conversation with police, the court then addressed the totality of circumstances issue and concluded that Bradshaw waived his right to counsel. The Oregon appellate court applied the Edward’s test consistently with the Supreme Court’s application of the Edwards test in the Bradshaw decision. The only difference is that the Oregon Court answered the initiation of conversation issue in the negative which under Edwards ends the waiver inquiry. The Supreme Court answered the initiation of conversation issue in the affirmative, thereby making an inquiry into the totality of circumstances proper.

86. 103 S. Ct. 2830.
87. Id. at 2835.
89. Id.
91. 103 S. Ct. 2830.
92. 451 U.S. at 486 n.9.
93. 103 S. Ct. at 2835.
95. 103 S. Ct. at 2834.
police, the police may then begin reinterrogation. At this point, the authorities may use their questioning expertise to elicit incriminating statements from the accused.96 Then under the totality of circumstances doctrine, if the suspect’s statements were voluntary and the suspect was legally competent to understand his acts, he will be held to have waived his right to counsel, and all statements made while in custody would be admissible at trial. The initiation of conversation question, therefore, has a determinative and potentially devastating effect on the waiver issue. Thus, the inquiry should focus acutely on what in fact the accused meant by his statement in order to assure that a knowing and intelligent waiver was made.97 In attempting to distinguish between those statements that should fall within the category of initiation and those that should not, a brief analysis of how lower courts have dealt with the issue prior to the Bradshaw decision is helpful.98

In McCree v. Housewright,99 the defendant McCree was arrested100 and advised of his rights as required by Miranda v. Arizona.101 The defendant was questioned until he indicated his desire to meet with an attorney, at which point the conversation ceased. McCree was then returned to his cell. Some time later, McCree knocked on his cell door and said he wanted to make a statement to

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96. See supra note 27 and accompanying text.
97. The standard for waiving a constitutional right is stricter with regard to the right to counsel than in other instances. In Schneckloth v. Bustamonte, 412 U.S. 218, 237 (1973) the Court stated, “Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees . . . .” The Court further explained:

A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial. Any trial conducted in derogation of that model leaves open the possibility that the trial reached an unfair result precisely because all the protections specified in the Constitution were not provided. A prime example is the right to counsel. For without that right, a wholly innocent accused faces the real and substantial danger that simply because of his lack of legal expertise he may be convicted.

412 U.S. at 241.
98. In addition to the cases cited below see State v. Breeze, 66 Hawaii 163, 657 P.2d 1044 (1983) (defendant requested that the detective return to his cell where defendant expressed his desire to make a statement); Payne v. State, 424 So. 2d 722 (Ala. Crim. App. 1982) (defendant requested a meeting with police at which statements were made); Pittman v. State, 210 Neb. 117, 313 N.W.2d 252 (1981) (defendant initiated further conversation by stating that he was being “railroaded” by his co-defendants); State v. Willie, 410 So. 2d 1019 (La. 1982) (defendant appeared before a federal magistrate and voluntarily signaled his willingness to discuss his acts with law enforcement officers). See also Wyrick v. Fields, 103 S. Ct. 394 (1982) (per curiam).
99. 689 F.2d 797 (8th Cir. 1982).
100. McCree was arrested for involvement in the robbery and murder of the owner and operator of a gift shop in Camden, Arkansas.
the police.\textsuperscript{102} The defendant was again Mirandized and police were
diligent in ascertaining whether he understood his rights and
whether he still desired to make a statement in the absence of coun-
sel.\textsuperscript{103} The court cited \textit{Edwards} as imposing a two prong test\textsuperscript{104} and
noted "[t]he crucial inquiry . . . is whether petitioner or the police
initiated the communication which led to his incriminating state-
ment."\textsuperscript{105} The court held that the defendant, by unequivocally stating
he had something to say to the police, initiated the conversation
during which he incriminated himself.\textsuperscript{106}

Similarly, in \textit{United States v. Thierman},\textsuperscript{107} the defendant was ar-
rested, \textsuperscript{108} read his \textit{Miranda} rights, and interrogated until he in-
voked his right to counsel.\textsuperscript{109} The questioning then ceased. Upon
overhearing that his family and girlfriend would have to be ques-
tioned, Thierman requested the return of the officer who had ini-
tially interrogated him.\textsuperscript{110} After a brief discussion involving the
investigation, the defendant stated that although his lawyer would
"kill him" he would cooperate with the police in order to avoid any
involvement of his girlfriend and family.\textsuperscript{111} The court held that
Thierman had invoked his right to counsel but had subsequently
initiated conversation within the meaning of \textit{Edwards} when he re-
squested the return of the detective in order to make a statement.\textsuperscript{112}

In \textit{United States v. Gordon},\textsuperscript{113} the defendant, Gordon, was ar-
rested for mail fraud, interstate transportation of stolen property,
and making false statements to a bank.\textsuperscript{114} Upon arrest, Gordon was

\textsuperscript{102} 689 F.2d at 799.
\textsuperscript{103}  Id. at 800. Before allowing McCree to make a statement the detectives read
him his rights, one by one, asked him if he understood each one, reminded him of his
prior request for counsel and finally allowed McCree to make a statement. Note that
the re-Mirandizing of an accused after he initiates conversation is relevant to the totality
of circumstances, the second step of the \textit{Edwards} standard of waiver.
\textsuperscript{104}  Id. at 802 n.8. The Court emphasized that the waiver inquiry entails first,
whether the defendant initiated conversation and second, whether defendant knowingly
and intelligently waived his fifth amendment right to counsel.
\textsuperscript{105}  Id. at 802.
\textsuperscript{106}  Id. The court then held that under the totality of circumstances an intelligent
waiver was made.
\textsuperscript{107}  678 F.2d 1331 (9th Cir. 1982).
\textsuperscript{108}  Thierman was arrested for credit card fraud and four post office burglaries.
His arrest was made while police were on their way to his house to execute a search
warrant.
\textsuperscript{109}  Id. at 1332.
\textsuperscript{110}  The events described took place in Thierman's apartment. Detective Barkman
questioned Thierman until he invoked his right to counsel, at which time Barkman left.
Thereafter Thierman overheard one officer speaking with another indicating that Bark-
man was going to question his girlfriend about the stolen money orders. At this point,
Thierman intervened and requested Barkman's return.
\textsuperscript{111}  Id. at 1333.
\textsuperscript{112}  Id. at 1334.
\textsuperscript{113}  655 F.2d 478 (2d Cir. 1981).
\textsuperscript{114}  Id. at 480.
advised of his Miranda rights. After an unsuccessful attempt to reach his attorney, Gordon requested that he be permitted to re-read the Advice of Rights form. After re-reading his rights, the defendant stated that he wished to provide information about "somebody else that should be arrested for the same thing." The court held that by doing so, Gordon had initiated conversation with the police. The court further concluded that under the totality of circumstances, Gordon had in fact waived his fifth amendment right to counsel.

In all of the cases cited above, the statements made by the defendants, subsequent to an invocation of their right to counsel, evinced a desire to reveal something they had not revealed during initial questioning, thus unambiguously manifesting a desire to discuss their predicament. Furthermore, this finding was reached by a careful analysis of the circumstances existing at the time the statement was made in order to determine what in fact the accused meant by his statement.

A statement by an accused should be strictly scrutinized in order to determine whether he has knowingly decided to discuss his predicament with the police in the absence of counsel. If not, the suspect should be considered "legally silent." Moreover, due to the strict standard for waiving a constitutional right and the inherently

115. 384 U.S. 436.
116. 655 F.2d at 482. In addition to informing an arrestee of his Miranda rights, officers often carry such a form to allow the accused to read over his Miranda rights. Such a procedure is helpful in ensuring that a suspect understands his rights upon arrest.
117. Id. at 485.
119. Id. at 485-86. "We are satisfied that Gordon initiated such communication and that the 'particular facts and circumstances surrounding [the] case, including background, experience and conduct of the accused' ... support the district court's finding that [Gordon knowingly and intelligently waived his right to counsel]." Id. at 485 (citing Edwards v. Arizona, 451 U.S. at 484; quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
120. In McCree v. Housewright, 689 F.2d 797, 802 (8th Cir. 1982) the court considered the fact that beginning in the morning of the day in question, "petitioner began knocking on the cell door stating that he had something he wanted to tell." McCree made his statement several hours later. Furthermore, the measures taken by the police in making sure that McCree still desired to make a statement, subsequent to his initiation of conversation, were relevant. In State v. Gordon, 655 F.2d 478, 486 (2d Cir. 1981) the court notes that "Gordon's cautious behavior before volunteering his statement ... persuades us that this decision to proceed without counsel was carefully considered ..." In United States v. Thierman, 678 F.2d 1331, 1333 (9th Cir. 1982) the court notes that Thierman was concerned from the outset of the interrogation about his girlfriend being questioned and acted on his own volition when he requested that the detective return.
121. 103 S. Ct. 2830 (1983). The term is used by the author to denote the legal conclusion which should follow from statements that cannot be fairly interpreted as a desire to talk in the absence of counsel. Such statements should be treated as if never made.
The Supreme Court in Oregon v. Bradshaw,\textsuperscript{122} however, interpreted Bradshaw's ambiguous statement to police as an initiation of conversation and ultimately found that Bradshaw had waived his right to counsel.\textsuperscript{123} Upon being arrested for furnishing liquor to a minor, Bradshaw was transported in a police car to a jail ten to fifteen miles away. It was during this trip that Bradshaw asked, "Well, what is going to happen to me now?"\textsuperscript{124} The Supreme Court held that "[a]lthough ambiguous, the respondent's question in this case . . . evinced a willingness and a desire for generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. It could reasonably have been interpreted by the officer as relating generally to the investigation."\textsuperscript{125} The analysis used by the Court is contrary to that set forth in Edwards\textsuperscript{126} and represents a radical departure from the strict standard for a waiver of the fifth amendment right to counsel.\textsuperscript{127} A more comprehensive inquiry into the context in which Bradshaw asked, "Well, what is going to happen to me now?" illustrates that it should have been interpreted as merely incidental to the custodial setting and not as a desire to talk about the investigation.

As the Oregon state court held, a fair interpretation of this statement is that it was a normal response to Bradshaw's custodial surroundings.\textsuperscript{128} His question, on its face, does not carry with it any indicia of a willingness to reveal anything more about the investigation.\textsuperscript{129} Support for this interpretation is found in the conversation that followed between the police officer and Bradshaw. The conversation was concerned with respondent's destination and the offense with which he would be charged.\textsuperscript{130} However, even assuming the

\begin{itemize}
  \item 122. 103 S. Ct. 2830.
  \item 123. Id. at 2835.
  \item 124. Id. at 2833.
  \item 125. Id. at 2835.
  \item 126. 451 U.S. 477.
  \item 127. See supra note 4 and accompanying text.
  \item 128. State v. Bradshaw, 54 Or. App. 949, 953, 636 P.2d 1011, 1013 (1981). "We do not construe defendant's question about what was going to happen to him [as] anything other than a normal reaction to being taken from the police station and placed in a police car, obviously for transport to some destination."
  \item 129. See supra note 121 and accompanying text. While the defendants in all of these cases involved the defendants' attempt to reveal something they had not talked about during the initial questioning, Bradshaw did nothing of the sort. He asked a question relating to his destination of which he had no knowledge and no choice. "The very essence of custody is the loss of control over one's freedom of movement." Oregon v. Bradshaw, 103 S. Ct. at 2840 (Marshall, J., dissenting.)
  \item 130. 103 S. Ct. at 2833.
\end{itemize}
question is ambiguous, due to the importance of the right to counsel and the strict standard for waiver historically adhered to by the Court, the ambiguity should be construed in the defendant’s favor, as legal silence.131 Second, in construing Bradshaw’s statement, the Court focused on the officer’s initial response to it and equated this response to a reminder to Bradshaw of his Miranda rights.132 This focus is also contrary to that mandated in Edwards v. Arizona.133 The Edwards Court specifically held that the number of times the Miranda warnings are furnished to an accused—while relevant to the totality of circumstances test—is insignificant absent a finding of initiation of conversation.134 Furthermore, in considering the officer’s response, the Court placed emphasis of the officer’s interpretation of the question.135 In scrutinizing a statement made by an accused, the inquiry should not focus on the police officer’s interpretation of the statement, but on the accused’s subjective intent.136 Another salient factor deserving more weight than that given by the Court in Bradshaw is the fact that respondent had invoked his right to counsel only moments before asking his question.137 This makes it difficult to believe that Bradshaw had so quickly changed his mind, deciding instead to forego his right to have counsel present.

As the above analysis illustrates Bradshaw, by asking, “Well, what is going to happen to me now?” was merely inquiring into where the officers were taking him. At this point, further questioning was a violation of Bradshaw’s fifth amendment privilege against self incrimination as construed by the United States Supreme Court in Miranda v. Arizona.138 “If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.”139 The suggestion that Bradshaw take a polygraph test and the fact that the subsequent interchanges were police-initiated

131. See supra note 121 and accompanying text.
132. Id. at 2835.
133. 451 U.S. 477.
134. Id. at 484.
135. The Court in Bradshaw stated: “It could reasonably have been interpreted by the officer as relating generally to the investigation. That the police officer so understood it is apparent . . . .” 103 S. Ct. at 2835.
136. In United States v. Montgomery, 714 F.2d 201 (1st Cir. 1983), the court interpreted the question “Am I being charged with each gun?” as a “natural, if not inevitable, query which would occur to one in his situation . . . .” Note the similarity between the question in Montgomery and Bradshaw’s question “Well, what is going to happen to me now?” These questions are natural responses to being placed in custody and should not be interpreted as a desire to talk with the police in the absence of an attorney only a short time after a suspect has invoked his right to counsel. Considering the frequency with which these questions are asked, the Bradshaw decision is a dangerous precedent that should be viewed in the future with much skepticism by the courts.
137. State v. Bradshaw, 54 Or. App. at 949, 636 P.2d at 1011.
139. Id. at 474.
should have precluded a finding that Bradshaw waived his previously invoked right to counsel.140 To allow reinterrogation based on this type of statement drastically undermines the safeguards that both Miranda141 and Edwards142 carefully erected around the right to counsel in the custodial arrest setting.

The potential for future injustice created by the holding in Oregon v. Bradshaw is alarming.143 As a result of the decision, the

140. Edwards v. Arizona, 451 U.S. at 484. As the Court stated in Edwards, the rule was designed to "protect an accused from any interrogation subsequent to an invocation of the right to counsel at the insistence of the authorities and not the accused." See United States v. Renda, 567 F. Supp. 487 (E.D. Va. 1983), "The initiation must be of a nature which indicates the accused's desire to engage in a colloquy with government personnel concerning his criminal activity." Id. at 488; see also United States v. Montgomery, 714 F.2d 201 (1st Cir. 1983); United States v. Gazzara, 587 F. Supp. 311 (S.D.N.Y. 1984).

143. In United States v. Montgomery, 714 F.2d 201 (1st Cir. 1983) the defendant was arrested for possession of firearms, he was read his Miranda rights and the following conversation ensued:

Montgomery: Am I being charged with each gun?
Agent Sherman: You will probably be charged with two counts.
Montgomery: Did all of the guns fire?
Agent Sherman: Yes. Why do you want to know?
Montgomery: The sawed-off was in pieces.
Agent Sherman: That is right, but it only took a minute to put together.
Montgomery: Ya, but it was missing a spring.
Agent Sherman: Well the State Police test fired the gun and it worked. Did you have any problem firing the gun?
Montgomery: I could not get it to work.

Id. at 202.

The court held that the question "Am I being charged with each gun?" did not constitute initiation of conversation and then discussed the consequences of interpreting initiation of conversation too loosely. "If such were to be held an 'open Sesame,' the opportunities for eviscerating all protective discipline and restraint in custodial interrogation would be immense." Id. at 204. The court then used the conversation above to illustrate how law enforcement can take one "simple, not-guilt-suggestive question" and use it "as a license to launch a fishing expedition." Id. at 205. The court held that Montgomery's first question "was a natural, if not inevitable, query which would occur to one in his situation," Id. at 204, or as the Supreme Court in Bradshaw put it "relating to routine incidents of the custodial relationship." Oregon v. Bradshaw, 103 S. Ct. at 2835. The answer given by the officer was unresponsive. 714 F.2d at 204. Either because of this unresponsiveness or because appellant knew enough about the law to know that violation of the firearms law involved the possession of a firearm that was operable, he asked his second question. Id. The officer responded with a question and the conversation continued. Montgomery's third and fourth statements were both relevant to prove possession. The officer's last question, "'Did you have any problems firing the gun?' was a question which, whether answered "yes" or "no," would entrap appellant into incriminating himself most directly." Id. The analysis in Montgomery illustrates the need to closely scrutinize an accused's statement after the suspect invokes his right to counsel. A suspect invokes his right to counsel to avoid any further interchanges with the police regarding his predicament, during which he may incriminate himself. A statement by a suspect in custody must show a change of mind without coercion or probing by officers in order to constitute "initiation" within the meaning of Edwards, 451 U.S. 477. Otherwise the protections announced in Miranda and Edwards are dangerously emasculated. The Fifth Circuit in United States v. Cherry, 733 F.2d 1124 (5th
question of what statements will satisfy the initiation requirement has been confused. Lower courts are left with little guidance. On the one hand, it is the duty of all courts to uphold the strict standard for a waiver of a constitutional right. Yet, under Bradshaw, the first and indispensable element for a valid finding of a waiver is easily found. With the initiation of conversation requirement satisfied easily, an accused, upon making practically any statement to police, opens the door to reinterrogation after having invoked his right to counsel and consequently a waiver of the right to the presence of counsel during these interchanges is more easily found.

Justice Marshall, in dissent, interprets Edwards as requiring not only that an accused initiate further communication, but also that the communication be about "the subject matter of the criminal investigation." Justice Rehnquist, writing for the majority, requires only that the accused "[evidence] a willingness and a desire for a generalized discussion about the investigation." Conceding for the moment that Justice Rehnquist's interpretation of Edwards is correct, its application in Bradshaw is too broad. If Bradshaw's statement satisfies the test of initiation, as the Court holds it does, then arguably any statement will satisfy the test and the inquiry as to the initiation is merely "who spoke first?"

Cir. 1984) provides a possible solution. The court in Cherry stated that an ambiguous statement by an accused should be followed with questions to clarify the suspect's intent as to whether the statement is in fact an assertion to speak with the authorities in the absence of counsel. Id. at 1130.

144. See supra note 97.

145. In Miranda v. Arizona, 384 U.S. at 474, the Court stated "if the individual states that he wants an attorney, the interrogation must cease until an attorney is present." As a result of Oregon v. Bradshaw, 103 S. Ct. 2830, this right to cut off questioning is easily forfeited by an accused who has expressly requested the presence of counsel.

146. Pursuant to Oregon v. Bradshaw, it is my contention that an accused can now waive the fifth amendment right to counsel without being aware that he is doing so. This is contrary to the constitutional standard of a knowing, voluntary, and intelligent waiver and must be reviewed with skepticism.

147. 103 S. Ct. at 2839 (Marshall, J., dissenting)

148. Id. at 2835.

149. Such concession is justifiably made. Although Justice Marshall would require a more specific statement by a suspect indicating his desire to discuss the investigation, both Justice Marshall and Justice Rehnquist would seemingly agree that whatever the correct standard may be, the statement must hold some indicia of a desire to discuss the investigation and not, for example, where the police may be taking a suspect.

150. See United States v. Morrow, 731 F.2d 233 (4th Cir.), cert. denied, 104 S. Ct. 2689 (1984) "Particularly since the Supreme Court has recently recognized that a question as vague as, 'Well, what is going to happen to me now?' may permit a finding that an arrestee 'initiated' conversation, we have little difficulty in holding that, by his affirmatively loquacious bearing, Morrow likewise initiated conversation with Alsbrooks, and thereafter waived his right to silence." Id. at 237. See also United States v. Kroesser, 731 F.2d 1509, 1520 (11th Cir. 1984).
Conclusion

In Edwards v. Arizona, the United States Supreme Court recognized that once an accused has invoked his right to counsel, “additional safeguards” are necessary to effectively preserve this right. The rule promulgated in Edwards was that once an accused invokes his right to counsel upon being taken into custody, a subsequent waiver of that right cannot be found unless the accused reopens dialogue with the authorities. However, in Edwards the Court offered no specific guidelines as to what constitutes initiation of conversation.

In Oregon v. Bradshaw, the Court had an opportunity to clarify the definition of initiation of conversation. The result, however, is an overinclusive definition of initiation of conversation in which virtually any statement made by an accused in custody is likely to rise to the level of initiation of conversation. A statement by an accused cannot reasonably qualify as an initiation of conversation within the meaning of Edwards v. Arizona unless it can be clearly said to invite the officers to discuss the investigation. Otherwise, the mandate that a waiver be a knowing and intelligent relinquishment of a known right or privilege is severely emasculated. Unless the statement can be fairly interpreted as a desire to forego the presence of counsel, the suspect should be considered legally silent. Moreover, due to the severe consequences that may ensue, an ambiguous statement should be interpreted in the defendant’s favor. Indeed, a much stricter scrutiny of an ac-

151. 451 U.S. 477.
152. Id. at 484.
153. Id.
155. See supra note 67 and accompanying text. The New York Court of Appeals, in recognizing the severe consequences to an accused who has waived his right to counsel, has held that an accused who has invoked his right to counsel cannot waive this right in the absence of counsel. In affording to a suspect the protection of the “indelible” right to counsel rule, the court of appeals in Cunningham expressed the view that Miranda warnings alone cannot suffice to ensure that an accused “will not waive an important constitutional right out of ignorance, confusion or fear.” The indelible rule of New York “breathes life into the requirement that a waiver of a constitutional right must be competent, intelligent and voluntary.” People v. Cunningham, 49 N.Y.2d 223, 351, 400 N.E.2d 360, 365, 424 N.Y.S.2d 421, 424 (1978). See also People v. Hobson, 39 N.Y.2d 479, 484, 348 N.E.2d 894, 898, 384 N.Y.S.2d 419, 422 (1976).

The same court in People v. Settles stated, “Absent the advice of an attorney, the average person, unschooled in legal intricacies, might very well unwittingly surrender this right when confronted with the coercive power of the State and its agents.” 46 N.Y.2d 154, 161, 385 N.E.2d 612, 615, 412 N.Y.S.2d 874, 878 (1978).

The New York Court of Appeals, in creating the “indelible rule” implies that a voluntary, intelligent and intentional waiver cannot exist unless counsel is present to bring home to an accused the ramifications of being subject to police custody without the assistance of counsel. Although it is doubtful that the Supreme Court will adopt this view as a matter of federal law, this indelible rule, if anything, manifests the need to
 cured's statement than that employed in the Bradshaw decision is necessary if the standard of proof for a finding of a waiver of the right to counsel is to be upheld.

James Kousouros