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Conversation between Police Officers Eliciting Admission by Suspect Not a Miranda Interrogation Unless the officers Should Have Known Their Words or Actions Were Reasonably Likely to Elicit an Incriminating Response.

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noted by the dissent, has "chosen the easiest line rather than the best."[120]

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CRIMINAL PROCEDURE—Interrogation—Conversation Between Police Officers Eliciting Admission by Suspect Not a *Miranda* Interrogation Unless the Officers Should Have Known Their Words or Actions Were Reasonably Likely to Elicit an Incriminating Response.

Rhode Island v. Innis
___U.S. ___, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

On January 17, 1975, Thomas Innis was arrested for armed robbery, after being identified by a taxi-driver as the man who robbed him with a sawed-off shotgun.[1] After the arrest, Innis was given his *Miranda* rights[2] on three separate occasions and stated he understood these rights and wanted to speak to a lawyer.[3] During Innis' transportation to the local police station, two of the three police officers discussed an unrecovered murder weapon, with Patrolman Gleckman expressing his fear that one of the handicapped children in a nearby school would find the weapon and injure himself.[4] Innis interrupted the conversation, offering to show the officers where the missing shotgun was located. After returning to the scene of the arrest, the police gave Innis his *Miranda* rights for the fourth time. Innis indicated he understood his rights but "wanted to get the gun

120. *Id.* at ___, 100 S. Ct. at 1156, 63 L. Ed. 2d at 411 (Powell, J., dissenting).

1. Rhode Island v. Innis, ___ U.S. ___, ___, 100 S. Ct. 1682, 1686, 64 L. Ed. 2d 297, 303 (1980).

2. *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966). The procedural safeguards of Miranda include four warnings:

> He has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479.

3. Rhode Island v. Innis, ___ U.S. ___, ___, 100 S. Ct. 1682, 1686, 64 L. Ed. 2d 297, 303 (1980).

4. *Id.* at ___, 100 S. Ct. at 1686, 64 L. Ed. 2d at 304. Patrolman Gleckman said, "[t]here's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves." *Id.* at ___, 100 S. Ct. at 1686, 64 L. Ed. 2d at 304.

out of the way because of the kids in the area of the school."[5] Innis then led the police to the shotgun.

Innis was indicted by a grand jury for kidnapping, robbery, and murder.[6] The trial court denied a motion to supress both the shotgun and the related incriminating statements, finding Innis had waived his right to remain silent when he led officers to the weapon.[7] On appeal, the Rhode Island Supreme Court overruled the conviction, holding the officers had interrogated Innis without a valid waiver of his right to counsel.[8] The United States Supreme Court granted certiorari to review the interrogation issue. Held—*Vacated and Remanded.* Conversation between police officers eliciting an incriminating admission by the suspect is not a *Miranda* interrogation unless the officers should have known their words or actions were reasonably likely to elicit an incriminating response.[9]

The fifth amendment privilege against self-incrimination[10] was included in the Bill of Rights to protect against brutal criminal interrogation practices such as inquisitions and proceedings of the Star Chamber.[11] Historically, the privilege has been used to protect "the natural individual from compulsory incrimination through his own testimony or personal records."[12] At common law the accused was considered incompetent to

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5. *Id.* at ___, 100 S. Ct. at 1687, 64 L. Ed. 2d at 304.

6. *Id.* at ___, 100 S. Ct. at 1687, 64 L. Ed. 2d at 304. When the cab driver identified Innis as the man who robbed him, Innis was already wanted for the kidnapping, robbery, and murder of another taxi-driver. *Id.* at ___, 100 S. Ct. at 1686, 64 L. Ed. 2d at 303.

7. *Id.* at ___, 100 S. Ct. at 1687, 64 L. Ed. 2d at 304-05.

8. Rhode Island v. Innis, 391 A.2d 1158, 1162-64 (R.I. 1978), *vacated and remanded,* Rhode Island v. Innis, ___ U.S. ___, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

9. Rhode Island v. Innis, ___ U.S. ___, ___, 100 S. Ct. 1682, 1690-91, 64 L. Ed. 2d 297, 308-09 (1980).

10. *See* U.S. CONST. amend. V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall he 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. . . .

Id.; cf. TEX. CONST. art. 1, § 10 (individual shall not be compelled to give evidence against himself).

11. Andresen v. Maryland, 427 U.S. 463, 470 (1976); *accord,* Michigan v. Tucker, 417 U.S. 433, 440 (1974); *see* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 26-28, 41-42, 47 (1968). The inquisition was a European judicial process which used torture to extract a confession from prisoners accused of heresy. The Star Chamber also used torture, and an inquisitional oath, which required the accused to answer a series of questions designed to extract a confession. *See id.* at 26, 41.

12. United States v. White, 322 U.S. 694, 701 (1944); *see* Bellis v. United States, 417 U.S. 85, 89-90 (1974). *But see* Andresen v. Maryland, 427 U.S. 463, 471, 477 (1976) (seizure of records containing incriminating statement not violative of fifth amendment because defendant not required to produce evidence); Fisher v. United States, 425 U.S. 391, 397 (1975) (fifth amendment privilege not violated by subpoena of tax records held by lawyer, unless

testify on his behalf.[13] The framers of the United States Constitution, in adopting the common law of England, chose the "accusatorial" rather than the "inquisitorial" system of justice.[14] The intention was to provide just criminal procedures in which the accused made no unwilling contribution to his own conviction.[15] This principle, incorporated in the Bill of Rights,[16] disallows interrogation of suspects.[17] The fifth amendment, however, does not afford blanket protection against self-incrimination,[18] but outlaws the use of physical or moral compulsion upon one claiming the privilege.[19]

In 1897 the United States Supreme Court established a "voluntariness" standard under the fifth amendment for deciding the admissibility of in-

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defendant compelled to produce them); United States v. Scornavacco's Restaurant, Inc., 528 F.2d 19, 20-21 (7th Cir. 1975) (owner of restaurant required to produce business records incriminating owner).

13. *See* People v. Talle, 245 P.2d 633, 642 (Cal. 1952). *But see* Shaefer, *Police Interrogation and the Privilege Against Self-Incrimination*, 61 NW. U.L. REV. 506, 514 (1966) (most nations consider silence of accused as one factor in verdict).

14. *See* Watts v. Indiana, 338 U.S. 49, 54 (1948); L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 39 (1968). Both systems were originated from the inquest in Europe. The major hallmarks of the inquisitorial system were as follows: no charges specified, secret proceedings, no confrontation of witnesses, presumed guilt, use of self-incriminating oath, case pleaded to the bench, double jeopardy allowed, cruel and arbitrary punishments. *Id.* at 39. The accusatory system entails use of public trials, confrontation of witnesses, presumption of innocence with burden on prosecution, defendant not allowed to testify, case pleaded to jury, no double jeopardy, and fair and just punishments. *Id.* at 39.

15. *See* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 432 (1968); Schaefer, *Police Interrogation and the Privilege Against Self-Incrimination*, 61 NW. U.L. REV. 506, 513 (1966).

16. *See* U.S. CONST. amend. V; Schaefer, *Police Interrogation and the Privilege Against Self-Incrimination*, 61 NW. U.L. REV. 506, 513 (1966).

17. *See* Brown v. Walker, 161 U.S. 591, 596-97 (1896); Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L.C. & P.S. 1014, 1015 (1934). Dean Pound suggested most interrogations were simply outside the legal system, placing a greater burden on the poor and uneducated who could not protect themselves. *See id.* at 1015. *See generally* Schaefer, *Police Interrogation and the Privilege Against Self-Incrimination*, 61 NW. U.L. REV. 506 (1966). Reasons proposed for not compelling testimony include prevention of torture, promotion of police investigation, evidence of dignity in legal system, and prevention of inquiry into political and religious beliefs. *Id.* at 507.

18. *See, e.g.*, United States v. Washington, 431 U.S. 181, 185-87 (1977) (admission of guilt desirable as long as not coerced); Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 36 (1979) (fifth amendment not applicable if immunity granted); Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does It Matter?*, 67 GEO. L.J. 1, 48 (1978) (confession must be made knowingly, with aid of counsel, free from compulsion).

19. *See, e.g.*, Fisher v. United States, 425 U.S. 391, 397 (1976) (use of incriminating evidence in tax records does not violate privilege); Perlman v. United States, 247 U.S. 7, 15 (1918) (use of incriminating evidence seized without constraint, compulsion, or extortion for public exhibit); Johnson v. United States, 228 U.S. 457, 458 (1913) (bankruptcy records containing incriminating evidence can be compelled under fifth amendment).

criminating statements in federal prosecutions.[20] Admissibility of incriminating statements in state prosecutions turned on whether the accused received due process guarantees[21] under the fourteenth amendment.[22] A state's freedom to regulate its courts was held in *Brown v. Mississippi*[23] to be limited by the requirements of due process.[24] Under the mandates of *Brown* a state may put a witness on the stand and require him to testify, yet may not use tortious interrogation to induce a confession.[25] In a later decision the Supreme Court held no confession was voluntary if induced by force, either physical or mental,[26] thereby reinforcing the premise that under an accusatorial system the government must establish its case by evidence, not by interrogation.[27]

Rule 5a of the Federal Rules of Criminal Procedure[28] was effectuated by the Supreme Court rulings in *McNabb v. United States*[29] and *Mallory*

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20. *See* Bram v. United States, 168 U.S. 532, 542-43 (1897) (test is, was statement free and voluntary, absent threat of violence, promise, or improper influence); *cf.* Wan v. United States, 266 U.S. 1, 3 (1928) (confession of young Chinese inadmissable even though no specific threat or promise induced it); Wilson v. United States, 162 U.S. 613, 623 (1896) (statement voluntarily made to commissioner while not under oath admissable).

21. *See* Powell v. Alabama, 287 U.S. 45, 47 (1932). Due process is not violated when "there is a law creating or defining the offense, a court of competent jurisdiction, accusation in due form, notice and opportunity to answer the charge, trial according to the established course of judicial proceedings, and a right to be discharged unless found guilty." *Id.* at 47; *see* Thomas v. State, 550 S.W.2d 64, 67 (Tex. Crim. App. 1977) (sixth amendment right to counsel part of due process).

22. *See* Powell v. Alabama, 287 U.S. 45, 71 (1932) (failure to give reasonable time to secure effective counsel denied due process).

23. 297 U.S. 278 (1936).

24. *Id.* at 285.

25. *Id.* at 285-86 (defendant convicted and sentenced to death for murder after confession induced by torture disallowed); *see, e.g.*, Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944) (accused interrogated thirty-six hours); Ward v. Texas, 316 U.S. 547, 549, 555 (1942) (defendent arrested without warrant, driven 100 miles, whipped and interrogated); White v. Texas, 310 U.S. 530, 533 (1940) (accused taken from jail to woods for beating and interrogation).

26. Watts v. Indiana, 338 U.S. 49, 52 (1949); *accord, e.g.*, Clewis v. Texas, 386 U.S. 707, 709-10 (1967) (confession after nine days of questioning, deprivation of sleep and food inadmissable); Davis v. North Carolina, 384 U.S. 737, 752 (1966) (confession after sixteen days of interrogation inadmissable); Spano v. New York, 360 U.S. 315, 322 (1959) (confession after interrogation by fourteen people inadmissable). *See generally* F. INBAU & R. REID, CRIMINAL INTERROGATIONS AND CONFESSIONS 144-51 (2d ed. 1967).

27. Watts v. Indiana, 338 U.S. 49, 54 (1949).

28. FED. R. CRIM. P. 5(a). "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, . . ., before a state or local judicial officer. . . ." *Id.*

29. 318 U.S. 332 (1943). Confessions rendered after two days of questioning were held inadmissable since the defendants were not taken before a magistrate. *Id.* at 344-45.

v. United States.[30] The rule commands officers making an arrest in a federal prosecution to take the accused before a magistrate without unnecessary delay.[31] By avoiding delay, the number of lengthy secret interrogations resulting in coerced confessions was hoped to be reduced.[32] By the early 1960's there was not a "litmus paper test" for constitutionally permissible interrogation.[33] State courts continued to determine due process violations by examining the circumstances surrounding the interrogation.[34] The United States Supreme Court, however, had begun the process of selective incorporation, applying the Bill of Rights to the states through the fourteenth amendment.[35] In 1964 in *Malloy v. Hogan,*[36] the Court first applied the fifth amendment to the States.[37] Overruling earlier decisions,[38] the Supreme Court stated, "it would be incongruous to have different standards determine the validity of a claim of privilege based on

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30. 354 U.S. 449 (1957). A delay of several hours was held to be unreasonable when arrest occured in mid-afternoon, and although several magistrates were available, none were consulted until after a confession was procurred. *Id.* at 455.

31. *See* Mallory v. United States, 354 U.S. 449, 451-52 (1954); McNabb v. United States, 318 U.S. 332, 342 (1943); FED. R. CRIM. P. 5(a); *cf.* TEX. CODE CRIM. PRO. ANN. art. 14.06 (Vernon 1966) (persons making arrest must take accused before magistrate without unnecessary delay).

32. *See* McNabb v. United States, 318 U.S. 332, 343-44 (1943). Division of duties between separate branches of government was intended to act as a safeguard in avoiding the "third degree." *Id.* at 343-44; *cf.* Mallory v. United States, 354 U.S. 449, 455 (1957) (suspect held and interrogated in same vicinity as magistrate — resulting confession inadmissible due to delay); Killough v. United States, 315 F.2d 241, 243-44 (D.C. Cir. 1962) (suspect's testimony as to location of victim's body inadmissable due to unnecessary delay in taking before magistrate). *See generally* Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue,* 47 GEO. L.J. 1, 20 (1958).

33. *See* Culombe v. Connecticut, 367 U.S. 568, 601 (1961). *See generally Symposium - Constitutional Problems in the Administration of Criminal Law,* 59 NW. U.L. REV. 660, 663 (1964) (courts used "coercive methods" test).

34. *See, e.g.,* Culombe v. Connecticut, 367 U.S. 568, 602-06 (1961) (duration and condition of detention, attitude of police, and suspect's physical and mental state considered); Fikes v. Alabama, 352 U.S. 191, 196 (1957) (defendant's education and mentality considered); Haley v. Ohio, 332 U.S. 596, 599 (1948) (age considered).

35. *See* Ker v. California, 374 U.S. 23, 33 (1963) (fourth amendment, unreasonable search and seizure applicable to states); Robinson v. California, 370 U.S. 660, 667 (1962) (eighth amendment, cruel or unusual punishment applicable to states); Gitlow v. New York, 268 U.S. 652, 666 (1925) (first amendment, free speech applicable to states).

36. 378 U.S. 1 (1964).

37. *Id.* at 3 (defendant refused to answer questions at inquest about prior gambling convictions); *see, e.g.,* Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977); Dudley v. State, 548 S.W.2d 706, 712 (Tex. Crim. App. 1977); Roberts v. State 545 S.W.2d 157, 160-61 (Tex. Crim. App. 1977).

38. *See* Adamson v. California, 332 U.S. 46, 51 (1947) (due process does not protect defendant giving testimony in state trial); Twining v. New Jersey, 211 U.S. 78, 113-14 (1908) (right against self-incrimination not fundamental to due process).

the same feared prosecution, depending on whether the claim was asserted in a state or federal court."[39]

The same year in *Massiah v. United States*,[40] the Court chose to apply the sixth rather than the fifth amendment to surreptitous interrogations.[41] The Court found admission of incriminating statements made outside the confines of a jail, after arraignment, to be a violation of the accused's sixth amendment right to counsel.[42] Several months later, the Supreme Court cited *Massiah* as precedent for its decision in *Escobedo v. Illinois*.[43] The Court dismissed, however, the idea that a formal indictment must occur before sixth amendment rights attach,[44] reasoning such a requirement favored form over substance.[45] Once an investigation has focused on a suspect and he is in custody, his sixth amendment rights are activated.[46] Furthermore, if counsel is denied, and the suspect is not warned of his absolute right to silence, his sixth amendment rights have been violated.[47] The rationale behind *Escobedo* was that if the right to counsel does not attach until the point of formal judicial proceedings, coercive activities during arrest and initial questioning will be encouraged.[48]

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39. Malloy v. Hogan, 378 U.S. 1, 11 (1964).

40. 377 U.S. 201 (1964).

41. *See id.* at 206 ("surreptitious interrogation" eliciting incriminating information from accused without his knowledge or consent).

42. *Id.* at 206. Defendant was arraigned and free on bail when he made several incriminating statements in the "bugged" car of his co-defendant. He did not realize his friend had cooperated with the authorities thereby allowing the conversation to be monitored. *Id.* at 206; *see* Brewer v. Williams, 430 U.S. 387, 399 (1977).

43. 378 U.S. 478, 484 (1964).

44. *See id.* at 486. Escobedo had been arrested for murder and had requested his lawyer, but was denied the opportunity to consult with him throughout the interrogation, even though the attorney was present in the station house. *Id.* at 479-82.

45. *See id.* at 486.

46. *See id.* at 490-91. The *Escobedo* approach to right to counsel has not been followed by the Court. *Escobedo* is now viewed as a self-incrimination case rather than a right to counsel case. *See* Kirby v. Illinois, 406 U.S. 682, 689 (1972).

47. Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964). *Escobedo* was limited to its facts by *Johnson v. New Jersey*. *See* Johnson v. New Jersey, 384 U.S. 719, 733-34 (1964). The Court, however, has had a long history of maintaining that the sixth amendment must be applied during accusatorial type proceedings against the defendant. *See* Mempa v. Rhay, 389 U.S. 128, 134 (1967) (probation and sentencing); United States v. Wade, 388 U.S. 218, 223 (1967) (line-up identification); White v. Maryland, 373 U.S. 59, 60 (1963) (preliminary hearings); Hamilton v. Alabama, 368 U.S. 52, 55 (1961) (arraignments); Powell v. Alabama, 287 U.S. 45, 66 (1932) (preliminary examinations). *See generally* Enkers & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47, 48, 53-58 (1964).

48. *See* Escobedo v. Illinois, 378 U.S. 478, 488 (1964); Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 15 (1979) (coercive type interrogation generally occurs prior to formal indictment).

Two years after *Massiah* and *Escobedo,* the Supreme Court again used the fifth amendment in deciding *Miranda v. Arizona,*[49] thereby forming the first concrete guidelines concerning custodial interrogation.[50] The *Miranda* 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."[51] The Supreme Court expressly applied the self-incrimination clause of the fifth amendment to police interrogations in *Miranda,*[52] ruling that statements might be excluded from evidence despite being voluntary[53] if proper warnings were not given first.[54] The Court recognized modern interrogation had become psychological rather than physical,[55] thereby creating a danger the accused may not easily escape compulsion.[56]

Individuals taken into custody, therefore, must be warned they have the right to remain silent, their statements may be used against them, and they have the right to an attorney during questioning.[57] Warnings must be administered regardless of age, education, intelligence, or prior experience with the law enforcement authorities to ensure the suspect

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49. 384 U.S. 436 (1966).

50. *Id.* at 442. The Court felt violence and brutality were not confined to the past; therefore, based upon current cases and several studies on the inhumanity of police practices, the Court decided reform was needed. *See id.* at 446-47. *See generally* Booth, *Confessions, and Methods Employed in Procuring Them,* 4 So. CALIF. L. REV. 83, 88, 94-95 (1930); Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later - Some Comments on a Remarkable Article,* 73 MICH. L. REV. 15, 20-21 (1974); Kauper, *Judicial Examination of the Accused - A Remedy for the Third Degree,* 30 MICH. L. REV. 1224, 1225 (1932).

51. Miranda v. Arizona, 384 U.S. 436, 444 (1966); *cf.* Oregon v. Mathison, 429 U.S. 492, 495 (1977) (coercive environment of police station not equal to custody so long as suspect free to leave); Beckwith v. United States, 425 U.S. 341, 342-45 (1976) (interview with Internal Revenue agent in own home not custodial interrogation).

52. Miranda v. Arizona, 384 U.S. 436, 441 (1966).

53. *Id.* at 444; *see* Michigan v. Tucker, 417 U.S. 433, 443 (1974). Prior to *Miranda,* the issue was voluntariness of the confession; after *Miranda,* a valid waiver of prescribed warnings was necessary to allow incriminating statements to be used. *Id.* at 442-44; *see* Commonwealth v. Bussey, 404 A.2d 1309, 1314-15 (Pa. 1979) (despite voluntariness, if no valid waiver, evidence will be barred).

54. *See* Miranda v. Arizona, 384 U.S. 436, 478-79 (1966).

55. *See id.* at 448. *See generally* F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS 24 (2d ed. 1967). Psychological techniques used during interrogation include: assuming the suspect's guilt; calling attention to suspect's symptoms of guilt; sympathizing with suspect; minimizing immorality of crime; appealing to suspect's pride; playing one suspect against another; and making reference to non-existing evidence against suspect. *See id.* at 26-27, 33, 38, 40, 73, 84, 103.

56. Miranda v. Arizona, 384 U.S. 436, 461 (1966).

57. *Id.* at 478-79; *see* Michigan v. Mosley, 423 U.S. 96, 100 (1975).

knows his rights, and the consequences of waiving them.[58] The courts have set a high standard for waiver of one's *Miranda* rights,[59] with the burden of proving a valid waiver resting with the prosecution.[60] Once warnings have been given and the suspect asserts his desire to cut off questioning, his request must be "scrupulously honored."[61] The *Miranda* Court, however, maintained that its holding did not bar from evidence purely voluntary statements.[62]

Despite *Miranda*, decisions are not in complete agreement as to what constitutes interrogation.[63] It is well settled any behavior seeking to elicit an answer from the suspect falls within the category of interrogation.[64] The Texas courts, in particular, look for probable cause to arrest, to sub-

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58. *See* Miranda v. Arizona, 384 U.S. 436, 469 (1966). *But see* Lederer, *Miranda v. Arizona - The Law Today*, 78 MIL. L. REV. 107, 137 (1977) (law enforcement officers may ask questions without warnings when there are important safety considerations).

59. *See* Miranda v. Arizona, 384 U.S. 436, 475 (1966) (setting high standards for waiver of constitutional rights); Carnley v. Cochran, 369 U.S. 506, 516 (1962) (silence does not constitute waiver); Commonwealth v. Bussey, 404 A.2d 1309, 1314 (Pa. 1979) (waiver must be explicit).

60. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

61. Michigan v. Mosley, 423 U.S. 96, 104 (1975). Interrogation was stopped after Mosley asked for an attorney, but began again, after warnings, two hours later. The Court found Mosley's rights had been upheld because of the delay in resuming questioning and the issuance of new warnings. *Id.* at 104-05, 107; *see* 81 DICK. L. REV. 661, 664-65 (1977); 43 TENN. L. REV. 472, 478-80 (1976).

62. Miranda v. Arizona, 384 U.S. 436, 478 (1966); *accord*, United States v. Washington, 431 U.S. 181, 187 (1977); Michigan v. Tucker, 417 U.S. 433, 447 (1974). *But see* Greenwald v. Wisconsin, 390 U.S. 519, 520-21 (1968) (totality of circumstances makes voluntary confession inadmissable); TEX. CODE CRIM. PRO. ANN. art. 38.22 §§ 1-6 (Vernon 1979 & Supp. 1980) (discussing admissability of confessions in Texas). Generally, oral confessions resulting from custodial interrogation are inadmissable as evidence in Texas except for impeachment purposes. *Id.* § 3. Confessions made in open court at trial, before a grand jury during an examining trial, after the suspect has been told he may remain silent, as res gestae of offense or arrest, and not as the result of a custodial interrogation, are admissable. *Id.* § 5.

63. *Compare* United States v. Anderson, 523 F.2d 1195-96 (5th Cir. 1975) (agent posing as patient requesting drugs was interrogation) *and* Jones v. State, 346 So. 2d 639, 639-40 (Fla. Dist. Ct. App. 1977) (reading evidence against defendant was interrogation) *and* Commonwealth v. Mercier, 302 A.2d 337, 340 (Pa. 1973) (reading accusatory statement of co-defendant was interrogation) *with* Vines v. Maryland, 402 A.2d 900, 903 (Md. 1979) (confronting suspect with seized evidence not interrogation) *and* Leuschner v. Maryland, 397 A.2d 622, 628 (Md. Ct. Spec. App. 1979) (police officer disguised as cellmate not interrogation) *and* Combs v. Commonwealth, 438 S.W.2d 82, 84-85 (Ky. 1969) (reading ballistics report not interrogation) *and* Howell v. State, 247 A.2d 291-92 (Md. Ct. Spec. App. 1968) (relating incriminating statement of co-defendant not interrogation).

64. *See* Brewer v. Williams, 430 U.S. 387, 392-93 (1977) (speech directed at suspect, but made to officer); Massiah v. United States, 377 U.S. 201, 206 (1964) (police bugged car). *See generally* Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does it Matter?*, 67 GEO. L.J. 1, 14-24 (1978); Comment, *Interrogation in Violation of Miranda-State v. Innis*, 13 SUFFOLK U.L. REV. 591, 593-94 (1979).

jective intent of the officers, to subjective belief of the accused, and to the focus of the investigation when determining if custodial interrogation has occurred.[65]

In *Brewer v. Williams*,[66] the Supreme Court found a violation of the sixth amendment right to counsel when an arraigned suspect had been subjected to an indirect interrogation.[67] The Court held the "Christian burial speech" delivered to Williams, subsequent to his arraignment, "tantamount to interrogation."[68] Moreover, the Court concluded the state had fallen short of proving Williams had made a knowing and intelligent waiver of his right when he made incriminating statements.[69]

Since formal judicial proceedings had begun,[70] Williams' sixth amendment right to counsel was violated the minute the "Christian burial speech" began.[71] The constitutional issue of indirect interrogation, therefore, was irrelevant.[72] *Brewer* did not, however, overrule *Miranda*, rather it extended *Massiah*.[73] After *Brewer* both the fifth and sixth amendments control police interrogations.[74]

In *Rhode Island v. Innis*[75] the United States Supreme Court reiterated

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65. *See* Newberry v. State, 552 S.W.2d 457, 461 (Tex. Crim. App. 1977).

66. 430 U.S. 387 (1977). Williams had been arrested and arraigned on murder charges. During the ride from one jurisdiction to another, one of the officers, who knew Williams to be a former mental patient and deeply religious, delivered the "Christian burial speech." The officer made an emotional plea to Williams to reveal the location of the victim's body since the weather conditions were poor and if snow fell during the night, it might be impossible to find the body thereby depriving the girl of a proper burial. *Id.* at 391-93.

67. *See id.* at 397-98. The *Brewer* Court did not apply the *Miranda* doctrine, noting *Miranda* applied to self-incrimination, while *Brewer* clearly hinged upon sixth amendment right to counsel. *Id.* at 397-98.

68. *See id.* at 399 n.6, 400.

69. *Id.* at 404. The Court held waiver requires more than comprehension of one's rights; it requires knowing relinquishment of these rights. *Id.* at 404; *see* Fare v. Michael, 442 U.S. 707, 724-25 (1979) (knowing and voluntary waiver determined from totality of circumstances); McCandless v. State, 425 S.W.2d 636, 640 (Tex. Crim. App. 1968) (burden lies with prosecution to prove waiver).

70. *See* Brewer v. Williams, 430 U.S. 387, 391 (1977).

71. *See id.* at 400.

72. *See id.* at 400. The exclusionary rule has been justified when police have engaged in willful and negligent conduct, thereby barring evidence which is obtained in bad faith. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (evidence obtained illegally may not be admitted against accused at trial); *cf.* TEX. CODE CRIM. PRO. ANN. art. 38.23 (Vernon 1979) (evidence obtained in violation of U.S. or Texas law inadmissable at trial). Confessions resulting from custodial interrogation in Texas must be written to be admissable against the accused. *Id.* art. 38.22, §§ 2-3.

73. *See* Brewer v. Williams, 430 U.S. 387, 397, 401 (1977) (no need to review *Miranda*, *Massiah* applies).

74. *See* White, *Rhode Island v. Innis: The Significance of a Suspect's Assertion to His Right to Counsel*, 17 AM. CRIM. L. REV. 53, 69 (1979).

75. ___ U.S. ___, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

that interrogation included both questioning and its functional equivalent.[76] Innis was clearly not subjected to "express questioning,"[77] but the issue of whether he was subjected to the functional equivalent of questioning was addressed.[78] "[F]unctional equivalent of questioning" was defined as "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect."[79] The Court acknowledged Innis may have been under subtle compulsion to speak, but declared subtle compulsion is not interrogation, since the officers did not have knowledge Innis would be susceptible to a plea for handicapped children.[80] The Court felt compulsion to speak must be greater than that inherent in a custodial setting to qualify as interrogation.[81] The Court determined Innis' remarks did not result from questioning or its functional equivalent, therefore, his *Miranda* rights were not violated.[82]

In a vigorous dissent, Justice Stevens disagreed with the majority's holding that police should know their behavior would be likely to elicit an incriminating response to qualify as the functional equivalent of a direct question.[83] The dissent stated the test should be "any statement that would normally be understood by the average listener as calling for a response is the functional equivalent of a direct question. . . ."[84] In a separate dissent, Justice Marshall stated the officer's appeal to Innis to "display some decency and honor," in helping locate a dangerous gun was a classic interrogation technique which should be recognized as interrogation.[85]

The Supreme Court concluded Innis was neither deprived of his sixth

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76. *Id.* at ___, 100 S. Ct. at 1689, 64 L. Ed. 2d at 307-08.

77. *Id.* at ___, 100 S. Ct. at 1690, 64 L. Ed. 2d at 308. Innis was never personally addressed by the officers. *Id.* at ___, 100 S. Ct. at 1690, 64 L. Ed. 2d at 308-09.

78. *Id.* at ___, 100 S. Ct. at 1690, 64 L. Ed. 2d at 309.

79. *Id.* at ___, 100 S. Ct. at 1689, 64 L. Ed. 2d at 308 (essence of inquiry was whether officers knew Innis would probably incriminate himself because of their statements).

80. *Id.* at ___, 100 S. Ct. at 1690, 64 L. Ed. 2d at 309.

81. *Id.* at ___, 100 S. Ct. at 1689, 64 L. Ed. 2d at 307. The Court distinguished *Innis* from *Brewer* since the police did not know Innis had any particular sensitivities which could be played upon. *Id.* at ___, 100 S. Ct. at 1690, 64 L. Ed. 2d at 309. In *Brewer* the police knew Williams was a mental patient with deep religious tendencies, intentionally calling him "Reverend." *See* Brewer v. Williams, 430 U.S. 386, 392 (1977).

82. Rhode Island v. Innis, ___ U.S. ___, ___, 100 S. Ct. 1682, 1690, 64 L. Ed. 2d 297, 309 (1980).

83. *Id.* at ___, 100 S. Ct. at 1694, 64 L. Ed. 2d at 313 (Stevens, J., dissenting) (any words or actions having effect of question should be viewed as a question).

84. *Id.* at ___, 100 S. Ct. at 1694, 64 L. Ed. 2d at 313 (Stevens, J., dissenting).

85. *Id.* at ___, 100 S. Ct. at 1692, 64 L. Ed. 2d at 311 (Marshall, J., dissenting); *see* F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS 60-62 (2d ed. 1967).

amendment right to counsel,[86] nor his fifth amendment right as interpreted in *Miranda*.[87] The holding in *Innis* raises the question whether a suspect, who is held in custody but not interrogated, has any constitutional protection against self-incrimination.[88] To answer this question, both the fifth and sixth amendments must be considered in light of the facts in *Innis*.[89] When the Court in *Massiah* applied the sixth amendment to incriminating statements, the suspect had been arraigned and released on bail;[90] the investigation had focused upon him; formal judicial proceedings had begun.[91] Unlike Innis, Massiah had a lawyer, had appeared in court, and was outside the presence of authorities when he made incriminating statements.[92] The Court reversed Massiah's conviction[93] because authorities attempted to extract incriminating evidence from Massiah after his arraignment, in the absence of his counsel.[94] Having just

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86. *See* Rhode Island v. Innis, ___ U.S. ___, ___, 100 S. Ct. 1682, 1689, 64 L. Ed. 2d 297, 307-08 (1980). The Court expressly rejects any application of the sixth amendment in cases of custody when no formal judicial proceedings have begun. *See id.* at ___, 100 S. Ct. at 1689 n.4, 64 L. Ed. 2d at 307-08 n.4. *Compare id.* at ___, 100 S. Ct. at 1689 n.4, 64 L. Ed. 2d at 307-08 n.4 (suspect under arrest) *with* Brewer v. Williams, 430 U.S. 387, 399 (1977) (suspect under arrest, arraigned, and committed to jail). *See generally* Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 4 (1979). The *Innis* Court adopted the reasoning of the *Brewer* Court on interrogation and waiver, but reached a different conclusion due to facts. *Id.* at 4.

87. *See* Rhode Island v. Innis, ___ U.S. ___, ___, 100 S. Ct. 1682, 1690-91, 64 L. Ed. 2d 297, 308-09 (1980). Innis was in custody and, therefore, under a form of subtle compulsion, but that did not equal interrogation unless the police officers should have known his remarks would be likely to bring a response. *Id.* at ___, 100 S. Ct. at 1690-91, 64 L. Ed. 2d at 308-09; *cf.* Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 16 (1977) (fifth amendment only protects against coercion).

88. *See* Rhode Island v. Innis, ___ U.S. ___, ___, 100 S. Ct. 1682, 1690-91, 64 L. Ed. 2d 297, 307-08 (1980).

89. U.S. CONST. amends. V, VI. *Innis* is a good example of the problem in applying the fifth and sixth amendments. The fifth amendment seeks to stop coerced self-incrimination, but does not delineate when that protection applies. The sixth amendment provides for assistance of counsel, but does not specify at what point the right arises. *Id.*

90. *See* Massiah v. United States, 377 U.S. 201, 206 (1964); Kamisar, *Brewer v. Williams, Massiah, and Miranda: What Is "Interrogation"? When Does It Matter?*, 67 GEO. L.J. 1, 41-42 (1978) (*Massiah* turns on attempt to gain information after counsel retained).

91. Massiah v. United States, 377 U.S. 201, 202-03 (1964).

92. *Compare* Rhode Island v. Innis, ___ U.S. ___, ___, 100 S. Ct. 1682, 1686, 64 L. Ed. 2d 297, 303 (1980) (defendant just arrested and placed in custody) *with* Massiah v. United States, 377 U.S. 201, 202-03 (1964) (defendant released on bail and sitting in friend's car). Most investigations occur between arraignment and trial; therefore, it is a critical time for advice of counsel. *See* Powell v. Alabama, 287 U.S. 45, 57 (1932).

93. *See* Massiah v. United States, 377 U.S. 201, 207 (1964).

94. *See id.* at 206-07; *cf.* Brewer v. Williams, 430 U.S. 387, 400 (1977) (after arraignment right to counsel would not arise absent interrogation); United States v. Doe, 455 F.2d

become the center of the investigation, Innis had no attorney representing him when he led police to the shotgun.[95] The sixth amendment does not function to stop any particular type of interrogation,[96] rather it compels authorities to deal through the attorney of the accused once formal judicial proceedings have begun.[97] In the absence of an indictment, arraignment, or formal charge, the majority of cases have ruled the sixth amendment right is not activated by mere custody.[98] Innis was not indicted, arraigned, or formally charged;[99] therefore, he had no sixth amendment right to counsel when he led police to the murder weapon.[100]

When Innis was arrested he requested an attorney to protect himself against self-incrimination, thereby invoking his fifth amendment right to counsel created by *Miranda*.[101] The safeguards developed in *Miranda*

1270, 1275 (1st Cir. 1972) (after arraignment grand jury may not subpoena defendant to gather information that might help prosecution's case).

95. *See* Rhode Island v. Innis, ___ U.S. ___, ___, 100 S. Ct. 1682, 1686-87, 64 L. Ed. 2d 297, 303-04 (1980). The period of time between when Innis requested a lawyer and led police to the shotgun was very short. He was given his *Miranda* rights, requested an attorney, and was driven less than a mile when he offered to locate the shotgun. *Id.* at ___, 100 S. Ct. at 1686-87, 64 L. Ed. 2d at 303-04.

96. *See* Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 9-10 (1979). The sixth amendment has traditionally functioned as a sword to allow the defendant to test the prosecution's evidence at a judicial proceeding, and to help the defendant present his best defense through advise of counsel. More recently, the sixth amendment has functioned as a shield, shielding the defendant from the state's efforts to obtain any evidence from him. *Id.* at 9-10; *see* Coleman v. Alabama, 399 U.S. 1, 9 (1970) (sword function evident at preliminary hearing to protect against improper prosecution of accused).

97. *See* Watts v. Indiana, 338 U.S. 49, 59 (1949). The rationale behind forcing authorities to deal through the attorney of the accused is that any reliable lawyer would not allow his client to confess unless it was the client's free will to do so. *Id.* at 59.

98. *See, e.g.*, Kirby v. Illinois, 406 U.S. 682, 689 (1972) (starting point of adversary system is when state has committed itself to prosecute); Massiah v. United States, 377 U.S. 201, 205 (1964) (defendant entitled to counsel from arraignment through trial); Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (accused must have legal assistance after being charged with crime).

99. *See* Rhode Island v. Innis, ___ U.S. ___, 100 S. Ct. 1682, 1686-87, 64 L. Ed. 2d 297, 303-04 (1980). When Innis offered to show police where the shotgun was located, he had been in custody less than an hour, and was within a few miles of the scene of arrest; therefore, no judicial proceeding had begun. *Id.* at ___, 100 S. Ct. at 1686-87, 64 L. Ed. 2d at 303-04.

100. *See* Kirby v. Illinois, 406 U.S. 682, 689 (1972) (sixth amendment rights attach when formal proceedings begin); Massiah v. United States, 377 U.S. 201, 205 (1964) (right to counsel attaches at arraignment).

101. *See* Miranda v. Arizona, 384 U.S. 436, 470-71 (1966). The fifth amendment does not specifically mention any right to counsel, but counsel is required to insure suspect is protected from involuntary self-incrimination. *Id.* at 470-71; *see* Commonwealth v. Mercier, 302 A.2d 337, 339 (Pa. 1973) (after arrest suspect may refuse to answer questions until counsel is provided); Commonwealth v. Nathan, 285 A.2d 175, 178 (Pa. 1971) (when suspect

only apply when there is custodial interrogation.[102] They do not arise when there is interrogation without custody[103] or custody without interrogation.[104] The Supreme Court denied Innis any rights under *Miranda* by holding he was not interrogated.[105] The definition of interrogation is crucial, therefore, in assessing a suspect's fifth amendment rights as interpreted in *Miranda*.[106] In *Miranda*, the United States Supreme Court found that all custodial settings are coercive;[107] therefore, a suspect must be safeguarded from involuntary self-incrimination.[108] The Court, in *Innis*, agreed with the *Miranda* reasoning regarding interrogation, but asserted custody without interrogation produces only subtle compulsion, not coercion.[109] Innis' exposure to subtle compulsion did not activate his *Miranda* right to counsel.[110] Innis' admissions, made prior to interroga-

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exercises *Miranda* rights, questions must stop). *But see* Michigan v. Mosley, 423 U.S. 96, 104 (1975) (questioning may resume after period of time if new warnings are given). *See generally*, White, *Rhode Island v. Innis: The Significance of A Suspect's Assertion of His Right to Counsel*, 17 AM. CRIM. L. REV. 53, 60 (1979).

102. *See* Miranda v. Arizona, 384 U.S. 436, 439 (1966); *cf.* Blankenship v. State, 432 S.W.2d 945, 947 (Tex. Crim. App. 1968) (mental examination of accused in custody not subject to *Miranda* rules).

103. *See, e.g.*, Oregon v. Mathiason, 429 U.S. 492, 495 (1977); Tilley v. State, 462 S.W.2d 594, 595 (Tex. Crim. App. 1971); Robinson v. State, 441 S.W.2d 855, 858 (Tex. Crim. App. 1969).

104. *See, e.g.*, Leuschner v. State, 397 A.2d 622, 628 (Md. Ct. Spec. App. 1979); Lucas v. State, 463 S.W.2d 200, 202 (Tex. Crim. App. 1971); Bendaw v. State, 429 S.W.2d 506, 508 (Tex. Crim. App. 1968).

105. *See* Rhode Island v. Innis, ___ U.S. ___, ___, 100 S. Ct. 1682, 1690, 64 L. Ed. 2d 297, 308 (1980). The Court concluded *Miranda* safeguards arise when the accused in custody is subjected to express questioning or its functional equivalent. Innis was not. *Id.* at ___, 100 S. Ct. at 1690, 64 L. Ed. 2d at 308-09.

106. *See* Brewer v. Williams, 430 U.S. 387, 400 (1977) (statements tantamount to interrogation making evidence obtained inadmissable); Commonwealth v. Mercier, 302 A.2d 337, 339 (Pa. 1973) (reading statements same as interrogation making evidence inadmissable). *See generally* Kamisar, *Brewer v. Williams, Massiah and Miranda: What is "Interrogation"? When Does it Matter?*, 67 GEO. L.J. 1, 14-24 (1978).

107. *See* Miranda v. Arizona, 384 U.S. 436, 461 (1966).

108. *See id.* at 461, 467 (pressures of interrogation undermine free will); Malloy v. Hogan, 378 U.S. 1, 8 (1964) (to fulfill privilege against self-incrimination accused must be guaranteed right to silence).

109. *Compare* Rhode Island v. Innis, ___ U.S. ___, ___, 100 S. Ct. 1682, 1690-91, 64 L. Ed. 2d 297, 308-09 (1980) (subtle compulsion does not equal interrogation) *with* Ancira v. State, 516 S.W.2d 924, 926 (Tex. Crim. App. 1974) (discussion with armed policeman in uniform was interrogation).

110. *See* Rhode Island v. Innis, ___ U.S. ___, ___, 100 S. Ct. 1682, 1690-91, 64 L. Ed. 2d 297, 308-09 (1980). *But see* Miranda v. Arizona, 384 U.S. 436, 467 (1966). "[T]here can be no doubt that the fifth amendment privilege is available. . .to protect persons in all settings in which their freedom of action is curtailed in any significant way. . . ." *Id.* at 467.

tion, must therefore be considered voluntary.[111]

To evaluate the effect of the *Innis* decision in Texas, similar circumstances must be analyzed under current Texas law. To be admissable against the accused, Texas generally requires confessions resulting from custodial interrogation to be written.[112] To determine if custodial interrogation has occured, the Texas courts and the fifth circuit look for probable cause to arrest, to subjective intent of the officers, to subjective belief of the accused, and to the focus of the investigation.[113] If Innis' oral statements had resulted from custodial interrogation, under section 3(a) of article 38.22 of the Texas Code of Criminal Procedure, they would be admissable for impeachment purposes only, provided proper statutory guidelines were met.[114] Section 3(a) does not apply, however, to statements "that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed."[115] Innis' statements led to the recovery of the murder weapon; therefore, in Texas such statements would have been allowed as substantive evidence against him.[116]

Purely voluntary oral statements, like those defined by the Supreme

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111. *See* United States v. Washington, 431 U.S. 181, 186-87 (1976); Taylor v. State, 420 S.W.2d 601, 606 (Tex. Crim. App. 1967). *See generally* Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does It Matter?*, 67 GEO. L.J. 1, 68 (1978) (when fifth and sixth amendment rights have not come into play, all that is left is volunteered statements).

112. *See* TEX. CODE CRIM. PRO. ANN. art. 38.22, §§ 2-3 (Vernon 1979 & Supp. 1980). Written statements are allowed only if accused has received *Miranda* warnings from magistrate in accordance with article 15.17 of the Texas Code of Criminal Procedure, and the accused has knowingly, intelligently, and voluntarily waived his *Miranda* rights. *Id.* § 2(a)-(b); *see* Smith v. State, 514 S.W.2d 749, 752-53 (Tex. Crim. App. 1974) (nonspontaneous admissions in response to questions inadmissable); Garner v. State, 464 S.W.2d 111, 112 (Tex. Crim. App. 1971) (in-custody statements not producing fruits of the crime inadmissable). *But see* Simmons v. State, 594 S.W.2d 760, 762-63 (Tex. Crim. App. 1980) (testimony at punishment phase describing attitude of accused admissable, not tantamount to confession).

113. *See* United States v. Warren, 578 F.2d 1058, 1071-72 (5th Cir. 1978); Newberry v. State, 552 S.W.2d 457, 461 (Tex. Crim. App. 1977).

114. *See* Harrison v. State, 556 S.W.2d 811, 812-13 (Tex. Crim. App. 1977); TEX. CODE CRIM. PRO. ANN. art. 38.22, § 3(a) (Vernon Supp. 1980).

115. TEX. CODE CRIM. PRO. ANN. art. 38.22, § 3(c) (Vernon Supp. 1980); *see, e.g.*, Marini v. State, 593 S.W.2d 709, 713 (Tex. Crim. App. 1980) (all parts of confession admissable, not just those leading to fruits of crime); Hamel v. State, 582 S.W.2d 424, 427 (Tex. Crim. App. 1979) (fruits of the crime stemming from confession admissable even when arrest is illegal); Garcia v. State, 581 S.W.2d 168, 173 (Tex. Crim. App. 1979) (oral statements leading to recovery of murder weapon admissable).

116. *See* Marini v. State, 593 S.W.2d 709, 712-13 (Tex. Crim. App. 1980); Garcia v. State, 581 S.W.2d 168, 173 (Tex. Crim. App. 1979).

Court in *Innis*[117] would not be barred by section 3(a) of article 38.22.[118] Prior to *Innis*, Texas law barred the use of confessions against the accused when an admission was not in writing and did not lead to the fruits of the crime.[119] If Innis had been questioned by police and said, "Yes, I did it. I killed the taxi driver with a shotgun," his statements would not have been admissable in Texas so long as he gave no information that led to the weapon.[120] The effect of the *Innis* Court's narrow definition of interrogation is to allow more custodial admissions to be classified as voluntary statements, thereby reducing the protection afforded an accused by section 3(a) of article 38.22 of the Texas Code of Criminal Procedure.

When the *Innis* Court gave a limited definition to interrogation, it was really seeking to define the functional equivalent of a question. Direct methods of questioning and strongly coercive police techniques have long been recognized as interrogation.[121] In narrowly defining the functional equivalent of a question, the Court has turned toward a pre-*Miranda* voluntariness standard.[122] The question for the courts may shift from whether the accused was interrogated in violation of *Miranda*, to whether the accused volunteered his statement or was coerced. Texas has given greater protection to the suspect than *Miranda*, barring the admission of most oral statements obtained from custodial interrogation.[123] Under the

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117. *See* Rhode Island v. Innis, ___ U.S. ___, ___, 100 S. Ct. 1682, 1690-92, 64 L. Ed. 2d 297, 308-09 (1980) (statements made when no response invited are voluntary).

118. *See* Newhouse v. State, 420 S.W.2d 729, 731 (Tex. Crim. App. 1967); Taylor v. State, 420 S.W.2d 601, 606 (Tex, Crim. App. 1967). Res gestae is admissable without being written if the admission is made soon after the event. *See* Smith v. State, 514 S.W.2d 749, 752 (Tex. Crim. App. 1974); Rubenstein v. State, 407 S.W.2d 793, 795 (Tex. Crim. App. 1966); TEX. CODE CRIM. PRO. ANN. art. 38.22, § 5 (Vernon 1979).

119. *See, e.g.*, Scott v. State, 564 S.W.2d 759, 760 (Tex. Crim. App. 1978) (evidence must conduce to establish guilt); Dudley v. State, 548 S.W.2d 706, 711 (Tex. Crim. App. 1977) (silence not evidence of guilt); *In re* R.L.S., 575 S.W.2d 665, 666 (Tex. Civ. App.—El Paso 1978, no writ) (confession must lead to evidence unknown by state). *See generally* Bubany, *The Texas Confession Statute: Some New Wine in the Same Old Bottle*, 10 TEX. TECH L. REV. 67, 83-85 (1978) (oral statements disallowed due to inherent unreliability).

120. *See* Smith v. State, 514 S.W.2d 749, 752 (Tex. Crim. App. 1974) (oral confession must lead to new evidence of crime to be admissable). *But see* Marini v. State, 593 S.W.2d 709, 713 (Tex. Crim. App. 1980) (words "I did it" admissable when part of one continuous confession which lead to fruits of crime).

121. *See* Brewer v. Williams, 430 U.S. 387, 399 (1977) (deliberate attempt to elicit information considered interrogation); Ancira v. State, 516 S.W.2d 924, 924-26 (Tex. Crim. App. 1974) (questioning by uniformed officer in squad car was interrogation).

122. *See* Watts v. Indiana, 338 U.S. 49, 53 (1949) (confession must be product of free will to be admissable); Brown v. Mississippi, 297 U.S. 278, 283 (1936) (confession must be free and voluntary beyond all doubt to be admissable); Wan v. United States, 266 U.S. 1, 14 (1924) (voluntariness standard not satisfied by showing lack of threat or promise).

123. *See, e.g.*, Harrison v. State, 556 S.W.2d 811, 813 (Tex. Crim. App. 1977) (purpose of Texas statute to prohibit all incriminating statements); Smith v. State, 514 S.W.2d 749,