Requests for Counsel During Custodial Interrogation *After* a Written Waiver of *Miranda* Rights

QUESTION: **Is a suspect's ambiguous reference to the need for an attorney sufficient to terminate an interrogation even after the suspect has waived his *Miranda* rights in writing?**

ANSWER: **No. Once the suspect has waived his *Miranda* rights in writing, any subsequent request for an attorney must be clear, unambiguous and unequivocal.**

CASE: *Alexander Malaska v. State of Maryland*, **Court of Special Appeals of Maryland Decided February 28, 2014**

The Background: On March 28, 2012, Dennis Liller was fatally shot by his neighbor, Eugene Malaska. The sequence of events leading to his death had its origins in a property dispute between the Malaskas and their neighbors. On the day of the murder, Liller had posted a "No Trespassing" sign on property that he owned. The property was adjacent to Malaska's home. However, there was a cluster of trees at the very edge of Liller's property that he claimed was his. Malaska claimed otherwise, and when his son saw the "No Trespassing" sign, he tore it up and scattered it. This act led to a heated verbal exchange between the neighbors which in turn led to a fight. As the fight neared its end, Malaska retrieved a .22 caliber rifle from his house and fired a shot from his front porch. Liller began to run away and Malaska fired again, striking Liller in the back. Liller died at the scene.

The Arrest and the Interrogation: Malaska was arrested at the scene by members of the Maryland State Police and the Allegany County Sheriff's Office. He was taken to the Cumberland Police Station where he was read his *Miranda* rights. Malaska signed a written waiver of those rights. He was interrogated by Corporal Martin of the Maryland State Police and Detective Dixon of the Allegany County Sheriff's Office. At the outset of the interrogation, Malaska stated "maybe I need an attorney". In reply, Corporal Martin said, "only you can decide that." Malaska then said, "possibly I need an attorney." In response, Detective Dixon said, "we both know … what happened tonight." Malaska then said, "I'll explain what happened." Corporal Martin said, "if you want an attorney, no other questions will be asked of you." In response, Malaska said, "No … I'd like to make, I'll make a statement" but that, "I think I need an attorney." Corporal Martin attempted to clarify, asking Malaska, "You want an attorney to talk to you before you, you answer any questions?" Malaska responded that, "I'll make a statement right now" and "you can ask me questions." Out of an abundance of caution, Corporal Martin made a further attempt to clarify by asking Malaska, "You don't want an attorney?" to which Malaska replied, "I don't need an attorney yet…."

Malaska then told the officers about the incident, including that he had acted to protect his son who was being attacked by Liller and others and that he had fired a warning shot to stop the attack. He said that, after the warning shot, one of the men with Liller charged him and that he fired again in self-defense. He said that he didn't know he had even shot Liller until he saw him on the ground.

The Charges, the Motion to Suppress and the Trial: Malaska was indicted for second degree murder and voluntary manslaughter. Prior to his trial, he moved to suppress his statements to the police. Malaska asserted that, even though he read and signed a waiver of his *Miranda* rights, he had "explicitly invoked" his right to counsel during the interrogation and that, therefore, the officers should have ceased their questioning. The trial court denied the motion and Malaska was convicted of voluntary manslaughter. After a sentence of eight years' imprisonment was imposed, Malaska appealed.

The Appeal and the Decision: The Court of Special Appeals affirmed Malaska's conviction. As to the interrogation issue, the Court began by stating that when a suspect *signs* a valid waiver of his *Miranda* rights prior to the commencement of a police interrogation, the suspect must thereafter unambiguously request counsel in order to invoke his right to counsel. This essentially means that a reasonable police officer in the circumstances of the interrogator would understand the suspect's statement to be a request for attorney. Here, Malaska's statements concerning counsel were ambiguous. As such, Corporal Martin properly sought clarification(s) from Malaska as to whether he actually wanted an attorney present. When Malaska's response was still somewhat confusing "I don't need an attorney yet", Corporal Martin sought even further clarification. That is when Malaska expressed his willingness to give a statement without the presence of counsel. Accordingly, the statement was validly obtained and Malaska's conviction was upheld.

NOTE: Written waiver forms are indispensable when it comes to custodial interrogations. However, even after execution of a waiver form, a suspect may still invoke his right to counsel at any point during the interrogation. The catch is that such request must be clear—so much so that it leaves no room for doubt. If the statement is in any way unclear, the interrogating officer should immediately seek clarification as to the suspect's actual intent. This is a practice expressly recommended by the Supreme Court in *Davis v. United States*. Clarifying questions help protect the rights of the suspect and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel.

By John F. Breads, Jr., Director of Legal Services, Local Government Insurance Trust