CRUCIAL STAGES, CRUCIAL CONFRONTATIONS, AND THE FLORIDA CRIMINAL DEFENDANT'S RIGHT TO COUNSEL

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I. INTRODUCTION

The right to the assistance of counsel is a fundamental right guaranteed to all criminal defendants. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."[1] The Florida Constitution also provides this right to defendants.[2] The right has been alternatively recognized as the "right to counsel"[3] and

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1. U.S. CONST. amend. VI.

2. See FLA. CONST. art. I, § 16(a) ("In all criminal prosecutions the accused . . . shall have the right . . . to be heard in person, by counsel or both . . . .").

3. Gideon v. Wainwright, 372 U.S. 335, 338 (1963).

as the "right to assistance of counsel."[4] This Comment uses these terms interchangeably. Irrespective of the terminology, courts have long recognized that:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[5]

The right to counsel granted by the U.S. Constitution is an evolving concept. Commentators have asserted that "[d]uring the past half century, Supreme Court decisions have transformed the Sixth Amendment's 'Assistance of Counsel' clause from a simple guarantor of the aid of retained counsel at trial into a requirement that counsel be available to protect the defendant's interests in an ever expanding variety of pre-trial contexts."[6] Part II of this Comment examines the right to counsel as it has evolved under the U.S. Constitution and the Florida Constitution. Part III reviews and analyzes the Florida Supreme Court's decision in Traylor v. State[7] and subsequent decisions in Florida courts, and compares them with the decisions of the U.S. Supreme Court relating to the right to counsel. Parts IV and V discuss the effect of equivocal invocations of Miranda rights in light of recent Florida and U.S. Supreme Court cases. Part VI analyzes the impact of Florida's right to counsel jurisprudence on various longstanding law enforcement methods. Finally, Part VII recommends a modification to the Florida Supreme Court's approach that will avoid interference with these longstanding methods of law enforcement.

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4. Id. at 339.

5. Powell v. Alabama, 287 U.S. 45, 68-69 (1932). Powell was the first major Supreme Court discussion of the right to counsel. See WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 11.1(a), at 519 (2d ed. 1992). Though not specifically grounded in the Sixth Amendment right to counsel, the decision has significantly influenced the Court's right-to-counsel jurisprudence. See id.; see also Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938) (holding that the Sixth Amendment guarantees the right to appointed counsel, as well as the right to retained counsel); Gideon, 372 U.S. at 341-44 (extending the right to appointed counsel in state cases to all indigent felony defendants).

6. E.g., OFFICE OF LEGAL POL'Y, DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE SIXTH AMENDMENT RIGHT TO COUNSEL UNDER THE MASSIAH LINE OF CASES 4-5 (1986).

7. 596 So. 2d 957 (Fla. 1992).

II. LEGAL BACKGROUND

A. Comparison of the Fifth and Sixth Amendment Rights to Counsel

Although the Sixth Amendment expressly grants criminal defendants the right to the assistance of counsel, a similar right is also derived from other constitutional guarantees. In Miranda v. Arizona,[8] the U.S. Supreme Court found that the right to consult with counsel was indispensable to the right against self-incrimination protected by the Fifth Amendment.[9] Police are required to inform a person subjected to custodial interrogation[10] that "he has the right to consult with a lawyer and to have the lawyer with him during interrogation."[11] Although the Court's language in Miranda seemed to imply that the warnings had a constitutional nexus, the Court later retreated from such a holding. In Michigan v. Tucker,[12] the Court indicated that procedural safeguards were not constitutionally mandated.[13]

The Fifth and Sixth Amendment rights to counsel have essentially different purposes. The Fifth Amendment right is designed to protect the suspect from self-incrimination. "It is not, therefore, actually a right to a lawyer in particular, but rather the right to have

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8. 384 U.S. 436 (1966).

9. See id. at 469.

10. 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." Id. at 444. The custody prong is determined using an objective standard that asks whether a reasonable person would have understood that his or her freedom of action was restricted to a "degree associated with formal arrest" and that he or she was not free to leave. Berkemer v. McCarty, 468 U.S. 420, 440 (1984).

11. Miranda, 384 U.S. at 471. The Court found that "[a] mere warning given by the interrogators" is insufficient because "[e]ven advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process." Id. at 469-70. Rather, the accused is entitled to have an attorney present during the interrogation. See id. at 470.

12. 417 U.S. 433 (1974).

13. See id. at 444. The Court discussed the Miranda warnings and explained:

> [T]hese procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected. . . . The suggested safeguards were not intended to "create a constitutional straitjacket," but rather to provide practical reinforcement for the right against compulsory self-incrimination.

Id. (citation omitted). This rejection of a constitutional nexus for the Miranda warnings is paradoxical. The Court had previously found that the Fifth Amendment's privilege against self-incrimination was a fundamental right made applicable to the states through the Fourteenth Amendment. See Malloy v. Hogan, 378 U.S. 1, 6 (1964). Although the Miranda Court held that the rule was not grounded in the Fifth Amendment, it nonetheless made use of the warnings mandatory for the states. See 384 U.S. at 490. Without some constitutional basis for the rules, however, they could not be made applicable to the states through the Fourteenth Amendment. See LAFAVE & ISRAEL, supra note 5, § 6.5(e), at 317.

good advice during police interrogation so the privilege against self-incrimination will not be unwittingly surrendered."[14] When a suspect has properly invoked the prophylactic Fifth Amendment right to counsel,[15] all interrogation must cease.[16] Thereafter, only the accused may initiate further communication unless counsel is physically present.[17] The rule relates to all interrogation on any offense. This rule, frequently referred to as the Edwards rule,[18] is harsh. Violation of the standard results in the exclusion of any communication.[19] If the suspect

> indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.[20]

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14. Craig R. Johnson, Note, McNeil v. Wisconsin: Blurring a Bright Line on Custodial Interrogation, 1992 WIS. L. REV. 1643, 1658.

15. See Connecticut v. Barrett, 479 U.S. 523, 528 (1987) ("[P]rohibition on further questioning . . . is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose.").

16. See Miranda, 384 U.S. at 474 ("[T]he individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.").

17. See id. Police may resume questioning after a suspect invokes the right to remain silent as long as interrogators "scrupulously honor" the suspect's right to cut off questioning. Michigan v. Mosley, 423 U.S. 96, 103-04 (1975) (finding that the suspect's right was scrupulously honored where the subsequent questioning was initiated by a different officer, concerned an unrelated offense, and took place more than two hours after the initial interrogation). Conversely, following invocation of the Miranda right to counsel, police may not initiate any interrogation without counsel present. See Edwards v. Arizona, 451 U.S. 477, 484 (1981) ("[A]n accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communications, exchanges, or conversations with the police.").

18. See, e.g., Davis v. United States, 114 S. Ct. 2350, 2356 (1994). The Edwards rule was derived from Edwards v. Arizona, 451 U.S. 477 (1981), which expanded the scope of Miranda by requiring law enforcement officers to immediately cease interrogation when an accused has clearly asserted the right to have counsel present during the interrogation. See id. at 485.

19. See Fare v. Michael C., 442 U.S. 707, 718 (1979). The Court justified this harshness by stating:

> [T]his relatively rigid requirement that interrogation must cease upon the accused's request for an attorney . . . has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity . . . has been thought to outweigh the burdens that the decision in Miranda imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence.

Id.

20. Miranda, 384 U.S. at 444-45.

The Miranda Court explained that these guidelines apply, however, only to custodial interrogation.[21]

Unlike the Fifth Amendment right to counsel, the Sixth Amendment right is "offense specific."[22] The right attaches at the initiation of adversarial judicial proceedings "by way of formal charge, preliminary hearing, indictment, information, or arraignment."[23] No invocation of the right need be made by the accused.[24] Once the Sixth Amendment right has attached, police may not "deliberately elicit"[25] incriminating statements from the accused outside the presence of counsel without an effective waiver.[26] Additionally, once the right has attached, the prosecution may not initiate any critical confrontation with the accused outside the presence of counsel.[27]

The Supreme Court and various commentators have noted that the Sixth Amendment right to counsel is both narrower and broader than its Fifth Amendment counterpart.[28] The Sixth Amendment is narrower in that it attaches only after the initiation of judicial proceedings,[29] while the Fifth Amendment applies to all custodial interrogation. However, the Sixth Amendment is broader in that it applies to situations outside of custodial interrogation, to which the Fifth Amendment right is limited.[30] In fact, the Sixth Amendment right to counsel extends to all "critical stages" of the

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21. See id. at 477-78; see also supra note 10. Interrogation refers to express action or questioning by a state agent that a reasonable person would conclude is designed to elicit an incriminating response. See Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). Thus, custodial interrogation is based upon the perception of the accused. See id.

22. McNeil v. Wisconsin, 501 U.S. 171, 175 (1991). Invocation of the Sixth Amendment right to counsel does not prohibit police from interrogating the suspect regarding crimes with which he or she has not yet been charged. See id. (holding that the Sixth Amendment right "cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced"). The Fifth Amendment right to counsel, by comparison, protects the suspect against any custodial interrogation and thus is not offense-specific. See id. at 178.

23. Kirby v. Illinois, 406 U.S. 682, 689 (1972). The Court explained that a person is entitled to counsel once "the adverse positions of government and defendant have solidified." Id.

24. See Brewer v. Williams, 430 U.S. 387, 404 (1977).

25. Massiah v. United States, 317 U.S. 201, 206-07 (1964) (holding that statements deliberately elicited in the absence of counsel violated the Sixth Amendment).

26. See Miranda, 384 U.S. at 475 ("[A] heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.").

27. See United States v. Wade, 388 U.S. 218, 227 (1967) (holding that the absence of counsel at a post-indictment lineup violated the Sixth Amendment).

28. See McNeil v. Wisconsin, 501 U.S. 171, 178 (1991); see also, e.g., Rick Madden & Cheryl M. Miller, Project: Twenty-Third Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1992-1993, 82 GEO. L.J. 1007, 1009-10 (1994).

29. See United States v. Gouveia, 467 U.S. 180, 189 (1984).

30. See Moran v. Burbine, 475 U.S. 412, 429 (1986).

criminal proceedings and to all "crucial confrontations" between the accused and the forces of the State.[31]

B. Critical Stages and Crucial Confrontations

In United States v. Wade,[32] the Court set forth the standard for identifying critical stages in the judicial process. The Court stated that the existence of a critical stage depended upon an analysis of "whether potential substantial prejudice to [the] defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice."[33] Thus, the Court held that a defendant's right to counsel may extend to proceedings outside the actual trial, including every stage at which the accused's rights may be impeded by the absence of counsel.[34] In addition to its decision in Wade, the Court has held that critical stages of the prosecution include arraignment,[35] preliminary hearings,[36] post-indictment interrogation,[37] and other pretrial confrontations.[38]

Since Wade, the Court has explained that only events occurring after the initiation of adversary judicial proceedings may comprise a critical stage.[39] The Court has also clarified that the defendant must be physically present and confronted by the prosecution for a critical stage to exist.[40] In such situations, the results of the

31. See infra Part II.B.

32. 388 U.S. 218 (1967). Wade involved the use of a post-indictment lineup conducted for the purpose of identification without notice to the accused's counsel. See id. at 220.

33. Id. at 227.

34. See id. at 226.

35. See Hamilton v. Alabama, 368 U.S. 52, 53 (1961). Arraignment is the "[p]rocedure whereby the accused is brought before the court to plead to the criminal charges against him in the indictment or information." BLACK'S LAW DICTIONARY 109 (6th ed. 1990). Accordingly, it necessarily occurs only after the initiation of adversary judicial proceedings.

36. See Coleman v. Alabama, 399 U.S. 1, 10 (1970).

37. See Brewer v. Williams, 430 U.S. 387, 401 (1977).

38. See United States v. Henry, 447 U.S. 264, 274-75 (1980) (finding that post-indictment statements deliberately elicited by an undercover inmate outside the presence of counsel violated the Sixth Amendment).

39. See Kirby v. Illinois, 406 U.S. 682, 689-90 (1972) (holding that a pre-indictment lineup did not constitute a critical stage because the right to counsel had not yet attached).

40. See United States v. Ash, 413 U.S. 300, 312 (1973) (holding that counsel need not be present when police show photographs of the defendant and others to witnesses, even when the defendant has already been indicted); cf. Wade, 388 U.S. at 228 (concluding that a post-indictment lineup raises concerns because lineups are "riddled with innumerable dangers and variable factors" that can only be prevented by counsel's presence).

confrontation might well determine the outcome of the actual trial.[41]

C. The Florida Constitution

The Florida Constitution's Declaration of Rights specifies those actions the State may not take against its citizens.[42] These rights are considered "so basic that the framers of our Constitution accorded them a place of special privilege" at the beginning of the document.[43] Article I, section 9 of the Florida Constitution sets forth the equivalent of the U.S. Constitution's Fifth Amendment right against self-incrimination,[44] providing in relevant part that "[n]o person shall . . . be compelled in any criminal matter to be a witness against himself."[45] Similarly, article I, section 16 of the Florida Constitution sets forth the equivalent of the U.S. Constitution's Sixth Amendment right to counsel, providing that "[i]n all criminal prosecutions the accused . . . shall have the right . . . to be heard in person, by counsel or both . . . ."[46]

The U.S. Supreme Court has long recognized that states may adopt additional protections and rights as long as they do not violate any federal constitutional provision.[47] In fact, every state constitution includes either internal provisions designed to protect individuals' rights or a separate declaration of rights.[48] Before most of the protections afforded by the Bill of Rights were made applicable to the states through the Fourteenth Amendment, state constitutions were the only guarantors of these fundamental rights.[49]

In interpreting their state constitutions, state courts are not generally bound by the U.S. Supreme Court's interpretation of equivalent provisions of the U.S. Constitution.[50] While some states have adopted a strong mirroring presumption or require an interpretation

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41. The Wade Court recognized that "today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality." 388 U.S. at 224.

42. See FLA. CONST. art. I.

43. Traylor v. State, 596 So. 2d 957, 963 (Fla. 1992).

44. Compare FLA. CONST. art. I, § 9 (preserving right against self-incrimination) with U.S. CONST. amend. V (same).

45. FLA. CONST. art. I, § 9.

46. Id. art. I, § 16(a).

47. See, e.g., Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980).

48. See LAFAVE & ISRAEL, supra note 5, § 2.10(a), at 93.

49. See id.

50. See id. § 2.10(a), at 95 ("In many instances, the state courts have adopted the reasoning urged by dissenting opinions in the Supreme Court. In others, state courts have adopted a quite different analytical mode for a particular guarantee . . . .").

consistent with that of the U.S. Supreme Court,[51] many state courts have adopted an independent approach,[52] treating the decisions of the U.S. Supreme Court as no more persuasive than the reasoning existing therein.[53]

III. THE TRAYLOR DECISION

A. The Factual Situation

John Traylor was charged by information with the June 11, 1980, murder of Tina Nagy in Jacksonville, Florida.[54] Two months later, Traylor was arrested by Alabama authorities for the August 5, 1980, murder of Debra Beacon in Birmingham, Alabama.[55] Alabama police ran a computer check of Traylor's fingerprints and discovered that he was wanted in Florida for the earlier murder.[56] Traylor requested and received the appointment of legal counsel for the Alabama charge on August 18, 1980.[57] Traylor's counsel advised him not to speak with police and directed Alabama police not to talk to Traylor.[58] On August 22, a Jacksonville detective flew to Birmingham to question Traylor about the Florida murder.[59] The detective was never advised that counsel had been appointed for the Alabama charge and, after obtaining a written Miranda waiver, began to interrogate Traylor about both murders.[60] During this interrogation, the suspect confessed to both murders.[61] Traylor was tried and convicted of second-degree murder in Alabama, then temporarily returned to Florida in March 1983, where he was charged by indictment with first-degree murder for the Florida crime.[62]

Prior to trial in Florida, Traylor's counsel sought to suppress both August 22 confessions.[63] He claimed that the confessions were obtained in violation of Traylor's right against self-incrimination and right to counsel under the constitutions of both Florida and the

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51. See id. § 2.10(c), at 99. Article I, section 12 of the Florida Constitution expressly states that its prohibition against unreasonable searches and seizures is to be "construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." FLA. CONST. art. I, § 12.

52. See LAFAVE & ISRAEL, supra note 5, § 2.10(c), at 100.

53. See id.

54. See Traylor v. State, 596 So. 2d 957, 960 (Fla. 1992).

55. See id.

56. See id.

57. See id.

58. See id.

59. See id.

60. See id. Florida police desired to use evidence of the Alabama murder as "similar fact" evidence in the Florida murder trial. See id. at 960 n.1.

61. See id. at 960.

62. See id.

63. See id.

United States.[64] The trial court denied the motion to suppress, and the jury found Traylor guilty of second-degree murder.[65] On appeal, the First District Court of Appeal (First DCA) affirmed, concluding that although the trial court had erred in admitting the Alabama confession because it was obtained outside the presence of counsel after the Sixth Amendment right to counsel had attached and was invoked, the error was harmless "in light of other overwhelming evidence of guilt."[66] In addition, the First DCA found that Traylor's right to counsel for the Florida murder charge had attached at the time of charging by information, but that counsel had neither been requested nor appointed for that charge.[67] Furthermore, the First DCA found that the Florida confession was also unlawfully obtained because the Miranda warning preceding the detective's interrogation was insufficient to inform Traylor of his Sixth Amendment right.[68] Nevertheless, the First DCA concluded that use of this confession also was harmless error.[69]

B. Federalism

Traylor appealed the First DCA's decision to the Florida Supreme Court. The supreme court began its decision with a discussion of federalism.[70] The court recognized that the purposes of the federal and state constitutions are different: "[S]tates may place more rigorous restraints on government intrusion than the federal charter imposes; they may not, however, place more restrictions on the fundamental rights of their citizens than the federal Constitution permits."[71] This approach permits states to experiment with the development of alternative methods of constitutional analysis.[72]

C. Privilege Against Self-Incrimination

The Traylor court next discussed the conflict between the state's desire to curb criminal activity and the need to protect a defendant's right against self-incrimination.[73] The court recognized the "unqualified good" of the state's authority to acquire voluntary confessions.[74]

64. See id.
65. See id.
66. Id.
67. See id.
68. See id.
69. See id.
70. See id. at 961.
71. Id.
72. See id. at 962. For a discussion of state courts' divergent interpretation of their respective state constitutions, see supra Part II.C.
73. See 596 So. 2d at 964.
74. Id. at 965.

The court's application of the Florida Constitution's right against self-incrimination to Traylor's factual situation closely paralleled the U.S. Supreme Court's interpretation of the same right under the Fifth Amendment. The court reiterated that the Florida Constitution required that the warnings set forth in Miranda be provided to suspects to ensure confessions are made voluntarily.[75] The court then discussed the degree of specificity necessary to invoke Miranda rights. "Under Section 9, if the suspect indicates in any manner that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop."[76]

D. Right to Counsel

Following discussion of the right against self-incrimination, the court addressed the right to counsel under article I, section 16 of the Florida Constitution.[77] The court concluded that "for this right to have meaning, it must apply at least at each crucial stage[78] of the prosecution."[79] The court defined a crucial stage as any stage that "may significantly affect the outcome of the proceedings."[80] The court further held that the right to counsel in Florida was "charge-specific"[81] as opposed to the U.S. Supreme Court's description of the Sixth Amendment right as "offense specific."[82]

The court next discussed the attachment of the article I, section 16 right to counsel. Beginning with a review of provisions in Florida Rules of Criminal Procedure relating to assignment of counsel to indigents, the court reasoned that the Florida Constitution's equal protection clause[83] requires that identical treatment be provided to nonindigents.[84] An indigent may be appointed counsel "when the person is formally charged with an offense, or as soon as feasible after custodial restraint, or at the first appearance before a committing magistrate,[85] whichever occurs earliest."[86] In a footnote, the

75. See id.

76. Id. at 966 (citing FLA. CONST. art. I, § 9) (emphasis added).

77. See id.

78. Cf. United States v. Wade, 388 U.S. 218, 237 (1967) (holding that the Sixth Amendment right to counsel applies to each "critical stage" of the prosecution).

79. Traylor, 596 So. 2d at 968.

80. Id.

81. Id. The term "charge-specific" refers to the rule that invocation of the right to counsel as to one charge imposes no restriction on police inquiry as to separate charges for which the section 16 right has not attached. See id.

82. McNeil v. Wisconsin, 501 U.S. 171, 175 (1991); see also supra note 22.

83. FLA. CONST. art. I, § 2.

84. See Traylor, 596 So. 2d at 970 ("[T]he procedural rights of nonindigents under section 16 are at least coextensive with those of indigents.").

85. The Florida Rules of Criminal Procedure require that an arrested individual be brought before a magistrate within 24 hours of being detained. See FLA. R. CRIM. P. 3.130(a). This "first appearance" generally occurs prior to indictment or the filing of formal

court further explained that the assignment of counsel is generally "feasible" by the time of booking.[87]

In giving effect to this earlier point for the attachment of the right to counsel, the court referenced the American Bar Association (ABA) standard upon which the Rules of Criminal Procedure were based.[88] The commentary to the ABA standard provides, in relevant part:

> This standard, however, extends beyond the Supreme Court's decisions, for it applies to situations that have not been held to be "critical stages" within the meaning of the sixth amendment. Thus, the standard recommends that counsel be provided "as soon as feasible after custody begins," assuming that this event occurs, as it usually does, prior to the defendant's appearance before a judicial officer or the filing of formal charges.[89]

E. Application to the Factual Situation

In applying these principles to the facts of the case, the Traylor court began by addressing the self-incrimination issue. The court rejected Traylor's contention that the confessions were obtained in violation of his article I, section 9 right against self-incrimination.[90] The court found that Traylor's attorney had attempted to invoke Traylor's right against self-incrimination by directing the police not to question his client.[91] However, the court also found that there was competent evidence to support the trial court's finding that Traylor had never personally invoked this privilege.[92] In fact, the court found that Traylor had executed a valid waiver of his article I, section 9 right, and that his admissions of guilt in both the Jacksonville and Birmingham homicides were voluntary.[93]

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charges, and thus would constitute an earlier attachment of the right to counsel than is provided by the Sixth Amendment.

86. FLA. R. CRIM. P. 3.111(a).

87. Traylor, 596 So. 2d at 970 n.38. Booking is an "[a]dministrative step taken after an arrested person is brought to the police station, which involves entry of the person's name, the crime for which the arrest was made, and other relevant facts on the police 'blotter.' " BLACK'S LAW DICTIONARY 183 (6th ed. 1990).

88. See Traylor, 596 So. 2d at 970.

89. Id. at 970 n.42 (quoting 1 ABA STANDARDS FOR CRIMINAL JUSTICE § 5-5.1 (1980)).

90. See id. at 970-71.

91. See id.

92. See id. at 971. The court found that there was competent substantial evidence to support the finding that the request did not result from any communication between Traylor and his counsel, but rather from defense counsel's routine request that the police refrain from interrogating his clients. See id. This finding is troublesome. Because Traylor met with his counsel before the police interrogation, it is possible that Traylor requested his counsel to invoke his privilege. Such a communication between the lawyer and client would be protected. See id. at 975-79 (Kogan, J., concurring in part and dissenting in part).

93. See id. at 971.

Turning to Traylor's claim that the confessions were obtained in violation of his article I, section 16 right to counsel, the court agreed with Traylor in part, finding that because Traylor had been arrested, charged with the Alabama offense, and had counsel appointed at his preliminary hearing, the Florida right to counsel had attached.[94] "Because Traylor subsequently requested counsel at the preliminary hearing and a lawyer was appointed, Florida police were constitutionally barred from initiating any crucial confrontation with him on that charge in the absence of his lawyer for use in a Florida court."[95] As to the Florida offense, however, the court found that although Traylor's article I, section 16 right to counsel had attached when he was charged by information on June 11, Traylor had not retained or requested the appointment of counsel on that charge when Florida police obtained his confession.[96] The court held that the notice provided to Traylor as part of his Miranda warnings was sufficient to satisfy his article I, section 16 right to counsel.[97] Finally, the court concluded that although the trial court had erred in admitting Traylor's confession to the Alabama murder, that error was harmless.[98] Accordingly, the court affirmed Traylor's conviction for second-degree murder.[99]

F. Justice Barkett's Opinion

Justice Barkett wrote separately, taking issue with the majority's application of the law to the facts of the case.[100] Justice Barkett believed that Traylor had invoked his right to counsel for all purposes through his request for counsel at the Alabama first-appearance hearing, thereby barring state-initiated custodial questioning on any matter.[101] In her analysis, Justice Barkett cited Patterson v. Illinois[102] for its implicit holding that "[w]hen an accused invokes the right to a lawyer by requesting counsel, the request is for all purposes for which he or she is entitled to a lawyer."[103] Justice Barkett would have held that because the article I, section 16 right to coun-

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94. See id. at 972.
95. Id.
96. See id.
97. See id. at 972-73.
98. See id.
99. See id.
100. See id. at 974-75 (Barkett, J., concurring in part and dissenting in part).
101. See id. at 974.
102. 487 U.S. 285 (1988).
103. Traylor, 596 So. 2d at 974 (Barkett, J., concurring in part and dissenting in part) (citing Patterson, 487 U.S. at 300). In Patterson, the U.S. Supreme Court held that warnings provided by law enforcement personnel under Miranda suffice to advise an accused of both the Fifth and Sixth Amendment rights to counsel. See 487 U.S. at 293. Furthermore, waiver of the right pursuant to Miranda constitutes waiver of the right under both provisions. See id. at 300.

sel was invoked at Traylor's first appearance, his article I, section 9 right to counsel was invoked simultaneously.[104] Accordingly, because the article I, section 9 right to counsel is not charge-specific, law enforcement personnel were precluded from initiating questioning on any charge after that point, and the trial court committed error in admitting the Florida confession.[105] Nevertheless, Justice Barkett concurred in the result because the admission of this confession was harmless in light of the other evidence against Traylor.[106]

G. Justice Kogan's Opinion

Justice Kogan also wrote separately, concurring in part and dissenting in part.[107] The portion of the majority opinion with which Justice Kogan took issue concerned the ability of an attorney to invoke a client's constitutional right to counsel.[108] Justice Kogan argued that because the trial court's factual findings indicated that the defense attorney had met and spoken with Traylor prior to directing police to refrain from interrogation, the attorney was able to satisfactorily invoke Traylor's right to counsel.[109] Because any communications between Traylor and his defense counsel were privileged, and thus beyond the knowledge of the state, the direction conveyed by the attorney to law enforcement personnel presumptively reflected Traylor's own desire to invoke his right to counsel.[110]

IV. EQUIVOCAL INVOCATION OF MIRANDA RIGHTS

A. The Florida Approach: Owen v. State (Owen I)

One issue that had been left unresolved by the U.S. Supreme Court's right against self-incrimination and right to counsel jurisprudence was the degree of clarity necessary to invoke either of these rights. What degree of specificity is required for a suspect to properly invoke the protections afforded by the rights to counsel? Before the U.S. Supreme Court's resolution of this issue in Davis v. United States,[111] the Florida Supreme Court addressed the issue in

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104. See Traylor, 596 So. 2d at 974-75 (Barkett, J., concurring in part and dissenting in part).
105. See id.
106. See id. at 975.
107. See id. at 975-85 (Kogan, J., concurring in part and dissenting in part).
108. See id.
109. See id. at 976.
110. See id. at 975.
111. 114 S. Ct. 2350 (1994). For a discussion of Davis, see infra Part IV.C.

Owen v. State (Owen I).[112] During Owen's interrogation, law enforcement officers obtained confessions to a series of crimes.[113] The interrogation followed an established pattern. Police presented their evidence for each crime and attempted to persuade Owen that they had the proof necessary to convict him.[114]

After several sessions following this routine, police continued to interrogate Owen after he responded to a question with the equivocal statement, "I'd rather not talk about it."[115] Instead of attempting to clarify the suspect's desire, the police urged Owen to explain.[116] "I don't want to talk about it," he replied, and police again pressed him to talk.[117] At trial, Owen moved to suppress the incriminating responses elicited after his equivocal statement.[118] The trial judge, after initially indicating that the continued questioning was a clear violation of Miranda, concluded the responses were not an invocation of Owen's rights.[119] Owen was subsequently convicted and sentenced to death.[120]

On direct appeal,[121] a divided Florida Supreme Court concluded that Owen's statements were, "at the least, an equivocal invocation of the Miranda right to terminate questioning, which could only be clarified."[122] The majority concluded that police had a duty to clarify the suspect's desires before continuing the interrogation.[123] Justice Barkett, in a concurrence joined by Justice Kogan, indicated her belief that Miranda required interrogation to cease when the individual invoked his or her rights " 'in any manner, at any time prior to or during questioning.' "[124] Justice Grimes, in a dissenting opinion, indicated his belief that existing case law did not require police to discontinue interrogation absent a clear invocation of the suspect's Miranda rights.[125] Taken together, the three approaches contem-

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112. 560 So. 2d 207 (Fla. 1990). The state would request reconsideration of the issue in light of Davis in State v. Owen, 654 So. 2d 200 (Fla. 4th DCA), review granted, 662 So. 2d 933 (Fla. 1995) (Owen II). See infra text accompanying notes 182-89.

113. See Owen I, 560 So. 2d at 209.

114. See id. at 210.

115. Id. at 211.

116. See id.

117. Id.

118. See id.

119. See id.

120. See id. at 209.

121. The Florida Constitution provides that the Supreme Court "[s]hall hear appeals from final judgments of trial courts imposing the death penalty." FLA. CONST. art. V, § 3(b)(1). Such appeals bypass the district courts of appeal.

122. Owen I, 560 So. 2d at 211. Although Owen I referred to the provisions of the U.S. Constitution, the Traylor court reaffirmed the Owen I holding as it related to the article I, section 9 right against self-incrimination. See Traylor, 596 So. 2d at 966.

123. See Owen I, 560 So. 2d at 211.

124. Id. at 213 (Barkett, J., concurring) (alteration in original) (quoting Miranda, 384 U.S. at 473-74).

125. See id. at 213 (Grimes, J., dissenting).

plated by the Owen I court cover the spectrum of options available to courts.

B. Judicial Approaches to the Problem of Equiv ocal Invocation

1. The Per Se Bar Approach

In Miranda, the U.S. Supreme Court sought to provide express guidance for law enforcement personnel and courts evaluating the admissibility of statements made during custodial interrogation.[126] The Court held that questioning must immediately cease if suspects indicate "in any manner" that they wish to discontinue the interrogation or consult with counsel.[127] Arguably, this language requires interrogators to discontinue questioning in response to a suspect's mere mention of counsel.[128] Such a per se bar sets forth a bright-line rule requiring no guesswork by police officers. Opponents of this per se bar argue that it prevents police from questioning a suspect in the absence of counsel even when the suspect does not desire to have counsel present.[129] The suspect's mere mention of counsel during the interrogation would have the effect of interfering with the suspect's actual desires. Despite its reasonableness in light of the Miranda "in any manner" language, only a minority of courts have adopted this approach.[130]

2. The Clarification Approach

A majority of state and lower federal courts follow what has become known as the clarification approach.[131] Applying this standard, when a suspect makes an ambiguous reference to counsel, law en-

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126. See 384 U.S. at 444-45, 467-79.

127. See id. at 444-45.

128. See Nancy M. Kennelly, Note, Davis v. United States: The Supreme Court Rejects a Third Layer of Prophylaxis, 26 LOY. U. CHI. L.J. 589, 597-98 (1995).

129. See, e.g., John J. Tomkovicz, Standards for Invocation and Waiver of Counsel in Confession Contexts, 71 IOWA L. REV. 975, 1010 (1986). The Supreme Court has reached this same conclusion. See Davis v. United States, 114 S. Ct. 2350, 2356 (1994) (concluding that the per se bar would "transform the Miranda safeguards into wholly irrational obstacles to legitimate investigative activity because it would needlessly prevent the police from questioning a suspect in the absence of counsel, even if the suspect does not wish to have a lawyer present").

130. See, e.g., Maglio v. Jago, 580 F.2d 202, 205 (6th Cir. 1978); People v. Superior Court, 542 P.2d 1390, 1395 (Cal. 1975); see also Tom Chen, Note, Davis v. United States: "Maybe I Should Talk to a Lawyer" Means Maybe Miranda Is Unraveling, 23 PEPP. L. REV. 607, 618 (1996).

131. See, e.g., United States v. March, 999 F.2d 456, 461 (10th Cir. 1993); United States v. Mendoza-Cecelia, 963 F.2d 1467, 1472 (11th Cir. 1992); United States v. D'Antoni, 856 F.2d 975, 980-81 (7th Cir. 1988); United States v. Gotay, 844 F.2d 971, 975 (2d Cir. 1988); United States v. Fouche, 833 F.2d 1284, 1287 (9th Cir. 1987); United States v. Porter, 776 F.2d 370, 370 (1st Cir. 1985) (en banc); Nash v. Estelle, 597 F.2d 513, 517 (5th Cir. 1979) (en banc); United States v. Riggs, 537 F.2d 1219, 1222 (4th Cir. 1976).

forcement officers are required to immediately cease substantive questioning and only can proceed with clarifying questions to discern whether the suspect desires to consult with counsel. This approach has the advantage of resolving the ambiguity in accordance with the suspect's actual desires. The clarification approach also permits courts to more readily determine whether the defendant invoked his or her Miranda rights. Opponents of the clarification approach, however, argue that it may permit interrogating officers to circumvent the Edwards rule by coercion or intimidation.[132] The Florida Supreme Court, like most other courts that have addressed the issue, adopted the clarification approach in Owen I.[133]

3. The Threshold Standard of Clarity Approach

The least common of the three approaches to ambiguous invocation of Miranda rights is the threshold standard of clarity approach.[134] This approach permits law enforcement officers to ignore any ambiguous request for counsel. When a suspect's utterance fails to meet a certain threshold of clarity, the interrogator has no obligation to clarify the suspect's wishes or to cease questioning.[135] The threshold standard of clarity approach is based upon language in Edwards that requires authorities to cease questioning a suspect "if he has clearly asserted his right to counsel."[136] This approach permits individual officers to use their subjective judgment as to whether the right has been unambiguously invoked.[137] Opponents of this approach are concerned that it disadvantages suspects whose exhaustion, intimidation, fear, or lack of adequate linguistic ability might preclude the clear invocation of their rights.[138] Such a result is precisely what the Supreme Court sought to prevent by mandating Miranda compliance.[139] In view of the several conflicting approaches in use, the legal community looked forward to the Court's resolution of the issue.

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132. See, e.g., Janet E. Ainsworth, In a Different Register: The Pragmatics of Powerlessness in Police Interrogation, 103 YALE L.J. 259, 311-12 (1993) (arguing that both the clarification and threshold standard of clarity approaches disadvantage women and minorities, who are more likely to use less direct and assertive patterns of speech).

133. See 560 So. 2d at 211 (citing Long v. State, 517 So. 2d 664, 667 (Fla. 1987)).

134. See, e.g., People v. Krueger, 412 N.E.2d 537, 540 (Ill. 1980); Bane v. State, 587 N.E.2d 97, 103 (Ind. 1992).

135. See Davis v. United States, 114 S. Ct. 2350, 2355 (1994).

136. 451 U.S. at 485 (emphasis added).

137. See, e.g., Krueger, 412 N.E.2d at 540.

138. See Tomkovicz, supra note 129, at 1010; see also Davis, 114 S. Ct. at 2360-61 (Souter, J., concurring). Justice Souter criticized the threshold standard of clarity rule as "requiring criminal suspects to speak with the discrimination of an Oxford don." Id. at 2364.

139. See Miranda, 384 U.S. at 445-58.

C. The United States Supreme Court's Subsequent Decision in Davis v. United States

1. The Majority Opinion

In 1994, the U.S. Supreme Court finally entered the discussion when it decided Davis v. United States[140] and addressed the issue of equivocal invocation of Miranda rights under the U.S. Constitution. The majority opinion addressed the problem that arises when a suspect makes an ambiguous reference to obtaining counsel during an interrogation.[141] Davis involved the case of a Navy seaman who had been convicted of murder at a general court-martial.[142] After a valid Miranda waiver, followed by more than an hour and a half of interrogation, Davis told investigators, "maybe I should talk to a lawyer."[143] Naval investigators responded by ceasing substantive questioning and attempting to clarify Davis's intent.[144] In response to clarification attempts, Davis indicated he did not want a lawyer.[145]

Davis urged the Court to adopt the per se bar approach, which would require investigators to immediately cease interrogation when a suspect makes any reference to obtaining counsel.[146] The government urged the Court to adopt the clarification approach, which would require investigators to ask limited questions to clarify the suspect's desires.[147]

Writing for the Court, Justice O'Connor adopted the threshold standard of clarity approach. The Court recognized the importance of an objective standard for interrogating investigators to follow when faced with an ambiguous reference to counsel.[148] The Court noted that although a suspect need not make a request with precision, "he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."[149] Although the majority opinion expressly recognized the propriety of police clarification of the suspect's desires, the Court declined to make clarification mandatory.[150] The Court explained:

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140. 114 S. Ct. 2350 (1994).
141. See id. at 2054.
142. See id. at 2053.
143. Id.
144. See id.
145. See id.
146. See Petitioner's Brief at 29-30, Davis (No. 92-1949). Because the investigators attempted to clarify Davis's desires with respect to his reference to counsel, advocating the clarification approach would not have benefited Davis on appeal.
147. See Respondent's Brief at 20, Davis (No. 92-1949); see also Davis, 114 S. Ct. at 2359 n.2 (Souter, J., concurring).
148. See Davis, 114 S. Ct. at 2355.
149. Id.
150. See id. at 2356.

> Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. . . . But we decline to adopt a rule requiring officers to ask clarifying questions. If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.[151]

2. Justice Souter's Concurrence

Although concurring in the result, Justice Souter, joined by three other members of the Court, refused to conclude that investigators were at liberty to ignore Davis's reference to counsel.[152] Instead, Justice Souter believed that the investigators had an affirmative, legal obligation to clarify the suspect's ambiguous statement.[153] Because the investigators stopped interrogation to clarify Davis's desires regarding counsel, Justice Souter concurred in the judgment affirming Davis's conviction based upon statements obtained after the clarification.[154] Grounding his opinion in fairness, practicality, and in the judgments of the majority of the courts that had already considered the issue, Justice Souter urged adoption of the clarification approach.[155]

D. Criticism of the Davis Decision

Numerous commentators have found fault with the Davis approach to ambiguous requests for counsel.[156] The most common criticism concerns the impact the threshold standard of clarity approach has on disadvantaged sections of society.[157] In his concurrence in Davis, Justice Souter commented that:

> [C]riminal suspects . . . "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures" would seem an odd group to single out for the Court's demand of heightened linguistic care. A substantial percentage of them lack anything like a confident command of the English language, many are

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151. Id.

152. See id. at 2359 (Souter, J., concurring). Justice Souter was joined in his opinion by Justices Blackmun, Stevens, and Ginsburg. See id. at 2358.

153. See id. at 2359.

154. See id.

155. See id.

156. See, e.g., Scott M. Lang, Self Incrimination: It Now Takes a Law Degree to Know How to Properly Invoke One's Right to Counsel, 42 NAVAL L. REV. 145, 163 (1995); Samira Sadeghi, Hung Up on Semantics: A Critique of Davis v. United States, 23 HASTINGS CONST. L.Q. 313, 315-16 (1995); Chen, supra note 130, at 609; Kennelly, supra note 128, at 592.

157. See, e.g., Ainsworth, supra note 132, at 320.

> "woefully ignorant," and many more will be sufficiently intimidated by the interrogation process or overwhelmed by the uncertainty of their predicament that the ability to speak assertively will abandon them.[158]

Another common criticism of the Davis decision is that the Court has renounced the premise on which Miranda was founded.[159] Miranda was based on the presumption that all custodial interrogation is by its nature inherently coercive.[160] The Davis Court placed its trust in the good faith of law enforcement officers.[161] As the recent O.J. Simpson murder trial demonstrated, blind trust in the good faith of law enforcement officers may very well be misplaced.[162]

V. THE FUTURE OF EQUIVOCAL INVOCATION IN FLORIDA

In the wake of the Davis decision, the status of an equivocal invocation of Miranda rights in Florida is somewhat unclear. In Deck v. State,[163] the Fifth District Court of Appeal (Fifth DCA) recently contemplated that status. During interrogation regarding allegations of sexual offenses against a minor, Deck responded, "I don't know. I can't talk about it anymore."[164] The officers made no attempt to clarify Deck's desires, but continued their interrogation.[165] After a sufficient number of incriminating responses had been obtained, Deck again made an ambiguous reference to terminating the session.[166] The interrogating officers then attempted to clarify the suspect's desires, at which point Deck confirmed his desire to terminate the interview.[167]

The Fifth DCA noted the conflict caused by the decision in Davis.[168] Although Davis altered the treatment of equivocal invocations of Fifth Amendment rights, it did not necessarily affect the treatment afforded to invocation of state constitutional rights. The court concluded that until the Florida Supreme Court reevaluated its approach in light of Davis, Traylor remained binding.[169] Although

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158. 114 S. Ct. at 2360-61 (Souter, J., concurring) (citations omitted).

159. See, e.g., Sadeghi, supra note 156, at 349.

160. See 384 U.S. at 455 (suggesting that it is naive to place blind trust in all police officers).

161. See Sadeghi, supra note 156, at 348-49 (arguing that police may now give inexact readings of Miranda warnings without any reprisal).

162. See, e.g., Christo Lassiter, The Stop and Frisk of Criminal Street Gang Members, 14 NAT'L BLACK L.J. 1, 47 n.169 (1995) (highlighting retired Los Angeles police detective Mark Fuhrman as an example of the potential for corruption among law enforcement officers).

163. 653 So. 2d 435 (Fla. 5th DCA 1995).

164. Id. at 435.

165. See id. at 436.

166. See id.

167. See id.

168. See id. ("The answer to this question was readily apparent prior to the advent of the decision of the United States Supreme Court in Davis v. United States.").

169. See id.

Deck concerned the right to terminate interrogation and remain silent, rather than the right to counsel, the same principles are applicable.[170] Accordingly, Florida law enforcement officers remain obligated to clarify a suspect's desires in response to an ambiguous reference to Miranda rights.

More recently, in Skyles v. State,[171] the Fourth District Court of Appeal (Fourth DCA) certified the issue to the Florida Supreme Court as a question of great public importance.[172] The Florida Supreme Court has granted discretionary review[173] and will decide the case without hearing oral argument.[174] Cecil Skyles had been convicted of two counts of sexual battery on a person under twelve.[175] Skyles, who was fourteen, had agreed to come to the police station and had received his Miranda warnings.[176] In response to questioning, he denied any wrongdoing.[177] At one point in the interrogation, he responded by saying, "I'm through man, that's all I'm saying" and "That's all I have to say is [sic] 'cause that's all I know."[178] The officers continued the interrogation and ultimately obtained Skyles' confession.[179] The trial court admitted the confession into evidence and Skyles was convicted.[180] On appeal, the Fourth DCA reversed and remanded for a new trial, concluding that Traylor governed until the Florida Supreme Court reviewed its decision in light of Davis.[181]

The Florida Supreme Court has granted discretionary review in yet another case questioning the impact of Davis in Florida.[182] In State v. Owen (Owen II),[183] the state requested the Fourth DCA to reconsider Owen I in light of Davis.[184] The Florida Supreme Court had previously held that Owen's "responses were, at the least, an equivocal invocation of the Miranda right to terminate questioning, which could only be clarified."[185] Prior to retrial, the state moved for

170. See id.
171. 670 So. 2d 1084 (Fla. 4th DCA), review granted, 679 So. 2d 774 (Fla. 1996).
172. See id. at 1085.
173. See State v. Skyles, 679 So. 2d 774 (Fla. 1996).
174. See Telephone Interview with Sid White, Clerk of Court, Fla. Sup. Ct. (Jan. 27, 1997).
175. See Skyles v. State, 670 So. 2d at 1084.
176. See id.
177. See id.
178. Id. at 1084-85.
179. See id.
180. See id. at 1084.
181. See id. at 1086.
182. See 662 So. 2d 933 (Fla. 1995).
183. 654 So. 2d 200 (Fla. 4th DCA), review granted, 662 So. 2d 933 (Fla. 1995). Owen I set the precedent for the Florida Supreme Court's treatment of equivocal invocation ofMiranda rights. For a review of the case's facts, see supra text accompanying notes 113-120.
184. See Owen II, 654 So. 2d at 201.
185. Owen I, 560 So. 2d at 211.

reconsideration in light of the Davis decision. The Fourth DCA denied the request and certified the question to the Florida Supreme Court.[186] The supreme court granted review in October 1995[187] and heard oral argument in January 1996,[188] but had yet to render its decision at the time this Comment was being prepared for publication.[189]

The analyses of the district courts of appeal in Deck, Skyles, and Owen II were undoubtedly correct. Nevertheless, the Florida Supreme Court should review its Miranda jurisprudence at the first opportunity. This opportunity is available to the court in both Owen II and Skyles. The court should affirm its earlier interpretation of the article I, section 9 right to counsel and right against self-incrimination in the Florida Constitution. Recognizing that it is free to afford citizens greater rights under the Florida Constitution than are provided by the U.S. Constitution, the court should continue its practice of requiring law enforcement officers to clarify any ambiguous reference to terminating interrogation or to counsel. Only the clarification approach satisfies all competing interests. It preserves the suspect's right to terminate the interrogation while still providing a workable guideline for law enforcement officers.[190] Both the threshold standard of clarity approach adopted by the Davis Court and the per se bar approach are flawed. Accordingly, the Florida Supreme Court should answer the questions certified by the Fourth DCA in Owen II and Skyles in the negative and hold that Traylor continues to require interrogating officers to clarify ambiguous requests for counsel notwithstanding Davis.

VI. Analysis of the Impact of the Traylor Decision

By identifying an earlier point for the attachment of the right to counsel under the Florida Constitution,[191] the Traylor decision has obvious ramifications for the conduct of law enforcement officers. While there is no doubt that the Florida Supreme Court may interpret the Florida Constitution in ways that provide broader rights to its citizens than the U.S. Constitution, the Traylor holding presents difficulties for effective law enforcement and investigation.

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186. See id. at 200.
187. See State v. Owen, 662 So. 2d 933 (Fla. 1995).
188. See White, supra note 174.
189. Id.
190. This same approach was embraced by Justice Souter in his concurrence in Davis. See 114 S. Ct. at 2359 (Souter, J., concurring).
191. See supra Part III.D.

A. DWI Testing

Many disputes involving the right to counsel are raised in driving-while-intoxicated (DWI) proceedings. Florida has an "implied consent" statute that requires that motorists declining to submit to chemical testing lose their driving privilege for one year.[192] By operating a motor vehicle within the state, a person is deemed to have granted consent to submit to blood, breath, or urine testing that is designed to detect the presence of chemical substances.[193] Florida's statute also provides that a motorist's refusal to submit to testing is admissible into evidence in any criminal proceeding.[194] While the statute requires officers to advise motorists that refusal will result in suspension of their driver's licenses, it does not mandate disclosure of the admissibility of the refusal as evidence of guilt.[195]

A number of courts have considered the relationship of chemical testing to a suspect's right against self-incrimination. The U.S. Supreme Court has addressed a similar issue and concluded that chemical testing is merely physical evidence gathering and is not testimonial in nature.[196] Similarly, the Court has considered the need for Miranda warnings in roadside stops prior to formal arrest and has held that Miranda does not apply to such situations because they do not meet the requirements for custodial interrogation.[197] In the absence of custodial interrogation, an individual has no Fifth Amendment right to consult with a lawyer before submitting to the tests.[198]

Fewer courts have addressed the issue of chemical testing and sobriety testing as it relates to the Sixth Amendment right to counsel, however. Some courts have denied the right to counsel on the basis that chemical testing pursuant to a motor vehicle stop is a civil proceeding, rather than a criminal proceeding in which the right to

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192. See FLA. STAT. § 316.1932(1)(a) (Supp. 1996) (providing that "failure to submit to any lawful test of his or her breath or urine, or both, will result in the suspension of the person's privilege to operate a motor vehicle for a period of one year").

193. See id. For a description of the technology associated with breathalyzer tests, see California v. Trombetta, 467 U.S. 479, 481-82 (1984).

194. See FLA. STAT. § 316.1932(1)(a) (Supp. 1996).

195. See id.

196. See Schmerber v. California, 384 U.S. 757, 764 (1966) (concluding that a blood alcohol test is not testimonial in nature and does not violate a suspect's right against self-incrimination). Testimonial evidence is limited to that which would confront the suspect with the "cruel trilemma" of silence, lying, or telling the truth. See Pennsylvania v. Muniz, 496 U.S. 582, 595-97 (1990).

197. See Berkemer v. McCarty, 468 U.S. 420, 439 (1984) (holding that temporary traffic stops do not constitute custody for Miranda purposes despite the fact that a citizen likely would understand that he or she is not free to leave).

198. See id. at 442.

counsel would apply.[199] This analysis is flawed because the chemical testing is inextricably intertwined with the criminal DWI prosecution.[200] Usually, however, a defendant's claim that sobriety testing violates the Sixth Amendment right to counsel is summarily dismissed because the right cannot have attached when charges have not yet been filed.[201] Florida's early attachment of the right to counsel, announced in Traylor, complicates this analysis.

The typical procedure followed by Florida police after detaining an individual suspected of DWI is to remove the person to a DWI intake station.[202] There, the suspect is videotaped performing various physical tests, and chemical testing is conducted.[203] Because the person has been arrested, the right to counsel has arguably attached pursuant to Traylor. At this point, the person has been restrained, and it is clearly feasible to provide counsel.[204] The remaining step is to determine whether chemical testing and videotaped sobriety testing constitute "crucial stages" for purposes of the Florida right to counsel.

In State v. Burns,[205] the Fifth DCA considered whether a DWI suspect has the right to counsel at a testing center.[206] The DCA discussed the feasibility of providing counsel at the testing center.[207] Admitting that the issue is a "nebulous gray area," the court declined to resolve the feasibility question.[208] Instead, the court denied the right to counsel because the scenario failed to constitute a "crucial stage" or "crucial confrontation" within the meaning of Traylor.[209] The court rejected the defendant's comparison of the chemical

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199. See, e.g., State v. Palmer, 191 N.W.2d 188, 190-91 (Minn. 1971) (reasoning that because chemical testing is civil in nature, "[t]he defendant . . . is not clothed with those substantive constitutional rights associated with criminal matters"); Commonwealth Dep't of Transp., Bureau of Driver Licensing v. Ingram, 648 A.2d 285, 294-95 (Pa. 1994) (refusing to extend the right to counsel before chemical testing, but requiring that officers inform the individual that his or her Miranda rights do not apply).

200. See Friedman v. Commissioner of Pub. Safety, 473 N.W.2d 828, 833 (Minn. 1991) (allowing a limited right to counsel prior to chemical testing because it constitutes a "crucial stage" in criminal proceedings).

201. See, e.g., Sites v. State, 481 A.2d 192, 196-97 (Md. 1984) (listing cases which have addressed the issue).

202. See State v. Burns, 661 So. 2d 842, 845 (Fla. 5th DCA 1995); see also State v. Hoch, 500 So. 2d 597, 598 (Fla. 3d DCA 1986).

203. See Burns, 661 So. 2d at 845-46.

204. See Traylor, 596 So. 2d at 970.

205. 661 So. 2d 842 (Fla. 5th DCA 1995).

206. See id. at 847.

207. See id.

208. Id.

209. See id. at 848 ("[A]dministering a breathalyzer and having a defendant perform the field sobriety test on videotape are really nothing more than the collection and preservation of physical evidence, as is done in every type of case, and do not constitute a crucial confrontation requiring the presence of defense counsel.").

testing with a physical lineup.[210] Nevertheless, in light of Traylor's earlier attachment of the right to counsel, the administration of DWI testing arguably meets the criteria for a crucial stage. Undoubtedly, a DWI suspect's decision whether to submit to testing will "significantly affect the outcome," as required by the Traylor test.[211]

In Traylor, the Florida Supreme Court distinguished a "crucial stage"[212] from a "critical stage,"[213] implying that the two are indeed different.[214] Clearly, if the purpose of the Florida Constitution is to provide broader rights than those guaranteed by the U.S. Constitution, a crucial stage must be interpreted as encompassing more events than the U.S. Supreme Court's critical stage.[215] Because the right to counsel has attached under the Traylor standard and the results of chemical testing will undoubtedly have a significant effect on the outcome, the motorist should be entitled to consult with an attorney before making the decision to consent to testing.

Other jurisdictions have adopted policies that permit consultation with a lawyer before testing.[216] A minority of states permit a limited right to consult with counsel in such situations.[217] This consultation right reduces motorist confusion, a common by-product of the implied consent statutes.[218]

Other courts have held that DWI testing constitutes a critical stage for purposes of their state constitutions but not for the U.S. Constitution.[219] Still other courts have found the Sixth Amendment

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210. See id. Post-indictment lineups have been deemed to be critical stages requiring the presence of counsel because they are riddled with the danger of unreliable identification and cannot be effectively questioned at trial without counsel's presence to note problems. See United States v. Wade, 388 U.S. 218, 228 (1967). The Wade Court differentiated lineups from purely physical tests such as blood tests. See id. ("[T]here is minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial.");cf. United States v. Ash, 413 U.S. 300, 312 (1973) (holding that the Sixth Amendment does not require the presence of counsel at a post-indictment photographic identification because the defendant is not present and confronted by his or her professional adversary).

211. 596 So. 2d at 968.

212. The Traylor court identified a crucial stage as "any stage that may significantly affect the outcome of the proceedings." Id.

213. The U.S. Supreme Court has held that the Sixth Amendment right to counsel applies to each "critical stage" of the prosecution. See Wade, 388 U.S. at 237.

214. See 596 So. 2d at 968 n.24.

215. See id. at 970.

216. See Louis W. Schack, Motorist Confusion: The Unfortunate By-Product of Pennsylvania's Implied Consent Law, 68 TEMP. L. REV. 931, 949 (1994).

217. See, e.g., Copelin v. State, 659 P.2d 1206, 1208 (Alaska 1983); Parsons v. Commissioner of Pub. Safety, 488 N.W.2d 500, 502 (Minn. Ct. App. 1992); Bickler v. North Dakota State Highway Comm'r, 423 N.W.2d 146, 147 (N.D. 1988); Siegwald v. Curry, 319 N.E.2d 381, 386 (Ohio Ct. App. 1974); State v. George, 640 A.2d 26, 27 (Vt. 1994).

218. See Schack, supra note 216, at 948. This limited right permits the motorist a reasonable time to consult an attorney by telephone. See id. The right does not guarantee actual consultation. See id.

219. See John R. Tunheim, Criminal Justice: Expanded Protections Under the Minnesota Constitution, 20 WM. MITCHELL L. REV. 465, 485-86 (1994); see also Nyflot v. Minne-

right to counsel does extend to this stage.[220] Despite this inconsistency, the U.S. Supreme Court has declined to address the issue.[221] States that have found a state constitutional right to consult with counsel before consenting to chemical testing include New York,[222] Minnesota,[223] and Oregon.[224] Most states that have denied this right have done so based upon a rationale that the right to counsel had not yet attached.[225] In light of Traylor, Florida courts are unable to use that same justification.

B. Undercover Jailhouse Informants

Another area of law enforcement that is complicated by Florida's early attachment of the right to counsel is the common practice of eliciting incriminating statements through undercover informants. In Illinois v. Perkins,[226] the U.S. Supreme Court held that because the use of undercover informants does not result in the inherently coercive atmosphere of custodial interrogation, Miranda warnings are inapplicable.[227] The Court explained:

> Conversations between suspects and undercover agents do not implicate the concerns underlying Miranda. The essential ingredients of a "police-dominated atmosphere" and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate. Coercion is determined from the perspective of the suspect. When a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking.[228]

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sota Comm'r of Pub. Safety, 474 U.S. 1027, 1030 (1985) (White, J., dissenting) (arguing that the Court should not have dismissed the appeal where lower courts have divided over the availability of the Sixth Amendment right to counsel before consenting to chemical testing).

220. See, e.g., Heles v. South Dakota, 530 F. Supp. 646, 654 (D.S.D. 1982), vacated as moot, 682 F.2d 201 (8th Cir. 1982); State v. Welch, 376 A.2d 351, 355 (Vt. 1977).

221. See Nyflat, 474 U.S. 1027 (1985) (dismissing the appeal for want of a substantial federal question).

222. See People v. Gursey, 239 N.E.2d 351, 353 (N.Y. 1968) (allowing consultation with an attorney prior to breath analysis provided that the delay does not "palpably impair" the statutory procedure for testing).

223. See Friedman v. Commissioner of Pub. Safety, 473 N.W.2d 828, 837 (Minn. 1991) (requiring a limited right to counsel on state constitutional grounds).

224. See State v. Spencer, 750 P.2d 147, 156 (Or. 1988) (holding that a driver has a right to consult an attorney prior to breath analysis, but the state need not wait a long period of time).

225. See Sites v. State, 481 A.2d 192, 196-97 (Md. 1984) (finding the Sixth Amendment right to counsel had not yet attached and citing cases); see also Tunheim, supra note 219, at 483-84 (noting Minnesota's rationale for attachment).

226. 496 U.S. 292 (1990).

227. See id. at 296-97.

228. Id. at 296 (citations omitted).

The defendant in Perkins had attempted to avail himself of his Fifth Amendment protections, arguing that he had not been advised of his Miranda rights before the undercover interrogation.[229] In the absence of custodial interrogation, however, the Court ruled that Miranda was inapplicable.[230] The Court also addressed the defendant's claim of a Sixth Amendment right to counsel, dismissing this argument because no charges had yet been filed on the subject of the interrogation.[231] Because judicial criminal proceedings had not been initiated, no Sixth Amendment right to counsel had attached. In dictum, however, the Court explained that "the government may not use an undercover agent to circumvent the Sixth Amendment right to counsel once a suspect has been charged with the crime."[232]

Florida's early attachment of the right to counsel creates problems in the context of undercover interrogation. Because the right attaches as soon as feasible after first restraint, any attempt to utilize undercover agents would unconstitutionally circumvent the Sixth Amendment, in violation of Perkins.

VII. CONCLUSION

The Florida Supreme Court's right-to-counsel jurisprudence has become complicated by recent events. The court, in its attempt to guarantee broader rights under the Florida Constitution than are guaranteed under the U.S. Constitution, has endangered several common methods of law enforcement. The court should reevaluate its current stance at the earliest opportunity. This opportunity was recently available to the court in its discretionary review of Owen II.[233] Though the court has not yet rendered its opinion in Owen II, the opportunity to review this issue also is available in Skyles.[234] The Florida Supreme Court should answer the questions certified by the Fourth DCA in both Owen II and Skyles in the negative, explaining that Traylor continues to require the clarification approach in Florida not withstanding the U.S. Supreme Court's holding in Davis.

229. See id. at 294.
230. See id. at 296.
231. See id. at 299.
232. Id.; see also Maine v. Moulton, 474 U.S. 159, 176-80 (1985) (holding that the State violated a defendant's Sixth Amendment right to counsel by arranging a recording of a conversation between the defendant and a co-defendant who was a government informant); United States v. Henry, 447 U.S. 264, 274-75 (1980) (holding that statements made by the defendant to a paid informant, while in jail, were "deliberately elicited" and an inadmissible violation of the defendant's Sixth Amendment right to counsel); Massiah v. United States, 377 U.S. 201, 206 (1964) (finding a violation of the Sixth Amendment right to counsel where the government obtained a confession secretly by recording a conversation between the defendant and co-defendant by placing a radio transmitter in the co-defendant's ear).
233. See supra notes 182-89 and accompanying text.
234. See supra notes 171-81 and accompanying text.

With regard to ambiguous requests invoking Miranda rights, the court should reaffirm its pre-Davis holding and require that interrogating investigators clarify the desires of the suspect before continuing with their interrogation. Only the clarification approach accomplishes the goals of both fairness and practicality. With respect to the earlier point of attachment for the right to counsel under the Florida Constitution, the court should abandon the notion that the right to counsel attaches as soon as feasible after restraint. Such a provision unduly interferes with legitimate, longstanding law enforcement practices. Rather, the court should settle on first appearance[235] as the point of attachment of the right to counsel. The protections afforded to defendants by adherence to Miranda and insistence upon the clarification of ambiguous invocation of rights will continue to sufficiently protect against any danger of coercion. Choosing first appearance as the point of attachment for the Florida Constitution's article I, section 16 right to counsel provides greater protection than is provided by the U.S. Constitution. Selection of first appearance satisfies the court's desire to expand the rights granted to citizens under the state constitution, while maintaining the effectiveness of law enforcement.

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235. See supra note 85.