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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

BRIAN WALTER KIPP,
Respondent.

CASE NO. 87,486

DCA No.94-00091

DISCRETIONARY REVIEW OF A DECISION OF THE SECOND DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE FACTS

On December 22, 1992 a patrolman for the Clayton County Georgia Police Department, Michael Harris, investigated a complaint of missing property at a local Days Inn. The property was taken from Wilson Lam while he was staying with two other men in room 208. Lamm had been invited to spend the night in room 208 that had been rented by the other men. The two men left in the morning taking Lamm's belongings. **(R 669, 675)**

The room was registered in the name of James Boyington. Boyington's car with Florida tags was found in the parking lot. Harris verified the local address in Florida for the registrant. The date of birth for the registrant did not match the description given by Lamm of the man that claimed to be James Boyington. **(R 627).** Harris searched the Boyington vehicle. Inside he found various items identifying Bayington. (R 630-631) He also found a letter addressed to Clifford Jarvis and a photograph. Lamm identified the photo of Jarvis as one of the men from room 208 that took his property. (R 629) A letter addressed to Brian Kipp was also found in the car. (R 638) Harris then cantacted the Zephyrhills, Florida police department and requested they check on the welfare of Mr. Boyington.

In response to the Georgia request, Zephyrhills officers Eakley and Griffin went to Boyington's residence on December 22, 1992 to conduct a welfare check. A landlord let them in. Inside the residence in a closet they found a body of a white male tied up with electrical and telephone cord. The body was identified

as that of James Boyington. (R 548)

Neighbors saw Mr. Boyington when he returned home from a cruise on December 19, 1992. But they did not see him thereafter. Two young men were seen going into the home that day. One of the men, identified as Clifford Jarvis(R 517), had been seen at the residence other times before.(R 513-514,520). There was testimony that Mr. Boyington was a homosexual. (R 517)

Zephyrhills police detective Gary Pierce telephoned the Citibank Corporation and requested they trace the usage of Mr. Boyington's stolen credit cards. The cards were not to be pulled when used. The trace was to allow authorities to catch up to the users. (R 648) Pierce also located photos of the suspects, including Kipp, and FAXed them to the Georgia police. (R 648-649)

On December 26, 1992, Morris Toler, Deputy Chief of Police for the Cobb County, Georgia police department was working a special holiday detail at a large shopping mall in suburban Atlanta. While there he received a complaint from one of the department stores regarding a problem they had with a credit card. When the card was used it came back with an unusual code, a code ten. Toler then called the credit card company and was referred to Zephyrhills police detective Gary Pierce. Toler contacted Pierce. Pierce informed Toler that the credit card being used belonged to a James Boyington from Zephyrhills and that Boyington was dead. (R 710-712) Toler was given the names of Kipp and Jarvis as possible suspects. (R 712-713) A description was obtained of the suspects. (R 713)

Chief Toler then began calling local hotels until he found one with a room registered to James Boyington. (R 714) He then proceeded to the hotel. In the parking lot he examined a 1992 Oldsmobile. It was the vehicle taken from Wilson Lamm in Clayton County. Toler knew there was a Clayton County arrest warrant for Kipp and Jarvis. (R 715-716) Taler and backup then went to the hotel room and apprehended Kipp and Jarvis. (R 717-719)

According to Toler, Kipp spontaneously begun to make remarks like, "What the hell's going on? What is this?" Then Kipp said, "I know what this is all about. It's about those damned credit cards. I can explain all that if you give me a minute." Kipp then said his name was James Boyington. (R 720-721) He stated that the problem was that Jarvis had last his driver's license and he did not have a picture ID. (R 725) Toler became irritated with Kipp because of his mouth, and told Kipp to shut up. (R 726) Kipp and Jarvis ultimately were transported to the county jail. (R 731)

Cobb County Police department Detectives Patrick Banks and John Dawes conducted two interrogations of Kipp after his arrest an credit card charges. They were both tape recorded. The tapes contained everything that was said during the interviews. (R 758, 761) The second interview is found in its entirety at pages 196 through 230 of the Supplemental Transcript of Record on Appeal.

The first interrogation began at 9:30 P.M. on December 26, 1993. Kipp was still holding himself out as being Boyington. The Georgia police knew he was Kipp and that Boyington was dead.

They also knew that Florida authorities were en route to interview Kipp. The Georgia authorities wanted to conduct their own interview so that they could back up their credit card case. They also thought it would assist Zephyrhills. (R 760) During this entire interview Kipp maintained that he was a traveling rock musician named James Boyington. (Supplemental R 232-255) Kipp, nee Boyington, told the officers he was halfway drunk. (Supplemental R 235) Four Jack Daniels bottles had been seized from the hotel room where Kipp was captured. (R 743) Both officers testified that Kipp was under the influence of alcohol when he gave the first statement. (R 749, 774) Banks swore that Kipp understood his *Miranda* rights. (R 749)

A second interview was begun at 3:50 A.M. on the 27th. (R 761, Supplemental R 196) Kipp was awakened while he was sleeping in the holding cell. (R 429) The officers did not know how long Kipp had been sleeping. (R 439) The procedure in Cobb County was for a defendant arrested the day before be taken before a magistrate the following day at 8:00 A.M. (R 432) Everything from the second interview was on the tape. (R 441)

During this second interview Kipp was not *re-Mirandized*. (R 196) Kipp failed to provide an audible response when asked if he still was willing to waive his rights and talk, (R 196) And the interrogation continued.

Early in the interview Kipp asked if he could return to his room. He was emphatically told no. (R 197) And the interrogation continued.

The officers then asked, "You want to talk to us about the situation?" Kipp did not give a direct response to the question but asked "where's Cliff?" (R 197) And the interrogation continued.

After making some preliminary statements that were not incriminating Kipp said, "And I probably -- think I shouldn't say anymore." (R 198)

To which the officers responded, "Okay, that's all you want to say?" (R 198)

And Kipp said, "Except I'd like to have a cigarette and a soda, maybe, please." (R 198)

But the interrogation continued. After Kipp told the officers he didn't want to say anything else, they stated, "Actually, let's clear this up. You're not Mr. Boyington, right?" (R 199) And the interrogation continued.

Kipp then answered some questions, After a few answers the police asked, "You told me just a few minutes ago that that's all you had to say. Now, are you telling me again that you want to waive your rights and--" (R 200) And the interrogation continued.

During the remainder of the interview Kipp explained that he was homeless. He met Clifford Jarvis in the Zephyrhills park. (R 210) Jarvis was homeless but knew James Boyington. (R 205) They went to Boyington's house. Boyington demanded sex from Kipp. Kipp said he had a violation of probation pending and that Boyington threatened to telephone the police if Kipp didn't

cooperate sexually. (R 202) Instead **Kipp** and Jarvis tied Boyington up(R 221,223), put him in a closet(R 223), took his wallet and car and hit the road. (R 212)

A third taped recorded interview took place at 8:05 A.M. on the 27th. (Supplemental R 258) It was conducted by Florida authorities that had arrived in Georgia to investigate the homicide. *Miranda* rights were given. (Supplemental R 259-260) In this interview **Kipp** repeated and expounded upon the statements he made during the second interrogation. (Supplemental R ***258-271)***

None of the officers involved in the interrogations provided verbal testimony either during the evidentiary suppression hearing or at trial regarding the statements made to them by Kipp. Each of the tapes were played in their entirety at the suppression hearing and at trial (with some minor references deleted at trial at the request of defense counsel).

Other than the stolen property in Kipp's possession, there was no evidence introduced at trial linking him to the murder and robbery except for his tape recorded statements.

SUMMARY

This Court does not have jurisdiction of this case because the *Kipp* decision does not directly and expressly conflict with *Traylor* but is based upon it, as now acknowledged by the state. The state's request for discretionary review was a veiled attempt to get this Court to revisit *Traylor* under the guise of conflict.

Even though this review purportedly is to determine conflict with *Traylor*, much of the state's argument questions the correctness of the appeal court's factual findings regarding the police conduct during the interrogations. Contrary to the explicit findings in *Kipp*, the state argues the detectives "merely attempted to clarify" the defendant's intentions. A review of the facts supports the decision of the appeal court, under either a state or federal analysis.

The three tape recorded statements were the only solid evidence against Kipp. The first tape was not incriminating. The second tape was incriminating, but it was obtained in violation of Kipp's procedural rights against self incrimination guaranteed by the constitution of the state of Florida.

Specifically, Kipp did not unequivocally waive his rights against self-incrimination at the beginning of the second interview. Moreover, during the interrogation he made two equivocal assertions of his right to terminate questioning. First, he asked if he could return to his room. This request is factually indistinguishable from a similar request made in a Third DCA case. Applying clear law from the Florida Supreme

court, the Third DCA ruled that a defendant's request to return home was an equivocal request to terminate questioning and that the only permissible questions thereafter were those that sought to clarify the defendant's wishes. The police in this case did not clarify Kipp's request to return to his room. Rather, they told him in no uncertain terms that he would not be returning to his room. And they proceeded to interrogate him.

Kipp made another equivocal assertion of his right to remain silent. He said, "And I probably -- think I shouldn't probably say any more." His interrogators then did ask the clarifying question. They asked, "That's all you want to say?" And Kipp said, "Except I'd like to have a cigarette and a soda."

The police absolutely knew at that point that Kipp did not want to say anymore. Still they plowed on. They would not stop. They then stated, "Actually, let's clear this up." And they proceeded to ask more questions. "Let's clear this up" is the exact follow-up question to an equivocal assertion of rights that was condemned in Owen v. ***State.***

The facts of this case should be analyzed by applying state law principles. Doing so, the result is clear. Every statement after Kipp made either an equivacal or unequivocal assertion to remain silent is inadmissible For the purposes of its opinion the appeal court assumed the Kipp's requests were equivocal. To the extent the requests were unequivocal there was clear error.

Kipp's suppression should even be reversed under the federal law because he did not make an initial unequivocal waiver and

because the detectives at one point absolutely knew that Kipp had invoked his rights to terminate questioning but continued their interrogation nonetheless.

Arguably the third statement taken by Zephyrhills authority was properly *Mirandized*. Still, it too is inadmissible. State law clearly holds that interrogation must stop when a suspect indicates in any manner that he or she does not want to be questioned. A resumption of questioning with proper warnings is permissible provided the suspect's initial exercise of the right to cut off questioning was scrupulously honored.

In this case the Georgia authorities did not scrupulously honor Kipp's request to cut off questioning. A review of the second interview reveals their adamant refusal to discontinue the interrogation and their persistent efforts to wear down Kipp's resistance. The Zephyrhills police and the citizens of the state of Florida are heirs of this dishonorable legacy. The third statement is inadmissible because of violations committed during the second interview. Both statements were inadmissible and were properly suppressed under either a state or federal analysis. They were also the only solid evidence against Kipp. His convictions were properly reversed.

It is not, therefore, necessary for this Court to reconsider the *Traylor* holding in light of Davis *v.* United States. Even if the issue is addressed, the state has not argued that the principle of primacy espoused in Traylor should be abandoned. Accordingly, if a reconsideration is undertaken the question

should be whether our state constitutional protection is grounded on policies different from the federal right. In Florida the emphasis is on the protection of the rights of the individual. The federal right has shifted from that focus and now has at lest an equal if not greater emphasis on law enforcement.

Moreover, ***Davis*** creates an unworkable test guaranteed to violate the rights of some suspects. In the real world, language is not sufficiently precise, especially in the coercive environs of custodial interrogation, to always provide specification with the "requisite level of clarity" that a suspect intends to invoke his or her rights against self-incrimination. If an ambiguous response is clarified an interrogation either continues or terminates. Clarification guarantees protection. The failure to clarify guarantees that at least in some instances a suspect that actually desires to remain silent but unartfully expresses the desire will lose that fundamental right.

Florida should not follow the example of ***Davis,*** but should provide greater protection for the rights of its citizens by requiring that ambiguous assertions of self-incrimination rights be clarified.

ARGUMENT I

THE DECISION OF THE SECOND DISTRICT IN *KIPP* DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THIS COURT IN *TRAYLOR V. STATE*, 596 So.2d 957 (Fla. 1992), BUT IN FACT WAS EXPLICITLY BASED ON *TRAYLOR*; MOREOVER, THERE IS NOT CONFLICT WITH *STATE v. OWEN*, 654 So.2d *200* (Fla. 4TH DCA), review granted, 662 So.2d 933 (Fla. 1995) BECAUSE *OWEN* DID NOT PROMULGATE A BINDING AND CONTRARY POINT OF LAW BUT MERELY CERTIFIED A QUESTION TO THIS COURT.

Petitioner alleged conflict in its brief an jurisdiction between the holding in the instant **case**, *Kipp* V. *State*, 668 So.2d 214 (Fla. 2d DCA 1996) and this Court's decision in *Traylor* V. *State*, **596** So.2d *957* (Fla. 1992)and *State* V. Owen, 654 So.2d 200 (Fla. 4TH DCA), review granted, 662 So.2d 933 (Fla. 1995). The source of the conflict was never described.

In fact, the district court opinion below explicitly relied and was based on Traylor. Rather than conflicting with *Traylor*, the DCA opinion rested upon it, as now acknowledged by the state in its brief on the merits. ("The Second District's opinion states that the Respondent's confession was obtained in violation of Traylor v. State ..." Petitioner's Brief on the Merits, p.11)

Further, the Petitioner urged conflict between the second district court's opinion in *Kipp* and the fourth district's decision in *State* V. *Owen*. Such a suggestion of conflict was misleading because the Owen court also affirmed the suppression of statements made after there had been an equivocal invocation of *Miranda*, also in reliance on *Traylor*. *Owen* and *Kipp* are not conflicting, but are consistent.

The Owen court did certify the question whether the

principles espoused in the U.S. Supreme Court decision in Davis or those from the *Traylor* decision should apply to equivocal invocations of the right to remain silent. The certification of that question, however, did not create conflict with the *Kipp* opinion because the certification question did not create any controlling precedent.

With its request for discretionary review the Petitioner really wanted this Court to limit the *Traylor* holding. That motive is now patently clear from Petitioner's brief on the merits. But such a review may not be done in this instance by conflict jurisdiction. The state moved the Second District Court to certify the question, but the appeal court chose not to do so.

A petition for review should be dismissed when upon subsequent examination it becomes apparent that review was improvidently granted because there was no direct and express conflict of decisions as required by article V, section 3(b)(3) of the Florida Constitution. *Dept.* of Health ***v. Nat.*** Adoption Counseling, **498** So.2d ***888*** **(Fla.** 1986); ***State v.*** *Brown,* **476** So.2d ***660*** **(Fla. 1985).**

Respectfully, this Court does not have jurisdiction and should proceed no further with this review.

ARGUMENT II

THE ADMISSION OF TAPE RECORDED STATEMENTS OF THE DEFENDANT WAS REVERSIBLE ERROR VIOLATING THE PRINCIPLES OF BOTH *TRAYLOR* AND *DAVIS*.

Much of the state's brief tacitly challenged the factual findings of the district court thus calling into question the correctness of the legal conclusions. In the face of specific findings to the contrary, the state urges that "[T]he officer's questions properly clarified Kipp's wish to continue the interrogation." (Petitioner's Brief on the Merits, p.12) Since the state has posed the issue, before tackling the ultimate question whether *Traylor* should be reconsidered, a review of the facts from *Kipp* supports the district court decision, applying either a state or a federal analysis.

Recall from the statement of facts that three separate interview sessions were conducted by the police with Brian Kipp. Each of the three interviews resulted in separate tape recordings that were ultimately introduced in their respective entireties at trial. Kipp unsuccessfully moved to suppress all three of the statements prior to trial based on a violation of state and federal constitutional rights. The Second District Court of Appeal reversed on state constitutional grounds. A review of the facts shows the decision was correct. Moreover, reversal was even appropriate under a federal constitutional analysis.

The starting and ending point for review of error in this case could be *Traylor* v. *State*, 596 So.2d 957 (Fla. 1992). *Traylor* clearly established the proposition that when called upon

to decide matters of fundamental rights, Florida's state courts are to give primacy to our state Constitution. Bluntly put, state courts are to ignore federal case law decisions until an initial analysis of a claimed constitutional violation has been examined under our state court principles.

Based upon the primacy analysis and the experience under *Miranda* and its progeny, the Florida Supreme Court held in *Traylor* that to ensure the voluntariness of confessions, the Self-Incrimination Clause of Article I, Section 9, Florida Constitution, requires that prior to custodial interrogation in Florida suspects must be told that they have a right to remain silent, that anything they say will be used against them in court, that they have a right to a lawyer's help, and that if they cannot pay for a lawyer one will be appointed to help them. This holding recounts the federal standard of the commonly called "*Miranda* warnings" and explicitly adopts them as the free standing law in Florida. Henceforth in Florida such warnings could more properly be called "*Traylor* warnings."

Traylor went on to require that:

> 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.

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

The Second District determined that Kipp either equivocally or unequivocally indicated that he wanted the interrogation to stop. *Kipp* ***v. State***, ***668*** So.2d 214, 215 (Fla. 2d DCA 1996). For the purposes of its opinion, the court assumed that the request

was an equivocal one. *Id.* at 216, n.2. This assumption is consistent with the appellate principle that a case should be decided upon the most narrow ground possible. See, *Dobson v. Crews,* 164 So.2d 252 (Fla. 1st DCA 1964). [An appellate court should confine its opinion ta those statements of legal principle necessary for the solution of the question.]

There was uncontrovertedly an equivocal request in *Kipp.* Applying that assumption the district court was nat required to determine the larger, disputed question whether there was an unequivocal request. To the extent that there was an unequivocal request clear error occurred.[1] *Kipp v. State,* 668 So.2d 214, 216 n.2 (Fla. 2d DCA 1996). The same result also would be true under *Davis* V. United *States,* ___U.S. ___, 114 S.Ct.2350, 129 L.Ed.2d 362 (1994).

If there was an equivocal indication that Kipp did not want to be interrogated, under prior and still binding state court precedent, all questioning should have been terminated except those that clarified Kipp's wishes. See *, Martinez v. State,* 564 So.2d 1071, 1073 (Fla. 1990); *Owen* V. *State, 560* So.2d 207,211 (Fla. 1990), *cert. denied,* 498 U.S. *855,* 11 S.Ct. 152, 112 L.Ed.2d 118 (1990) and Long V. *State,* 517 So.2d 664 (Fla. 1987), *cert. denied,* 486 U.S. 1017, 108 S.Ct. 1754, 100 L.Ed.2d 216 (1988). Although the literal language of *Traylor* and *Miranda*

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[1] If there was an unequivocal request the DCA opinion should be affirmed even though the appeal court did not reach that issue. It is axiomatic that a decision should be affirmed if any basis for doing so appears in the record. *Escarra v. Winn-Dixie* Stores, *Inc.,* 131 So.2d 483 (Fla. 1961).

call for questioning to cease if a suspect indicates in any manner that he or she does not want to be interrogated, the *Kipp* decision did not go that far. The district court was consistent with the law of ***Martinez,*** Owen and ***Long*** which allow clarifying questions following an ambiguous invocation.

It should be explained why ***Martinez,*** Owen and ***Long*** are clearly still binding. There was no question prior to the advent of the decision of the United States Supreme Court in ***Davis v. United States,*** ___U.S. ___, 114 S.Ct.2350, 129 L.Ed.2d 362 (1994). ***Davis*** dramatically altered the federal rule in regard to the obligation of an interrogating officer confronted with a suspect's equivocal reference to a ***Miranda*** right. In ***Davis*** the court receded from prior federal decisions establishing a rule similar to that espoused in Martinez, ***Owen*** and ***Long.*** In ***Davis*** the majority opinion expressly declined to adopt a rule requiring officers to ask qualifying questions, and stated:

> If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.

Davis v. United States, ___U.S. ___, 114 S.Ct. 2350, 129 L.Ed.2d 362, 373 (1994).

Davis' diminution of rights under the federal system is not applicable to a review of a defendant's rights against self-incrimination under the Florida Constitution. That was the fundamental point in *Traylor*.

Explicit recognition of Davis' non-application in Florida is apparent from a review of a recent roller coaster case from the

Fifth District Court of Appeal. In an initial opinion, applying principles from Owen and Long, the 5th DCA reversed a conviction that was based upon the erroneous admission of statements made after the defendant made an equivocal assertion of a Miranda right. Subsequent questions were not limited to clarifying the defendant's wishes but were designed "to clear matters up." Deck v. State, 20 Fla. Law Weekly D36 (Fla. 5th DCA Dec. 22, 1994).

The state successfully moved for rehearing, apparently based on the new *Davis* decision, and a totally revised opinion was rendered. This time the trial court action was affirmed with explicit reliance upon the newly cited decision in Davis. Deck v. State, 20 Fla. Law Weekly D400 (Fla. 5th DCA Feb. 10, 1995).

Subsequently, the court granted the defendant's request for a rehearing and again substituted a totally revised opinion. The conviction was reversed once again. The court opined that *Traylor* directly addressed the issue of an equivocal assertion of a *Miranda* right, and that opinion was controlling rather than Davis. Traylor expressly argued that a fundamental right created by the state constitution must be respected even if no similar right is recognized by the federal courts. Deck *v.* State, 20 Fla. Law Weekly D747 (Fla. 5th DCA March 24, 1995).

To sum up the law applicable for a review of the district court's decision, applying the primacy of state law, the second tape recorded statement is inadmissible if there was an unequivocal assertion of a *Traylor* right.[a] The same result would

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[a] See n.1.

hold true even if the federal principles espoused in *Davis* were applied.

The statement is also clearly inadmissible under present state constitutional interpretations if there was an equivocal assertion followed by subsequent questions going beyond a clarification of Kipp's wishes.

Returning to the facts of the instant case, Kipp was taken to a room or holding cell following the first interview. At 3:50 A.M. he was awakened and taken for another interrogation. There was no testimony concerning the length of time that he had been asleep prior to being awakened. Nor was there any testimony explaining the Georgia officer's urgency to conduct another interrogation at that hour of the morning. The Florida robbery and homicide was not their case. They knew that Florida law enforcement was on the way. Why then the urgency for them to re-question Kipp?

The obvious answer to this rhetorical question is that the officers fully intended to take advantage of the coercive nature of the custodial interrogation process noted and decried in *Miranda v.* Arizona, **384 U.S. 436, 86 S.Ct. 1602, 16** L.Ed.2d **(1966).**

The dispositive issue is the failure of the officers to follow *Miranda,* or *Traylor,* procedures. Explanation of the error best proceeds sequentially.

When the Georgia detectives renewed their interrogation they did not re-*Mirandize* Kipp. Instead they referenced the prior

warnings and asked, "Are you still willing to waive your rights and talk to us, answer questions?" (R 196,l. 9-10) To which Kipp gave "(No audible response.)" (R 196, 1.11) The officers then proceeded with the interview even though Kipp had not audibly or in any other positive manner waived his rights. This was a violation of the "bright-line standard" established in *Traylor*, and any subsequent questioning violated Kipp's state constitutional rights against self-incrimination. See, *Traylor v. State*, 596 So.2d 957, 966 (Fla. 1992).

In its recitation of the facts the state attempted to justify Kipp's silent waiver. The state noted that during cross-examination at the suppression hearing defense trial counsel asked the detective the following:

> Q And then Mr. Kipp is asked again by detective Dawes in your presence, I believe: Are you still willing to waive your rights and talk to us as requested? And Mr. Kipp says: Sure.
> A. Yes, sir.

The state asserts this testimony clarified Kipp's equivocal response concerning waiver. It did not. As actually evidenced by the official transcript of the tape recorded interview, Kipp did not say "Sure", as sworn to by the detective. The detective provided testimony regarding the waiver which was not true. Kipp gave no audible response to the request for waiver, and the detectives did nothing to clarify this equivocal response. Silence does not constitute an unequivocal waiver.

In addition to violating the Florida Constitution, proceeding with the interview without obtaining an unequivocal

waiver also violated the federal rule of *Davis*. *Davis* permits police to continue an interrogation without clarifying questions when, at some point within the interrogation, a person equivocally requests a lawyer. However, *Davis* still requires that there be an initial unequivocal waiver before the interrogation may even proceed. "We therefore hold that, after a ***knowing and voluntary*** **waiver** ***of*** the ***Miranda*** rights, law enforcement officers may continue questioning until **and** unless a suspect clearly requests an attorney." *Davis* ***v.*** United ***States***, ___U.S. ___, **114** S.Ct. 2350, **129** L.Ed.2d **362**, 373 **(1994)**. (emphasis added). See also, *Leyva v.* ***State***, 906 P.2d 894 **(Utah App.** 1995)[*Davis* only applies to equivocal *Miranda* references after a valid Miranda waiver.]

Returning to Kipp's interrogation, the police did not seek to clarify whether **Kipp** intended to waive his rights and **speak** with them. Instead, after some preliminary prodding where the officers tried to get the defendant to divulge his real identity, **Kipp** indicated that he did not want to answer questions. This indication is apparent from the following interchange:

> A (Inaudible) go back to the room.
> Q **No.** You're not going to -- you're not going back to the room, no.
> **a** I can assure you ain't going back to the room, Mr. **Kipp.** Okay? (R 197)

Kipp's comment was, at **the** least, an indication in some manner that he did not want to answer further questions. Wanting to go back to the room is not consistent with wanting to stay in the room and answer questions. The failure to allow **Kipp** to return

to his room violated his right to remain silent, as explained below:

> Through the exercise of his (the suspect's) option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting.

Michigan ***v. Mosley*****, 423 U.S.** 96, 104, 96 S.Ct. 321, **46** L.Ed.2d **313, 321 (1975).**

The instant situation is indistinguishable from the facts in ***State*** V. ***Wininger,*** 427 So.2d **1114 (Fla. 3d DCA 1983),** and the legal results should be the same. In ***Wininger,*** the defendant was answering questions until he was informed he was a suspect. **At** that point Wininger stated to the interrogating officer; **"I** don't believe it. I want to go home. Can I**."** The officer responded, "Sure, you will be able to go, but I **want** to talk to you about this. It's very serious. A man you lived with for seventeen years is dead." The questioning continued, and the defendant answered the questions. The trial court later found that the defendant's request to go home was the functional equivalent of an announced desire to cease the interrogation which was not, when the police cantinued the interrogation, scrupulously honored, as it had to be. The trial court suppressed all statements made by the defendant following his request to go home. The third DCA affirmed. The only potentially permissible questions would be those directed at clarifying the defendant's wishes. ***State*** V. ***Wininger,*** 427 So.2d 1114 (Fla. 3d DCA 1983).

It should be noted that Kipp's facts are even more extreme than those in *Wininger.* At least in *Wininger* the interrogator acknowledged that the defendant would be able to return home. In the present case, Kipp's interrogators woke him up at four in the morning and when he asked if he could return to his room they very dramatically and forcefully denied him that avenue of escape from their questioning. Their denial implicates the voluntariness of the subsequent answers. And it more clearly violates the *Miranda* or *Traylor* procedural requirements.

If this wasn't enough, the interrogators go on to violate Kipp's procedural rights yet again. After they told Kipp he was not going back to his room they asked "You want to talk to us about the situation? Once again, Kipp fails to give a clear indication that he is waiving his rights instead he asks Where's Cliff (a co-defendant)." (R 197, 1.11-14)

Once again, the officers should not have gone forward because they did not have a "bright-line waiver." Instead, the interrogators proceeded with more questions explicitly designed to secure information about the robbery and homicide. Kipp relates some preliminarily inculpatory information but then states, "And I probably -- think I shouldn't probably say any more." (R 198, 1.15-16) If this is an unequivocal request for his *Miranda* rights then all statements thereafter were inadmissible. But, the analysis continues even if the assertion is viewed as being equivocal.

Kipp's interrogators responded to his assertion with

concededly clarifying questions:

> Q Okay.
> Q Okay.
> Q That's all you want to say?

(R 198, 1.17-19)

To which Kipp unequivocally responded:

> A Except that I'd like to have a cigarette and a soda, maybe, please.

(R 198, 1.20-21)

It is absolutely clear that the officers clarified any ambiguity in Kipp's assertion of his ***Miranda*** right. The colloquy can only be paraphrased to read: Yes, that's all I want to say, except I'd like a cigarette and soda. It was a violation of Kipp's procedural rights to continue any questioning after this unequivocal assertion.

Nonetheless, the interrogators continued. After some questions about the soda and some wavering by Kipp, the detectives resumed pounding the questions:

> Q Actually, let's clear this up. You're not Mr. Boyington, right? We do know that. We have established that. It' Mr. Kipp? Is it K-I-P-P or K-I-P. I don't understand the Ps. Two Ps. (R 199)

And Mr. Kipp proceeded to answer their questions."

Make no mistake, the detectives knew Kipp had asserted his right to terminate questioning, yet they marched on. Their

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[3] The state's reliance on *O'Neal* v. State, 649 So.2d 311 (Fla. 3d DCA 1995) to justify the detective's continued interrogation after there had been an unequivocal invocation is misplaced. The detectives knew Kipp's identity. They merely used the name ploy as an interrogation tool to get Kipp to resume talking after he had told them he did not want to say anymore.

knowledge was manifest as evidenced by a question after they had reinitiated the interrogation:

> Q You told me just a few minutes ago that that's all you had to say. Now, are you telling me again that you want to waive your rights and--

(R 200, 1.22-24)

In the first place, there is no evidence that Kipp initially waived his rights in the second interrogation session. Secondly, if the detective knew that Kipp had said that's all he had to say (as evident in Kipp's comments at R198, 1. 15-21), ***why was the officer still asking questions?*** Kipp had not reinitiated contact. Moreover, it is patently clear that the express language used by the detectives, "let's clear this up," is not a question clarifying the assertion of Kipp's rights. In fact it was the very type question condemned in Owen and in ***Deck.*** After the defendant in ***Owen*** made an equivocal assertion of his ***Miranda*** right, "Instead of exploring whether this was an invocation of the right to remain silent . . . the police urged him (the defendant) to clear matters up." Owen v. ***State, 560*** So.2d 207, 211 (Fla. 1990). Once again our facts are even more outrageous. The officers here did ask the clarifying question. And even though it is apparent that they absolutely knew that Kipp said he didn't want to talk anymore they pressed on and said, "Actually, let's clear this up."

So, to answer the question posited above, ***why was the officer still asking*** questions?, there is absolutely no constitutional reason why the detectives should have continued to ask Kipp questions. They should have stopped. Their failure to

do so renders any statements elicited thereafter inadmissible,

The same result is true even under ***Davis.*** ***Davis*** created a "requisite level of clarity" rule:

> Invocation of the Miranda right to counsel 'requires at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney' ... But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understoad only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning. (Citations omitted; emphasis in the original).

Davis ***v. United States,*** ___U.S. ___, 114 S.Ct. 2350, 129 L.Ed.2d 362, 371 (1994).

The ***Davis*** rule intended to ease the predicament of police officers faced with an ambiguous statement. However "[A] police officer who understands a statement as a clear invocation of the right is in no position to plead such a quandary and should not benefit from a rule designed to avoid it." ***Stewart v. U.S., 668*** A.2d 857 (D.C.App. 1995). If the detectives knew that Kipp had unequivocally invoked his rights, as they admitted on page 202 of the suppression hearing transcript, then even under ***Davis*** they weren't permitted to continue questioning.

Under the facts of this case, Kipp's statement was correctly suppressed under either a state or federal constitutional analysis. Applying *Traylor* principles of primacy and looking to state law first, the detectives conduct violated the Florida constitution and it is not necessary to make the federal analysis. But, even under a federal analysis, the detectives conduct violated Kipp's rights under the United State

constitution because there was not an unequivocal initial waiver and because during the interview the detectives actually knew that Kipp had unequivocally invoked his right to terminate the interrogation yet they pressed on.

The *Kipp* case is not a proper vehicle to limit the *Traylor* holding in light of ***Davis.*** The district court reached a proper decision in light of either state or federal precedent.

ARGUMENT III

THE PRINCIPLES ANNOUNCED BY THE UNITED STATES SUPREME COURT IN ***DAVIS*** SHOULD NOT APPLY TO THE ADMISSIBILITY OF CONFESSIONS IN FLORIDA, IN LIGHT OF ***TRAYLOR.***

The state would like this Court to reconsider the holding in ***Traylor.*** However, this case can be decided without reaching the question whether the principles announced in Davis apply to the admissibility of confessions in Florida, in light of Traylor. First, this Court does not have jurisdiction with this case to make such a reconsideration because ***Kipp*** does not expressly and directly conflict with Traylor. Second, the district court reached a correct decision even applying the federal analysis from ***Davis.***

Even though this Court does not have to consider limiting Traylor, on the merits there are several good reasons why the ***Traylor*** analysis is superior to that of ***Davis*** in achieving the twin goals of the protection of individual liberty interests and the effective promotion of police investigations.

Traylor v. State enunciated the doctrine of primacy. With the decision, Florida joined at least eleven states that have chosen to interpret the self-incrimination provisions of their own state constitutions in a manner independent of the federal court's Fifth Amendment jurisprudence. ***Traylor v. State, 596*** So.2d 957,961 n.2 (Fla. 1992).

The primacy doctrine is not limited to constitutional issues of self-incrimination but has been applied by Florida courts in a number of different constitutional contexts. See, ***Matter of***

Dubrei, 629 So.2d 819 (Fla. 1993); *Silver Rose Entertain. v. Clay County,* 646 So.2d 246 (Fla. 1st DCA 1994); *In re Forfeiture of $8,489.00,* 603 So.2d 96 (Fla. 2d DCA 1992).

In its request to limit the *Traylor* holding the state has not suggested that Florida recede from the primacy doctrine. Accordingly, this Court must proceed via a primacy analysis if it is to reconsider *Traylor* in light of *Davis,* as requested by the Petitioner.

The Petitioner's reference to those states that have adopted *Davis* is not helpful in this endeavor. None of the states cited by the Petitioner that have adopted Davis did so independently of a Fifth Amendment analysis. All of the cases cited by the Petitioner that adopted *Davis* were bound to do so under supremacy principles." Art. VI, section 2, U.S. CONST.

Interestingly, some of the courts without a primacy review have gone to great lengths to interpret and distinguish *Davis. See, State v.* Leyva, 906 P.2d 894 (Utah App. 1995); *State v. Long,* 526 N.W.2d 826 n.5 (Wis. App. 1994)[Reserving the state constitutional question for another day.]

States that have declined to adopt Davis have done so under primacy notions: however, they do not provide much insight into the rationale for their decision, other than they intend to provide their citizens greater protection than the federal

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[A] Except, *State v. Bacon, 658* A.2d 54 (Ver. 1994). In *State v. Badger,* 141 Vt. 430, 450 A.2d 336 (1982), Vermont chose to construe the self-incrimination provision of its constitution independently of the federal court's holdings. Nonetheless, *Bacon* was decided without reference to the Vermont constitution.

constitution. See, ***State v. Hoey,*** 881 P.2d 504 (Hawai'i 1994). See also, ***Luallen v. State, 465*** So.2d 672, 676 (Ga. 1996) (Fletcher, Presiding Justice, concurring).

In making the primacy analysis in order to construe the Florida self-incrimination provision, this Court should focus primarily on factors that inhere in our unique state experience, such as the express language of the constitutional provision, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state's own general history, and finally any external influences that may have shaped state law. ***Traylor v. State, 596 So.*** 2d 962. See also, Mary A. Crossley, Note, ***Miranda and the State Constitution: State Courts Take a Stand,*** 39 Vand.L.Rev. 1693 (1986).

In sum, as recognized by the Petitioner, a primacy analysis fundamentally centers on whether the respective state and federal constitutional provisions, as interpreted by their controlling court decisions, foster, protect and are guided by identical policy considerations. The state urges, without citation, support or analysis, that Florida courts and federal courts have been guided by such identical policies. If that was true in the past it is not the present case as an examination of the core policies protected in ***Traylor*** and ***Davis*** amply reveal.[5]

Traylor's primary focus is on the prevention of government

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[5] See, Mary A. Crossley, ***Note, Miranda and the State Constitution: State Courts Take a Stand,*** 39 Vand.L.Rev. 1693 (1986).

overreaching and the protection of individual rights. The *Traylor* decision analyzed the historical development of the Florida Declaration of Rights and observed that the framers of our Constitution deliberately rejected short-term solutions to fighting crime in favor of a fairer more structured system of criminal justice. ***Traylor*** v. ***State, 596*** So.2d ***957, 963*** (Fla. 1992). The Court summed up its beliefs with a quote from ***Bizzell*** **v.** ***State,*** 71 So.2d 735, 738 (Fla. 1954):

> These rights [enumerated in the Declaration of Rights] curtail and restrain the power of the State. It is more important to observe them, even though at times a guilty man may go free, than it is to obtain a conviction by ignoring or violating them. The end does not justify the means. Might is not always right. Under our system of constitutional government, the State should not set the example of violating fundamental rights guaranteed by the Constitution to all citizens in order to obtain a conviction.

Traylor ***v.*** State, 596 So.2d 957, 963-964 (Fla. 1992).

Traylor recognized and adhered to the principle that the state's authority to obtain freely given confessions is not an evil, but an unqualified good. ***Id.*** at 965. Nonetheless the primary focus of Florida's constitutional guarantee is on the protection of the rights of the individual.

In contrast, ***Davis'*** primary focus was the consideration of **"the** other side of the Miranda equation: the need for effective law enforcement." ***Davis v. United States,*** ___U.S. ___, 114 S.Ct. 2350, 129 L.Ed.2d 362, 372 (1994).

An equation is a statement of the equivalence of mathematical or logical expressions. [For a simple example, (Two + Two = Three + One = Seven - Three)]. An equation is a

balancing device.

In Davis a majority of the United State Supreme Court ruled that the protection of the interest of an individual from self-incrimination is equal to the need for effective law enforcement. To facilitate that enforcement the court countenanced the erosion of the rights of all citizens.

Some critics have argued that the equation is unbalanced in favor of facilitating law enforcement efforts.[6] But, at the least, the federal government considers the two interests to be equal.

Such a policy determination is contrary to the historical development of the Declaration of Rights under the Florida constitution. In Florida the rights of police are important but not equal to the rights of the individual. In Florida the rights of the individual are paramount.

Accordingly, the policy considerations addressed by *Traylor* and *Davis* are not the same. State courts in Florida remain free, even after *Davis,* to interpret and enforce the self-incrimination clause of the Florida Constitution to give broader protection than that given by the federal constitution.

It is evident that the *Davis* court strained to achieve its result. The facts of the case reveal it was not necessary for the court to reach the decision that it did in order to resolve the issues in *Davis.* In Davis the defendant made an equivocal request for counsel. ("Maybe I should talk to a lawyer.") The

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[6] *Id.*

interrogator then asked clarifying questions:

> [We m]ade it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, [']No, I'm not asking for a lawyer,' and then he continued on, and said, 'No, I don't want a lawyer.' p.368

The interview then continued for about an hour until Davis then said, "I think I want a lawyer before I say anything else." At that point questioning ceased. *Davis v. United* States, ___U.S. ___, 114 S.Ct. 2350, 129 L.Ed.2d 362, 369 (1994).

A motion to suppress was denied with the trial judge making the unspectacular ruling given the facts of the case that "the mention of a lawyer by [petitioner] during the course of the interrogation [was] not in the form of a request for counsel and ... the agents properly determined that [petitioner] was not indicating a desire for or invoking his right to counsel." *Id,* at 129 L.Ed.2d 369. The trial court decision was twice affirmed on appeal, and the petitioner applied for certiorari to the United States Supreme court. -The court obviously wanted to hear the case given the few petitions for certiorari reviewed that term.

In the *Davis* opinion the Supreme Court noted that state and federal courts have developed three different approaches to a suspect's ambiguous or equivocal request for counsel. Some jurisdictions have held that any mention of counsel, however ambiguous, is sufficient to require that all questioning cease. Others have defined a threshold standard of clarity for invoking

the right to counsel and have held that comments falling short of the threshold do not invoke the right. The third approach permits clarifying questions. ***Id.*** at 129 L.Ed.2d 369.

The trial court in Davis applied the third approach holding that Davis' comment was ambiguous and that the agents properly clarified his wishes before proceeding with the interview.

The Supreme Court granted certiorari in the case to decide on the merits which of the approaches it would follow. Such a determination was unnecessary. The ***Davis*** case could have been affirmed by acknowledging that the procedure used by the agents in asking clarifying questions was acceptable. See, ***Henry v. State,*** 462 S.E.2d 737 (Ga. 1995); ***Cargle v.*** State, 909 P.2d 806 (Okl. Cir. 1995); ***State v. Long,*** 526 N.W.2d 826 (Wis. App. 1994). In all three cases the police actually asked clarifying questions following ambiguous responses. Because the clarifying questions were asked, the courts found it unnecessary to decide whether the police were obligated to ask them. In ***Davis*** the question whether police must ask clarifying questions in the face of an ambiguous invocation should have been saved for another day as that issue was not before the court and was not necessary to resolve the case. See, ***Dobson v. Crews,*** 164 So.2d 252 (Fla. 1st DCA 1964)

Nonetheless, the Supreme Court reached to consider and adopt the "threshold" approach in ***Davis.*** If an invocation of rights against self-incrimination fails to meet the "requisite level of clarity" then officers need not stop questioning a suspect. This theoretical "bright line" test has created an unworkable standard

in the real word, as amply illustrated by viewing the state court experience following the *Davis* decision.

In *Brown v. State, 630* So.2d 481, 484-485 (Ala. Crim. App. 1993) a conviction originally was reversed with the court holding that "regardless whether the appellant's request to speak to his friend, who is an attorney, is considered a clear request or is considered an equivocal request, the investigators' failure to respond to or to clarify that request nonetheless violated the appellant's Fifth Amendment rights." The United States Supreme Court subsequently remanded the case in light of *Davis v. United States.*

On remand a majority of the court of appeal affirmed the conviction finding that the defendant's query to the investigators "Is it going to piss y'all off if I ask for my - to talk to a friend that is an attorney? I mean, I'm going to do whatever I have got to do. Don't get me wrong" was not an unambiguous request for counsel as required by *Davis. Brown v. State,* 668 So.2d 102, 103 (Ala. Crim. App. 1995).

The dissenting opinion found that Brown's statement was sufficient to convey to the police officers interrogating him that he wanted to talk to a lawyer. The dissent noted:

> Once these fear-based qualifying statements from the interrogatee are dealt with, what he is saying is that he wanted to talk to a friend that is an attorney." This is a real-life interrogation and a real-life request for an attorney by an intimidated suspect who is in close confinement and is surrounded by law enforcement officers.

*Id.*at 105 (Taylor, Presiding Judge, dissenting.)

The Brown case then moved to the Alabama Supreme Court which was similarly split on whether Brown's statement could "reasonably [have been] construed to be an expression of a desire for the assistance of an attorney." *Ex Parte* Brown, 668 So.2d 105 (Ala. 1995); quoting *Davis.*

A further example of failure to reach a consensus on the "requisite clarity" of language occurred in *State v. Williams,* 535 N.W.2d 277 (Minn. 1995). During an interrogation the defendant stood up in agitation, shouted "I don't have to take any more of your bullshit," stalked out of the interrogation room and returned to his cell. The majority found this to be an equivocal assertion of rights. A concurring opinion determined the behavior was neither equivocal or unequivocal, but that the defendant was making a time-honored childish statement - "I won't listen to anything more you have to say," not "I want to remain silent." Another judge dissented in part finding that there was nothing equivocal, uncertain, or doubtful in the manner the defendant chose to invoke his right to remain silent.

The police in *Williams* waited five minutes for the defendant to calm down then went to his cell, told him that the victim was expected to live and could identify him, an assertion that was pure speculation, and asked if he would like to tell his side of the story. These certainly were not clarifying questions: but, they were permissible because Williams' comments and actions failed to meet the requisite level of clarity and these real world investigators did not therefore have a bright line they

could not cross.

Finally one more example, in *State v. Eastlack, 883* P.2d 999 (Ariz. 1994) a defendant was answering questions during an interview when a detective asked him "How about the gun?", to which Eastlack remarked, "I think I better talk to a lawyer first." The majority concluded that this remark was not a clear request for an attorney. A concurring opinion disagreed, finding:

> While I can imagine situations involving a police interrogation in which the statement, "I think I better talk to an attorney," might be ambiguous in context, such is not the case here. The words. "I think," are not, as used by most people, all that ambiguous.

1021.

In Davis itself, when the defendant told the police, "I think I want a lawyer before I say anything else," they ceased their questioning immediately. While the Supreme Court was not called on to in *Davis* to consider whether these words were an unequivocal request for counsel, it is interesting that the police apparently understood them as such.

Moreover, the phraseology, "I think I need a lawyer" has long been the subject of interpretive dispute. See, *Long v.* State, 517 So.2d 664, 665-666 (Fla. 1988).

The upshot of these cases is that trained jurists are unable to reach a consensus on whether certain statements are equivocal or unequivocal expressions of the invocation of a constitutional guaranteed right against self-incrimination. Such confusion is understandable given the general lack of precision in our

language and the specific tendency of individuals who feel intimidated or powerless to speak in equivocal or nonstandard terms when no ambiguity or equivocation is meant. See, Davis v. ***United States,*** ___U.S. ___, 114 S.Ct. 2350, 129 L.Ed.2d 362, 378 n.4 (1994)(Souter, J. concurring.)

Davis' "requisite clarity rule" will not work in the real word. The only justification for the rule is that it makes the job of police easier because they do not have to ascertain whether a suspect actually is invoking his or her rights.

The downside of the rule is the likelihood that some suspects who are attempting to invoke their rights will continue to be interrogated and will involuntarily give up those rights. The rule in ***Davis*** in fact guarantees that the constitutional rights of at least some citizens who unartfully demand them will be violated.

Empirically it seems easier to ascertain that a request is ambiguous than that it is unequivocal. Faced with an ambiguous request, what is the harm in asking clarifying questions? As is evident from the suspects' conduct in many cases, Davis included, clarification reveals that many suspects do not want to stop the interrogation or desire the assistance of an attorney. In those cases where clarification reveals the suspect does intend to invoke his rights, the purpose of the constitutional guarantee is protected.

If clarifying questions are not asked, it is an inevitable conclusion that some suspects who intend to exercise their rights

will not be able to do so solely due to an imprecise choice of words. Our constitutional guarantees should not depend on such flimsy protections.

In sum, Florida emphasizes the protection of different policies than does the federal government since Davis. Fighting crime is an important consideration, but it should not be paramount or even equal to the protection of individual liberties. This Court should not adopt the majority position in Davis but should follow the precedent of **Martinez,** *Long,* Owen and Justice Souter's concurring opinion in *Davis,* thus providing greater rights for the citizens of Florida than is present under the federal constitution.

CONCLUSION

The *Kipp* decision does not expressly and directly conflict with ***Traylor.*** In fact the instant decision was based on Traylor. Accordingly, the Court does not have jurisdiction and the Petitio should be dismissed.

Under the facts of the case, the decision was correct even if federal constitutional standards are applied. Kipp never provided an unequivocal waiver before the second interrogation. And, at one point in the interrogation, the detectives unequivocally knew, by their own admission, that Kipp did not want to talk anymore. Their continued questioning violated **Kipp's** rights under either a state or federal analysis.

In any event, Traylor should not be reconsidered. There are differences in the Florida and federal policy concerns. In Florida protection of the rights of the individual is the primary policy concern. Federal law does not recognize the rights of the individual as paramount, instead it places too much weight on the need for effective law enforcement. Moreover, ***Davis*** has created an unworkable standard that guarantees that the rights of some suspects will be violated. This Court should not adopt *Davis*.

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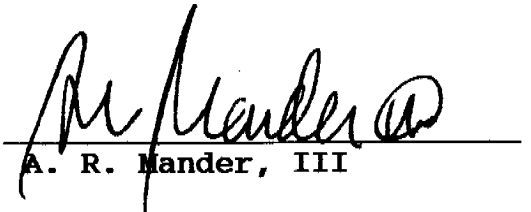
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Jurisdictional Brief has been furnished to the Attorney General's Office, Robert J. Krauss and John M. Klawikofsky, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607-2366, by regular U.S. mail delivery on June 24, 1996.



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