

Nova Law Review

Volume 22, Issue 1

1997

Article 11

An Equivocal Invocation of One's Right to Remain Silent Will Not Cease Police Interrogation in Florida Anymore in Light of the Florida Supreme Court's Decision in State of Florida v. Owen

Beth Connolly*

*

Copyright ©1997 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

An Equivocal Invocation of One's Right to Remain Silent Will Not Cease Police Interrogation in Florida Anymore in Light of the Florida Supreme Court's Decision in *State of Florida v. Owen*

TABLE OF CONTENTS

I. INTRODUCTION	459
II. AN OVERVIEW OF THE RIGHTS OF THE ACCUSED FLORIDIAN WITH RESPECT TO CONFESSION LAW	460
A. <i>Constitutional Protections</i>	460
B. <i>Procedural Prophylactic Protections</i>	461
III. THE FACTUAL SITUATION OF <i>OWEN V. STATE</i>	462
IV. PROCEDURAL POSTURE OF <i>OWEN V. STATE</i>	464
V. THE APPELLANT STATE URGES THE COURT TO ANSWER THE CERTIFIED QUESTION IN THE AFFIRMATIVE.....	466
VI. THE APPELLEE OWEN URGES THE COURT TO ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE	470
VII. JUSTICE GRIMES, WRITING FOR THE MAJORITY OPINION, ANSWERS THE CERTIFIED QUESTION IN THE AFFIRMATIVE.....	474
VIII. SHAW'S CONCURRING OPINION: WHAT IS "CLEARLY?"	477
IX. JUSTICE KOGAN'S DISSENT STATING THAT HE WOULD ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE	479
X. CONCLUSION.....	483

I. INTRODUCTION

Historically, in Florida, interrogating officers were required to cease all questions other than those to clarify the suspect's wishes pursuant to a suspect's equivocal invocation of the right to remain silent.¹ However, after the Supreme Court of Florida's recent decision in *State v. Owen*,² and in light of the United States Supreme Court decision in *United States v. Davis*,³ that is no longer the case. Now, a suspect in Florida must clearly and

1. See *Traylor v. State*, 596 So. 2d 957, 966 (Fla. 1992).

2. 696 So. 2d 715 (Fla. 1997).

3. 512 U.S. 452 (1994).

unequivocally invoke his right to remain silent.⁴ Following anything less than an unambiguous invocation of one's rights, police officers are no longer required to ask only clarifying questions but rather can proceed with their interrogation.⁵

This comment will discuss both the prior and current state of confession law in Florida. It will also address the impact the *Davis* decision had on *Owen*, as well as the impact *Owen* will have on the handling of equivocal invocations of one's rights in Florida. Part II will give some background on both the constitutional and procedural protections afforded a suspect in Florida. Part III will address the factual situation of *Owen*. Part IV will deal with the procedural posture of the case. The initial brief of the Appellant State in *Owen* will be analyzed in Part V. Part VI will focus on the brief that the Appellee, Owen, submitted to the Supreme Court of Florida. The decision of *State v. Owen* will be discussed in Parts VII-BIX; beginning with the Grimes majority's and continuing with Justice Shaw's concurring opinion and Justice Kogan's dissent, respectively. Part X will conclude that the failure to require clarifying questions upon an ambiguous invocation of one's right to remain silent, coupled with the application of a reasonable person test, will best serve the State of Florida as a whole.

II. AN OVERVIEW OF THE RIGHTS OF THE ACCUSED FLORIDIAN WITH RESPECT TO CONFESSION LAW

A. *Constitutional Protections*

The Fifth and Sixth Amendments of the United States Constitution afford accused individuals due process of the law.⁶ The Fifth Amendment provides, *inter alia*, that in a criminal case no individual be compelled to be a witness against himself.⁷ The Sixth Amendment affords the accused with, among other things, the right to the assistance of counsel.⁸ Article I, Sections 9 and 16 of the Florida Constitution mirror the United States Constitution's Fifth and Sixth Amendments, respectively. Article I Section 9 provides A[n]o person shall . . . be compelled in any criminal matter to be a witness against himself,"⁹ much like the Fifth Amendment's right against

4. *Owen*, 696 So. 2d at 718.

5. *Id.*

6. U.S. CONST. amend. VI.

7. U.S. CONST. amend. V.

8. *Id.*

9. FLA. CONST. art. I, § 9.

self-incrimination.¹⁰ Likewise, Article I Section 16 of the Florida Constitution reiterates the protection afforded by the Sixth Amendment, providing “[i]n all criminal prosecutions the accused . . . shall have the right . . . to be heard in person, by counsel or both . . .”¹¹

B. *Procedural Prophylactic Protections*

Federal case law has spawned protections beyond those provided by the Fifth and Sixth Amendments of the United States Constitution. The most noteworthy of these are the *Miranda v. State of Arizona* rule¹² and the *Edwards v. State of Arizona* rule.¹³ In *Miranda*, the United States Supreme Court decided that in order to honor an accused’s Fifth Amendment right against self-incrimination, specific guidelines must be followed.¹⁴ The court required:

Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he 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.¹⁵

In *Edwards v. State of Arizona*, the Court expanded on the *Miranda* rule. In *Edwards*, the Court held:

[A]dditional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights [A]n accused . . . having expressed his desire to deal with the police only through counsel, is

10. U.S. CONST. amend. V.

11. See FLA. CONST. art. I, § 9 and § 16(a), respectively.

12. 384 U.S. 436 (1966).

13. 451 U.S. 477 (1981).

14. *Miranda*, 384 U.S. at 445.

15. *Id.*

not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.¹⁶

Much like the adherence to the principles of the Federal Constitution by the drafters of the Florida Constitution, Florida courts have reiterated the procedural rules of both *Miranda* and *Edwards*. In *Traylor v. State*,¹⁷ the Supreme Court of Florida refers to *Miranda* and its progeny, holding:

[T]o 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.

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. If the suspect indicates in any manner that he or she wants the help of a lawyer, interrogation must not begin until a lawyer has been appointed and is present or, if it has already begun, must immediately stop until a lawyer is present. Once a suspect has requested the help of a lawyer, no state agent can reinitiate interrogation on any offense throughout the period of custody unless the lawyer is present, although the suspect is free to volunteer a statement to police on his or her own initiative at any time on any subject in the absence of counsel.¹⁸

III. THE FACTUAL SITUATION OF *OWEN V. STATE*

In May 1984, Duane Owen was apprehended by the Boca Raton police and identified as a burglary suspect.¹⁹ Owen was found to have many outstanding warrants and, while in custody, initiated contact with the Boca Raton police to expound upon his role in some of the charges he faced; burglaries, sexual batteries, and murders in both Boca Raton and Delray Beach.²⁰

16. *Edwards*, 451 U.S. at 484-85 (citations omitted).

17. *Traylor*, 596 So. 2d at 957.

18. *Id.* at 965-66 (footnotes omitted).

19. *Owen v. State*, 560 So. 2d 207, 209 (Fla. 1990).

20. *Id.*

Throughout the questioning, Owen was made aware of his rights under *Miranda* and specifically renounced his desire for an attorney, but he requested the presence of a familiar Delray police officer, Officer Woods.²¹ The interrogation of Owen was plagued with his confessions of crimes, followed by a refusal to talk and, ultimately, his initiating contact with the officers to talk again.²² On about June 18, 1984, Owen contacted police and confessed to committing a burglary, sexual battery, and murder in Boca Raton on May 29, 1984.²³ Owen's confessions revealed that his method of operation in these crimes was to remove his clothing, burglarize, and usually, after subduing his victim into an unconscious state, sexually assault the individual.²⁴

On June 21, 1984, Delray Beach police obtained an inked impression of Owen's footprint, in connection with the March 24, 1984 slaying of a fourteen year old babysitter in Delray.²⁵ The victim, who was last heard from at about ten o'clock that evening, was found to have been sexually assaulted and murdered as a result of multiple stab wounds.²⁶ Investigators discovered a bloody footprint at the scene of the murder.²⁷ Delray police presented Owen with both the inked footprint and the bloody footprint from the crime scene.²⁸ The following is an excerpt of the interrogation between Officer Rick Lincoln of the Boca Raton police force, Officer Mark Woods of the Delray Beach Police Department, and Duane Owen:

OFFICER LINCOLN: Cthat I have to know, Duane. A couple pieces of the puzzle don't fit. How did it come down? Were you looking at that particular house or just going through the neighborhood?

THE DEFENDANT [OWEN]: I'd rather not talk about it.

OFFICER WOODS: Why?

OFFICER LINCOLN: Why? You don't have to tell me about the details if you don't want to if you don't feel comfortable about that. Was it just a random thing? Or did you have this house picked out. That's what I'm most curious about. Things happen, Duane. We can't change them once they're done.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Owen*, 560 So. 2d at 210.

25. *Id.*

26. *Id.* at 209.

27. *Id.* at 210.

28. *Id.*

THE DEFENDANT [OWEN]: No.²⁹

After further questioning, Owen stated that he had never been at that house before.³⁰ The officers then went on to ask Owen some other questions regarding a bicycle:

THE DEFENDANT [OWEN]: How do you know I even had a bike? You don't even know that.

OFFICER LINCOLN: You tell me you didn't have a bicycle. See, you won't lie, Duane. I know you won't lie when you are confronted with the truth. Now, are you going to tell me you didn't have a bicycle? I know that much about you now. You play by the rules. Those rules are important. We all need rules. Now did you have a bicycle? Of course, you did. Now, where did you put it?

THE DEFENDANT [OWEN]: I don't want to talk about it.

...

OFFICER LINCOLN: I won't make you tell me something you're not comfortable in talking about, Duane. But I do want to know some of the things that shouldn't hurt that much to talk about. What you did with the bicycle? How long you were outside the house? Those kinds of things. I know what you're reluctant to talk about and I won't press you on that.

THE DEFENDANT [OWEN]: I don't see what them kind of things got to do with it anyway.

OFFICER LINCOLN: It's all part of the crime, Duane.³¹

Owen initially denied involvement in the March 24 murder, but later confessed to the crime.³²

IV. PROCEDURAL POSTURE OF *OWEN V. STATE*

Duane Eugene Owen was charged, tried, convicted, and sentenced to death in the Circuit Court of Palm Beach County, for burglary, sexual battery, and the first degree murder of a fourteen-year-old Delray Beach babysitter.³³

29. *Owen*, 560 So. 2d at 215 (Grimes, J., dissenting).

30. Answer Brief of Appellee at 55, *Owen* (No. 85,781); *see also* State v. Owen, 696 So. 2d 715 (Fla. 1997).

31. *Owen*, 560 So. 2d at 215-16 (Grimes, J., dissenting).

32. *Id.* at 210.

33. *Id.* at 209.

Owen's conviction was primarily based on statements of a confession given to police during custodial interrogation.³⁴ Owen appealed his conviction, contending that the confession was inadmissible due to "(1) . . . improper . . . coercion [by police officers] in violation of his fifth amendment right to remain silent," and (2) violation of his *Miranda* rights due to continued questioning after invocation of his right to end the interrogation.³⁵ The Supreme Court of Florida reversed Owen's conviction, based on his second contention regarding violation of his *Miranda* rights, and remanded the case for retrial.³⁶ The court held that statements made by Owen during interrogation such as "I'd rather not talk about it" and "I don't want to talk about it," were "at the least, an equivocal invocation of the *Miranda* right to terminate questioning, which could only be clarified. It was error for the police to urge appellant to continue his statement."³⁷

Prior to Owen's retrial, the United States Supreme Court decided *Davis v. United States*.³⁸ In *Davis*, the Court held that:

After a knowing and voluntary waiver of rights under *Miranda v. Arizona*, . . . law enforcement officers may continue questioning until and unless a suspect clearly requests an attorney [I]f a reference is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, *Edwards* does not require that officers stop questioning the suspect.³⁹

In light of *Davis*' clarification of *Miranda*, the State filed a motion in the Circuit Court of Palm Beach County to reconsider the admissibility of Owen's confession.⁴⁰ The circuit court held the confession inadmissible.⁴¹ The State then sought certiorari review by the Fourth District Court of Appeal of Florida. This too, was denied, but the district court certified the following question to the Supreme Court of Florida:

DO THE PRINCIPLES ANNOUNCED BY THE UNITED STATES SUPREME COURT IN *DAVIS* APPLY TO THE

34. *Id.* at 210.

35. *Id.*

36. *Owen*, 560 So. 2d at 211-12; *see also* *State v. Owen*, 654 So. 2d 200 (Fla. 4th Dist. Ct. App. 1995).

37. *Owen*, 560 So. 2d at 211.

38. 512 U.S. 452 (1994).

39. *Id.* at 452 (citation omitted).

40. *Owen*, 654 So. 2d at 201.

41. *Id.*

ADMISSIBILITY OF CONFESSIONS IN FLORIDA, IN LIGHT
OF TRAYLOR?⁴²

V. THE APPELLANT STATE URGES THE COURT TO ANSWER THE CERTIFIED
QUESTION IN THE AFFIRMATIVE

The State in its initial brief asked the Supreme Court of Florida to answer the certified question in the affirmative.⁴³ The State's first contention that the certified question should have been answered in the affirmative was that *Traylor v. State*⁴⁴ should not apply to the instant case.⁴⁵ The State relied on the fact that *Owen* was initially decided based on the Florida Supreme Court's interpretation of the federal *Miranda* rule, and not on either the United States or Florida Constitution.⁴⁶ Therefore, in light of the limitation placed on the *Miranda* rule by the United States Supreme Court's finding in *Davis*, those findings should be applied to *Owen*'s case.⁴⁷

Here, the State distinguished *Owen* from the two cases relied on by respondent: *Haliburton v. State*⁴⁸ and *Traylor v. State*.⁴⁹ The State contended that both *Haliburton* and *Traylor* dealt with whether the suspects' confessions were voluntary as required by both the Fifth Amendment and the state constitution.⁵⁰ In both the original trial and on remand from the United States Supreme Court, the Supreme Court of Florida in *Haliburton* held the defendant's confession to be involuntary due to a violation of state law.⁵¹

The State argued that *Traylor*, too, was distinguishable from *Owen* because it also dealt with whether the defendant's confession was voluntary on constitutional grounds and thereby admissible.⁵² Conversely, *Owen*'s confession was considered voluntary and not in violation of the Fifth

42. *Id.* at 202; see also *Owen*, 696 So. 2d at 716.

43. Initial Brief of Appellant at 5, *State v. Owen*, 696 So. 2d 715 (Fla. 1997) (No. 85,781).

44. 596 So. 2d 957 (Fla. 1992).

45. Initial Brief of Appellant at 6, *Owen* (No. 85,781).

46. *Id.* at 4.

47. *Id.*

48. 476 So. 2d 194 (Fla. 1985).

49. 596 So. 2d 957 (Fla. 1992).

50. Initial Brief of Appellant at 7, *Owen* (No. 85,781).

51. *Id.* (citing *Haliburton v. State*, 514 So. 2d 1088 (Fla. 1987) and *Haliburton v. State*, 476 So. 2d 192 (Fla. 1985)) (involving a defendant who was not informed prior to questioning that his sister had hired an attorney who wanted to see him).

52. *Id.* at 8 (citing *Traylor v. State*, 596 So. 2d 957 (Fla. 1992)). In *Traylor*, the court analyzed the defendant's state rights under Article I, Section 9 of the Florida Constitution and Federal Constitutional Fifth Amendment rights against self incrimination. *Traylor v. State*, 596 So. 2d 957, 960 (Fla. 1992).

Amendment, but the court found the confession violated Owen's *Miranda* rights.⁵³ Here, the State differentiated between cases involving constitutional violations, like *Traylor* and *Haliburton*, and those non constitutional rules intended to prevent violation of one's Fifth Amendment or state constitutional right against self-incrimination, such as *Miranda*. The State emphasized that *Miranda* warnings function to prevent coercion but are not protected by the Constitution.⁵⁴ The State reiterated that pursuant to *Davis*, the *Traylor* rationale is inapplicable to the admissibility of Owen's confession which involved a violation of *Miranda* rights.⁵⁵ To bolster recognition of the distinction drawn by the State, the appellant referred the court to the similarity between the instant case and other decisions made by or relied on by this same court.⁵⁶ Also, the State pointed out instances of where the court refused to intertwine the violation of a constitutional right rationale with cases involving the violation of prophylactic rules such as *Miranda* and *Edwards*.⁵⁷

In *State v. Craig*,⁵⁸ the Supreme Court of Florida addressed the issue of whether the defendant was given adequate *Miranda* warnings and whether he had in fact waived his right to counsel.⁵⁹ The State noted the similarity of the issue in *Craig* to the issue in Owen's case—the manner in which a defendant invokes his right to remain silent.⁶⁰ The State then proceeded to remind the court of its own rationale in both the instant case and in *Craig*.⁶¹ The court in these cases noted the distinction between issues of voluntariness of confessions and issues of proper *Miranda* warnings and a defendant's invocation or waiver of his right to remain silent.⁶² As willing as the court was to differentiate between such issues, the State emphasized the court's reluctance to apply *Craig* to *Haliburton*.⁶³ Here, it seems the State attempted to show that this

53. Initial Brief of Appellant at 7, *Owen* (No. 85,781).

54. *Id.* at 8 (citing *Brown v. State*, 565 So. 2d 304, 306 (Fla. 1990); *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989); and *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)).

55. *Id.*

56. *Id.* at 9.

57. Initial Brief of Appellant at 9, *Owen* (No. 85,781).

58. 237 So. 2d 737 (Fla. 1970).

59. *Id.* at 738.

60. Initial Brief of Appellant at 9, *Owen* (No. 85,781).

61. *Id.*

62. *Id.* Appellant cited to *Owen*, where the court stated that "the confession was entirely voluntary under the fifth amendment and that no improper coercion was employed." *Owen*, 560 So. 2d at 210. Yet, the court went on to add: "Owen next argues that even if the confession was voluntary under the fifth amendment, it was nevertheless obtained in violation of the procedural rules of *Miranda*. On this point, we agree." *Id.*

63. *Haliburton*, 476 So. 2d at 194.

court's refusal to extend *Craig* to *Haliburton*⁶⁴ was analogous to their argument that *Traylor* should not apply to *Owen* since *Traylor* and *Haliburton* function as issues based on constitutional law and *Owen* and *Craig* were based on federal rules of procedure.⁶⁵

The State further noted that the court, in first finding *Owen*'s confession to be inadmissible, relied *Asolely on federal authority*⁶⁶ in determining that only clarifying questions may follow an ambiguous invocation of one's right to remain silent.⁶⁷ The State referred to the court's reliance in *Owen* on previous interpretations of the *Edwards* rule.⁶⁸ The court specifically followed and cited *Long v. State*⁶⁹ which interpreted *Edwards* as requiring all questioning, other than questions to clarify the defendant's equivocal response, cease even after an equivocal invocation of *Miranda* rights.⁷⁰ Noting that the court felt bound to apply *Long* to find *Owen*'s confession inadmissible, the State relied on *Davis*' interpretation of the *Edwards* rule to now compel the court to find *Owen*'s confession admissible.⁷¹ Appellant State further reasoned that the court should answer the certified question in the affirmative, stating *A United States v. Davis* should apply in Florida and in the instant case.⁷²

64. Initial Brief of Appellant at 9, *Owen* (No. 85,781). Appellant quoted *Haliburton*:
The state argues that we should find appellant's waiver valid under our decision in *State v. Craig*. We are unpersuaded . . . as the issues before us in *Craig* were the adequacy of the preinterrogation warnings to inform the defendant of his right to consult with an attorney and have the attorney with him during interrogation and *the manner in which the defendant expressed his desire to waive counsel*.

Id. (quoting *Haliburton v. State*, 476 So. 2d 192, 194 (Fla. 1985)).

65. Initial Brief of Appellant at 9, *Owen* (No. 85,781).

66. *Id.* at 10.

67. *Id.* Petitioner noted that the court was referencing *Long v. State*, 517 So. 2d 664 (Fla. 1987).

68. *Owen*, 560 So. 2d at 210.

69. 517 So. 2d 664 (Fla. 1988).

70. Initial Brief of Appellant at 10, *Owen* (No. 85,781). Appellant cited to *Long*, where the court held:

We are bound by the United States Supreme Court decisions in *Miranda* [and] *Edwards* . . . which we conclude mandate suppression of *Long*'s confession. Without this equivocal request for counsel, we would find this confession voluntary and admissible. *Miranda* and *Edwards*, however, establish a bright line test that controls this case and requires suppression of the confession.

Long, 517 So. 2d at 667.

71. Initial Brief of Appellant at 11, *Owen* (No. 85,781).

72. *Id.* at 12.

The State correlated the holding and rationale of the *Davis* decision in not expanding the *Edwards* rule to the reasons why the Supreme Court of Florida should not expand on its equivalent interpretation of the *Edwards* rule.⁷³ In *Davis*, with regard to the equivocal invocation of one's *Miranda* rights, the court held: "[w]e 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."⁷⁴

The Court in *Davis* acknowledged a lack of uniform standards among the lower courts in applying *Edwards* to equivocal requests and, with its decision in that case, attempted to maintain the bright-line standard for police interrogations.⁷⁵ The State emphasized the Supreme Court of Florida's prior announcement of its need for maintaining the bright-line standard as well.⁷⁶ The State expounded by illustrating the similarities between Florida courts adopting the *Miranda* and *Edwards* rules almost verbatim pursuant to Article I, Sections 9 and 16 of the Florida Constitution.⁷⁷ Summing up, the State noted that "[i]n light of the fact that Florida and federal courts have been guided by identical policy considerations, this Court should adopt the rationale and rule of *Davis*. In other words, this Court should apply its pre-*Edwards* analysis in *Craig*."⁷⁸

A third reason given by the Appellant as to why the certified question should be answered in the affirmative was that "[t]he doctrine of law of the case should not bar application of *Davis* to the instant case."⁷⁹ The doctrine of the law of the case means "all questions of law which have been decided by the highest appellate court become the law of the case which, except in extraordinary circumstances, must be followed in subsequent proceedings,

73. *Id.*

74. *Id.* (quoting *Davis v. United States*, 512 U.S. 452, 461-62 (1994)). The *Davis* court went on to reiterate that decision's effect on the longstanding rules in *Miranda* and *Edwards*:

We held in *Miranda* that a suspect is entitled to the assistance of counsel during custodial interrogation even though the Constitution does not provide for such assistance. We held in *Edwards* that if a suspect invokes the right to counsel at anytime, the police must immediately cease questioning him until an attorney is present. But we are unwilling to create a third layer of prophylaxis to prevent police questioning when a suspect *might* want a lawyer.

Davis v. United States, 512 U.S. 452, 462 (1994).

75. Initial Brief of Appellant at 12-13, *Owen* (No. 85,781) (citing *Davis v. United States*, 512 U.S. 452, 462 (1994)).

76. *Id.* at 14-15 (citing *Traylor v. State*, 596 So. 2d 957, 966 (Fla. 1992)).

77. *Id.* at 15-16.

78. *Id.* at 17.

79. *Id.* at 20.

both in the lower and appellate courts.”⁸⁰ Exceptions to this doctrine can be made when “adherence to the rule would result in ‘manifest injustice.’”⁸¹ In urging the court to apply *Davis* in an exception to the law of the case doctrine, the State equated the case history of *Brunner Enterprises, Inc. v. Department of Revenue* with the case history of *Owen*.⁸² While *Brunner* was on remand, the United States Supreme Court delivered an opinion that directly contradicted the state court’s decision in *Brunner*.⁸³ In *Brunner*, exceptional circumstances were found, and the law of the case doctrine dispensed with it.⁸⁴

The State, in an attempt to persuade the court to do the same in the instant case, emphasized fairness to the State in their pursuit of justice,⁸⁵ a non prejudicial effect on the defendant,⁸⁶ and the chance to remedy the erroneous interpretation of the federal rule.⁸⁷ The State even went on to give accolades to Justice Grimes’ dissent and Justice Ehrlich’s concurrence in which they reject the notion that questioning must cease upon an equivocal invocation of *Miranda* rights.⁸⁸

VI. THE APPELLEE OWEN URGES THE COURT TO ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE

First, Owen argued that the “law of the case” doctrine should not be used as grounds for altering the previous decision of this court.⁸⁹ Owen, like the State, cited to *Brunner* but distinguished his case from that of *Brunner*.⁹⁰ Owen relied on the court’s opinion in *Brunner*, stating “no party is entitled as

80. *Brunner Enter., Inc. v. Department of Revenue*, 452 So. 2d 550, 552 (Fla. 1984).

81. *Id.* at 552-53 (citing *Strazzulla v. Hendrick*, 177 So. 2d 1, 4 (Fla. 1965)).

82. Initial Brief of Appellant at 21, *Owen* (No. 85,781).

83. *Id.* (citing *Brunner Enter., Inc. v. Department of Revenue*, 452 So. 2d 550, 552 (Fla. 1984)). *Brunner* involved a decision that out-of-state stock sold by a foreign corporation could be taxed in Florida.

84. *Id.* (citing *Brunner Enter., Inc. v. Department of Revenue*, 452 So. 2d 550 (Fla. 1984)).

85. *Id.* The State specifically said, “[p]reclusion of critical inculpatory evidence based on an erroneous legal ruling would be a manifest injustice and would result in a total miscarriage of justice.” *Id.* at 22.

86. Initial Brief of Appellant at 21, *Owen* (No. 85,781). The State claimed “[t]he defendant is in no different circumstance than he was during pendency of the direct appeal.” *Id.*

87. *Id.* at 22. Appellant stated: “[t]he continued adherence to a federal rule that does not even exist does nothing to protect or uphold any state or federal constitutional right. The doctrine of law of the case should not be used to perpetuate this costly error.” *Id.*

88. *Id.* (citing *Owen v. State*, 560 So. 2d 207, 216 (Fla. 1990)).

89. Answer Brief of Appellee at 11, *Owen* (No. 85,781). *Id.*

90. *Id.*

a matter of right to have the law of the case reconsidered, and a change in the law of the case should only be made in those situations where strict adherence to the rule would result in 'manifest injustice.'"⁹¹

While practically using the same quote as the State did in their brief,⁹² Owen urged that the present case is not one of those exceptional situations, as was *Brunner*.⁹³ Owen rejected the correlation between *Brunner* and *Owen*, in that the intervening decisions by the United States Supreme Court warrant different results.⁹⁴ He stated: "[s]pecifically, contrary to the situation in *Brunner*, *Davis* does not alter the law in Florida nor is it clearly applicable to the facts of this case."⁹⁵

Owen urged that there were three differences that should make *Davis* inapplicable in the present case.⁹⁶ First, *Davis* concerned the equivocal invocation of one's right to counsel, whereas *Owen* involved the defendant's right to have questioning cease upon his statement "I'd rather not talk about it."⁹⁷ Second, the Appellee used dicta from the *Davis* case⁹⁸ to support their notion that when a defendant's request seems ambiguous, the clarification approach is best.⁹⁹ Finally, Owen provided that the established law in Florida is that once a suspect indicates in any manner that he does not want questioning to continue, the questioning must cease at once.¹⁰⁰

The Appellee felt the *Davis* decision in no way altered the law based on Article I, Section 9, of the Florida Constitution and, therefore, the law of the case should not be reconsidered.¹⁰¹ Ironically, in light of how the Supreme Court of Florida actually answered the affirmative question posed to them in the instant case, Owen argued that the only way the law of the case should be changed was if the court were to conclude: "(1) *Davis* applies with equal force

91. *Id.* at 12 (quoting *Brunner Enter., Inc. v. Department of Revenue*, 452 So. 2d 550, 552-53 (Fla. 1984) (citations omitted)).

92. See Initial Brief of Appellant at 21, *Owen* (No. 85,781) where the State said, "[t]he [S]tate asserts that strict adherence to the erroneous ruling would result in 'manifest injustice.'" *Id.*

93. Answer Brief of Appellee at 12, *Owen* (No. 85,781).

94. *Id.* Appellee referred to *Asarco Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982). *Asarco* was the case whose decision directly contradicted the outcome of *Brunner*, while *Davis* is the related case decided prior to Owen's retrial.

95. Answer Brief of Appellee at 12, *Owen* (No. 85,781).

96. *Id.* at 13.

97. *Id.*

98. See *Davis v. United States*, 512 U.S. 452, 461 (1994). The Court said that often clarifying questions will be good police practice in determining whether a right to counsel is being invoked. *Id.*

99. Answer Brief of Appellee at 14, *Owen* (No. 85,781).

100. *Id.* at 15. Appellee was referring to *Traylor v. State*, 596 So. 2d 957 (Fla. 1992).

101. Answer Brief of Appellee at 15, *Owen* (No. 85,781).

to the right to remain silent and to terminate questioning; (2) the statements ‘I’d rather not talk about it.’ and ‘I don’t want to talk about it.’ are equivocal; [and] (3) the Florida Constitution should be interpreted consistent with *Davis*.¹⁰²

Owen’s next argument was one the State chose not to dissect: that Owen’s statements “I’d rather not talk about it” and “I don’t want to talk about it” were only equivocal invocations of his right to remain silent.¹⁰³ On direct appeal the court held that Owen’s “responses were, at the least, an equivocal indication of the *Miranda* right to terminate questioning.”¹⁰⁴ Appellee continued on to identify the court’s earlier interpretation of an equivocal response in *Long v. State* quoting: “[w]hen a person expresses both a desire for counsel and a desire to continue the interview without counsel, further inquiry is limited.”¹⁰⁵

Appellee defined Owen’s statements as courteous, clear, and unequivocal expressions of his right to remain silent.¹⁰⁶ Appellee blasted the further questioning by Officers Woods and Lincoln as clearly violative of Owen’s *Miranda*¹⁰⁷ rights, stating they badgered, cajoled,¹⁰⁸ and “pressed him to talk.”¹⁰⁹

Owen referred to *Miranda* and its progeny¹¹⁰ as standing for the essential principle that the defendant has the right to terminate questioning by indicating his right to remain silent in any manner and at any point in the interrogation,¹¹¹ and that this right be meticulously upheld by the police.¹¹² On this point, Appellee concluded Owen’s statements were not ambiguous and, since they dealt with his right to remain silent rather than his right to counsel, *Davis*

102. *Id.*

103. *Id.*

104. *Owen*, 560 So. 2d at 211.

105. *Long v. State*, 517 So. 2d 644, 667 (Fla. 1987) (citations omitted); *see also* Answer Brief of Appellee at 16, *Owen* (No. 85,781).

106. Answer Brief of Appellee at 17, *Owen* (No. 85,781). Appellee said “[t]here is no part of ‘I’d rather not talk about it’ that expresses the desire to continue to answer questions” and “‘I don’t want to talk about it’ is unequivocal.” *Id.*

107. *See Miranda v. Arizona*, 384 U.S. 436, 479 (1966). In *Miranda* the Court held the defendant’s right to terminate questioning must be scrupulously honored.” *Id.*

108. Answer Brief of Appellee at 17, *Owen* (No. 85,781).

109. *Id.* at 16 (quoting *Owen v. State*, 560 So. 2d 207, 211 (Fla. 1990)).

110. *See Michigan v. Mosley*, 423 U.S. 96 (1975).

111. *Id.* at 103-04. The Court held that the suspect Acontrol[s] the time at which questioning occurs, the subjects discussed, and the duration of the interrogation.” *Id.* The Court also provided that the interrogation must cease when the suspect indicates in any manner his right to remain silent. *Id.* at 101-02.

112. *See Miranda*, 384 U.S. at 479, where the Court found the defendant’s invocation of right to cut off questioning must be scrupulously honored.” *Id.*

should not apply and Owen's confession should remain inadmissible.¹¹³ Appellee's last argument importuned the court to uphold their earlier decision in relying solely on the Florida Constitution as the governing law of the case.¹¹⁴ As stated above, Article I, Section 9 of the Florida Constitution mirrors the Fifth Amendment provision against self-incrimination.¹¹⁵ Owen relied mainly on the court's decision in *Traylor v. State*, in bolstering his position that Florida law serves as an independent basis for the court's decision:¹¹⁶ "when called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state constitution and to give independent legal import to every phrase and clause contained therein."¹¹⁷

Next, Appellee focused on the similarities between how this court decided *Haliburton v. State*, on remand in light of the United States Supreme Court's intervening decision in *Moran v. Burbine*,¹¹⁸ and the present case and its relationship to the United States Supreme Court's *Davis*¹¹⁹ decision.¹²⁰ In *Haliburton*, the defendant was not told prior to police interrogation that his family had hired an attorney to represent him, in violation of his rights.¹²¹ While pending retrial, the United States Supreme Court decided *Moran* holding that questioning is to end only upon the defendant specifically requesting an attorney.¹²² Just like the instant case, the Supreme Court of Florida had the opportunity to reconsider the *Haliburton* decision in light of *Burbine*.¹²³ In choosing to rely solely on the Florida Constitution the Supreme Court of Florida rejected the United States Supreme Court's narrower interpretation in *Burbine*, and again held the confession inadmissible as it violated Article I, Section 9 of the Florida Constitution.¹²⁴ Correlating the decision in *Haliburton* with the instant case, Appellee urged the court to apply Florida law and reject *Davis*' narrow interpretation of a defendant's proper invocation of his right to remain silent.¹²⁵

113. Answer Brief of Appellee at 28, *Owen* (No. 85,781).

114. *Id.*

115. Article I, Section 9 of the Florida Constitution provides, "[n]o person shall . . . be compelled in any criminal matter to be a witness against himself." *Id.*

116. Answer Brief of Appellee at 29, *Owen* (No. 85,781).

117. *Id.* (quoting *Traylor v. State*, 596 So. 2d 957, 962 (Fla. 1992)).

118. 475 U.S. 412 (1986).

119. 512 U.S. 452 (1994).

120. Answer Brief of Appellee at 30, *Owen* (No. 85,781).

121. *Haliburton*, 476 So. 2d at 192.

122. Answer Brief of Appellee at 30, *Owen* (No. 85,781) (citing *Moran v. Burbine*, 475 U.S. 412 (1986)).

123. *Id.*

124. *Id.*

125. *Id.* at 31.

VII. JUSTICE GRIMES, WRITING FOR THE MAJORITY OPINION, ANSWERS
THE CERTIFIED QUESTION IN THE AFFIRMATIVE

Justice Grimes and the majority began with a recapitulation of the facts and procedural posture of Duane Owen's case.¹²⁶ The justices emphasized the case against Owen was primarily based on his confession given to Officers Lincoln and Woods.¹²⁷ They also reiterated the court's finding on direct appeal, stating that although Owen's confession was voluntary under the Fifth Amendment, it was nonetheless obtained in violation of his *Miranda* rights.¹²⁸ The major factors of the earlier decision were ambiguous responses given by Owen to questions¹²⁹ the Supreme Court of Florida characterized as "relatively insignificant" details of the crime which amounted to "at the least, an equivocal invocation of the *Miranda* right to terminate questioning."¹³⁰ Another point the Grimes group highlighted was that the court's earlier decision was, as the Appellant's brief argued, based solely on a previous interpretation of federal rule: interrogation, other than clarifying questions, must cease upon a suspect's equivocal invocation of his *Miranda* rights.¹³¹ This procedure was not followed by Officers Woods and Lincoln in obtaining the inculpatory statements made by Owen, so the confession was ruled inadmissible, and the trial court decision reversed because the court was unable to find admitting the confession to be harmless error.¹³² Next, the majority discussed how the supervening decision in *Davis*,¹³³ which concerned equivocal invocation of one's right to counsel, related to the instant case, which concerned equivocal invocation of one's right to remain silent.¹³⁴ As if in direct response to appellee's brief,¹³⁵ the court held that the *Davis* rule

126. *State v. Owen*, 696 So. 2d 715, 717 (Fla. 1997).

127. *Id.* at 717.

128. *Id.*

129. *See Owen*, 560 So. 2d at 215. Owen was asked by Officer Lincoln a number of times if he had ever been to the house before, to which Owen finally replied "I don't want to talk about it." Also, Owen was asked if he had been scoping out that particular house to rob and he responded with "I'd rather not talk about it." Officer Lincoln also asked Owen questions regarding if he had a bicycle with him the night he committed the crime and where was the bike now. To that, too, Owen responded with "I don't want to talk about it." *Id.*

130. *Id.* at 211.

131. *Owen*, 696 So. 2d at 717.

132. *Id.*

133. 512 U.S. 452 (1994). In *Davis*, the Court held, police can continue an interrogation beyond clarifying questions until the suspect makes a clear and unequivocal request for counsel. *Id.*

134. *Owen*, 696 So. 2d at 717.

135. *See Answer Brief of Appellee at 15, Owen* (No. 85,781). Appellee made a statement that in order for *Davis* to apply to the present case, the court will have to conclude

applies to a suspect's right to remain silent and determined Owen's confession to be admissible.¹³⁶

In support of their finding, the court cited to two cases from the Eleventh Circuit Court of Appeals: *Coleman v. Singletary*¹³⁷ and *Martin v. Wainwright*.¹³⁸ In *Coleman*, the court was faced with a similar issue as in the present case of whether or not the defendant's confession, after an equivocal assertion of his right to remain silent, was admissible.¹³⁹ Grimes and the majority quoted the *Coleman* court which stated: "[b]ecause we are bound to follow the Supreme Court's holding in *Davis*, our decisions creating a duty to clarify a suspect's intent upon an equivocal invocation of counsel are no longer good law."¹⁴⁰ Next, referring to *Martin*, the *Coleman* court expounded: "[f]urthermore, we have already recognized that the same rule should apply to a suspect's ambiguous or equivocal references to the right to cut off questioning as to the right to counsel."¹⁴¹

Grimes and the majority summed up their holding by stating "*Davis* now makes it clear that, contrary to our belief at the time, federal law did not require us to rule Owen's confession inadmissible."¹⁴² Additionally, the majority opinion paralleled the Appellant's brief, in that it acknowledges that its earlier decisions, including *Owen*, were validated by the courts previous and erroneous interpretation of federal law.¹⁴³ The opinion, like Appellant's brief, emphasized the rationale of the court in *State v. Craig*¹⁴⁴ as being a predecessor to the notion that *Davis* should be followed in *Owen*.¹⁴⁵

Subsequently, the majority, through Grimes, refuted Appellee's contention that *Traylor v. State* dictated a finding that Owen's confession should be deemed inadmissible, pursuant to Article I, Section 9 of the Florida Constitution.¹⁴⁶ Grimes' group stated that Owen's reliance on the court's

that "*Davis* applies with equal force to the right to remain silent and to terminate questioning." *Id.*

136. *Owen*, 696 So. 2d at 719.

137. 30 F.3d 1420 (11th Cir. 1994).

138. 770 F.2d 918 (11th Cir. 1985).

139. *Coleman*, 30 F.3d at 1421.

140. *Id.* at 1424 (citing *Martin v. Wainwright*, 770 F.2d 918, 924 (11th Cir. 1985)).

141. *Id.* The court quoted *Martin* stating "[w]e see no reason to apply a different rule to equivocal invocations of the right to cut off questioning." *Id.*

142. *Owen*, 696 So. 2d at 718.

143. *Id.* at 718-19; see also Initial Brief of Appellant at 6-10, *Owen* (No. 85,781).

144. 237 So. 2d 737, 739-40 (Fla. 1970). In *Craig*, the court found that an ambiguous request for a lawyer does not require police to clarify the suspect's wishes. *Id.* at 740.

145. See *Owen*, 696 So. 2d at 719; see also Appellant's Brief at 6-10, *Owen* (No. 85,781).

146. *Owen*, 696 So. 2d at 719. The court specifically stated, "*Traylor* does not control our decision in this case." *Id.*

words in *Traylor* regarding Section 9 that “if the suspect indicates in any manner that he . . . does not want to be interrogated, interrogation . . . must immediately stop”¹⁴⁷ was inapplicable¹⁴⁸ In what seems to be ambiguous and equivocal in and of itself, the majority claimed Owen “reads a meaning into these words that we never attributed to them.”¹⁴⁹ The majority attempted to clarify by illustrating, as did Appellants in their brief, that the words “in any manner”¹⁵⁰ mirror the language of *Miranda* and are therefore not additional safeguards to the federal law.¹⁵¹

Additionally, Justice Grimes’ majority touched upon the fact that *Traylor* involved voluntariness of a confession, rather than invocation of *Miranda* rights,¹⁵² as appellant’s brief also argued.¹⁵³ After rejecting Owen’s argument in favor of applying *Traylor* to the instant case, the majority went on to acknowledge that though they are authorized to disregard the findings of the United States Supreme Court in *Davis*, they were unwilling to do so.¹⁵⁴ The justices were more persuaded by the policy concern of the Court in *Davis* that the bright line that officers have been afforded, due to decisions like *Miranda* and *Edwards*, would become dim if equivocal statements by suspects allowed for questioning to terminate.¹⁵⁵

Again, consistent with issues raised by Appellant in the initial brief, the majority felt that “[t]o require the police to clarify whether an equivocal statement is an assertion of one’s *Miranda* rights places too great an impediment upon society’s interest in thwarting crime.”¹⁵⁶ Next, the majority tackled the issue of whether the intervening decision in *Davis* provided an exceptional circumstance to the “doctrine of law of the case.”¹⁵⁷ They held that the doctrine serves as a means for judicial economy, and is not an indisputable directive, but rather a self-imposed limitation to achieve that

147. *Traylor*, 596 So. 2d at 966. The court in *Traylor* referred to the Florida Constitution, Article I, Section 9.

148. *Owen*, 696 So. 2d at 719.

149. *Id.*

150. *Id.* (quoting from the FLA. CONST. art. I, § 9).

151. *Id.*

152. *Id.*

153. See Initial Brief of Appellant at 7, *Owen* (No. 85,781).

154. *Owen*, 696 So. 2d at 719.

155. *Id.* at 718-19.

156. *Id.* at 719.

157. *Id.* at 720. The doctrine of the law of the case provides that “all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts.” *Brunner*, 452 So. 2d 550, 552 (Fla. 1984). Only in exceptional circumstances in which manifest injustice will result, can the court reconsider and remedy an earlier erroneous ruling which has become the law of the case. *Owen*, 696 So. 2d at 720.

goal.¹⁵⁸ Also, the majority noted that “[a]n intervening decision by a higher court is one of the exceptional situations that this Court will consider when entertaining a request to modify the law of the case.”¹⁵⁹

The majority concluded that in light of the United States Supreme Court ruling, *Davis* should be applied as the law of the case in Owen’s retrial in order to prevent a manifest injustice by forcing the State to adhere to the court’s previous erroneous interpretation of the federal law.¹⁶⁰ However, the majority did not push the envelope as far as the State may have wanted them to. The majority recognized the State’s preference to forgo the retrial and simply have both Owen’s confession and original convictions reinstated, but refused to overturn its previous decision for a retrial.¹⁶¹ By answering the certified question in the affirmative, the majority summarized that “Owen stands in the same position as any other defendant who has been charged with murder but who has not yet been tried.”¹⁶²

VIII. SHAW’S CONCURRING OPINION: WHAT IS “CLEARLY?”

Justice Shaw’s concurring opinion walked that fine line between concurrence and dissent. While voicing an agreement with the majority’s holding that now in Florida, pursuant to *Davis*, a suspect must clearly invoke his *Miranda* rights to terminate questioning after a previous voluntary waiver of that right, Justice Shaw also voiced his dissatisfaction with the majority’s own ambiguity as to what “clearly” means.¹⁶³

The discrepancy Justice Shaw had with the majority was that although he agreed with the *Davis* standard of one’s need to “clearly invoke” the right to remain silent, he felt Florida’s standard should include an explanation of what will be construed as a clear invocation.¹⁶⁴ To support his suggested broadening of the *Davis* standard, Justice Shaw used *Traylor*, the same case the majority hesitated to apply. He emphasized the federalist principles which illustrate that a state may exceed the protections afforded to its citizens by the federal

158. *Id.* (citing *Strazzulla v. Hendrick*, 177 So. 2d 1, 3 (Fla. 1965)).

159. The majority cites both *Brunner* and *Strazzulla* in support of this reasoning. *Id.* at 720 (citing *Brunner Enter., Inc. v. Department of Revenue*, 452 So. 2d 550, 552 (Fla. 1984), and *Strazzulla v. Hendrick*, 177 So. 2d 1, 4 (Fla. 1965)).

160. *Id.*

161. *Id.*

162. *Owen*, 696 So. 2d at 720.

163. *Id.* at 721 (Shaw, J., concurring). Justice Shaw specifically stated: “I concur in the majority opinion, as far as it goes, but write specially to express my view as to what constitutes a ‘clear’ invocation of the right to cut off questioning in Florida.” *Id.*

164. *Id.*

government in order to better safeguard those individuals.¹⁶⁵ He quoted much of the *Traylor* decision, specifically focusing on the concept that often times federal decisions serve as adequate guidelines for state courts, though it is frequently necessary for the state courts, in order to meet local concerns, to elaborate on the federal findings.¹⁶⁶ Expressly, Justice Shaw noted the court's statement in *Traylor*:

[F]ederal precedent applies equally throughout fifty diverse and independent states [T]he Court oftentimes is simply unfamiliar with local problems, conditions and traditions [N]o court is . . . more sensitive or responsive to the needs of the diverse localities within a state, or the state as a whole, than that state's own high court. In any given state, the federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling.¹⁶⁷

In Justice Shaw's own words, in order to "comport with federalist principles,"¹⁶⁸ Florida needs to adopt a standard of what is a "clear" invocation of one's rights by looking at the totality of the circumstances when the statement is made by the suspect.¹⁶⁹ Due to the diverse cultural makeup of the region Justice Shaw expressed the concern of adhering to a strict standard of what is deemed "clear."¹⁷⁰ For the less educated migrant worker, or the newly emigrated Floridian, "clearly" invoking one's right to remain silent may be a far cry from the invocation made by the second year Nova law student who just recently wrote an article on the issue.¹⁷¹ In order to combat this potential problem, Justice Shaw suggested that Florida adopt a reasonable person standard in ascertaining whether an invocation of the right to remain silent was done "clearly."¹⁷² He stated, "[i]n my view, a suspect 'clearly' invokes the right to cut off questioning when a reasonable person would

165. *Id.* at 721-22

166. *Owen*, 696 So. 2d at 721-22.

167. *Id.* at 721 (quoting *Traylor v. State*, 596 So. 2d 957, 961-62 (Fla. 1992)).

168. *Id.*

169. *Id.*

170. *Id.* at 721-22. Justice Shaw emphasized that much of Florida's population consists of non-English speaking immigrants from the surrounding countries and islands, who are often poorly educated. *Owen*, 696 So. 2d at 721-22.

171. *Id.* at 722. Shaw offered the example that "to require a migrant worker with a limited education and strong regional dialect to 'clearly' invoke his or her constitutional rights with the same precision and forcefulness as a urologist or a nationally-recognized trial lawyer is simply unrealistic." *Id.*

172. *Id.*

conclude that the suspect has evinced a desire to stop the interview. All the circumstances surrounding the statement—including the suspects' schooling, command of English, and ethnic background—should be considered.”¹⁷³

In a somewhat haphazard way, Justice Shaw threw in a brief statement about the equivocal nature of Owen's statements. Citing to the court's conclusion that Owen's "responses were, at the least, an equivocal invocation of the *Miranda* right to terminate questioning.”¹⁷⁴ Justice Shaw fashioned his own depiction of equivocal statements. He created a spectrum where statements rank from "no invocation" of rights having been made to "an equivocal invocation" having been made, and finally "a clear invocation" having been made.¹⁷⁵ He categorized Owen's statements as lying between equivocal and clear and used that assessment in his agreement with the majority, stating, "I agree that under these circumstances this case must be remanded for reconsideration under the *Davis* standard.”¹⁷⁶ His analysis, stretching the meaning of the word, of Owen's statements ended there. He seemed to just accept the court's previous determination that Owen's statements were equivocal, and therefore deemed *Davis* applicable. Justice Shaw summarized his opinion by reemphasizing his agreement with the majority that *Davis* should be followed, but cautioned the majority that "without further elucidation this standard is in danger of being used as a 'one glove fits all' criterion.”¹⁷⁷

IX. JUSTICE KOGAN'S DISSENT STATING THAT HE WOULD ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE

Chief Justice Kogan, in his dissent, forcefully rejected the majority's adoption of *Davis* and what he referred to as the "threshold standard of clarity" approach.¹⁷⁸ Particularly, he supported the retainment of what he called "the clarification" approach, which requires only questions to clarify the suspects' wishes after an ambiguous statement to remain silent or a request for an attorney is made by that individual.¹⁷⁹ Justice Kogan portrayed the benefits of applying the clarification approach, rather than the threshold standard of clarity

173. *Id.*

174. *Owen*, 560 So. 2d at 211.

175. *Owen*, 696 So. 2d at 722.

176. *Id.*

177. *Id.*

178. *Id.* (Kogan, J., dissenting). In a footnote, Justice Kogan identifies the "threshold standard of clarity" approach as one used by federal courts in situations involving ambiguous invocations of *Miranda*. The term refers to the notion that one must clearly invoke the *Miranda* rights in order for questioning to cease. *Owen*, 696 So. 2d at 722 n.9.

179. *Id.* at 722-23.

approach, as being threefold. Kogan argued that the clarification approach, rather than the *Davis* threshold standard of clarity approach, provides officers involved in an interrogation setting with a more workable guideline.¹⁸⁰ He refuted the Grimes' majority opinion that the *Davis* rationale preserves the bright line rule.¹⁸¹

Justice Kogan, like Justice Shaw, expressed a grave concern over allowing individual officers to determine whether a right has been "clearly" invoked by the suspect.¹⁸² Acknowledging Shaw's concurrence, Kogan referred as well to the difficulties likely to face interrogating officers, due to the diverse educational and cultural background of Florida residents.¹⁸³ In addition, Kogan referred to "[o]ther factors such as a suspect's physical condition, level of intimidation, level of fear, or lack of linguistic ability [which will] also make the task of identifying a clear invocation of Miranda rights a difficult one."¹⁸⁴

Justice Kogan's rationale mirrored and often directly quoted from Justice Souter's concurring opinion in *Davis*. He suggested that in order to eliminate the guesswork associated with determining which invocations are clear and which are not, Florida courts should simply continue to follow the clarification approach.¹⁸⁵ Another advantage Kogan saw in retaining the clarification approach was the consistency it would afford both in situations where the suspect initially invokes his right to remain silent and in situations where the invocation is pursuant to a previous knowing and intelligent waiver of that right.¹⁸⁶ Again citing to Souter's concurring opinion, Kogan said, "applying a single approach is consistent with Miranda's promise of a 'continuous' opportunity to exercise one's *Miranda* rights."¹⁸⁷

Besides setting better guidelines for police, Justice Kogan felt the clarification approach served both society's interest in minimizing crime and the interest of the accused individual.¹⁸⁸ In support of his contention that the clarification approach has sufficiently dealt with Florida's fight on crime,

180. *Id.*

181. *Id.* at 723. Kogan referred to the majority opinion citing to *Davis* creating "a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information." *Davis v. United States*, 512 U.S. 452, 453 (1994).

182. *Owen*, 696 So. 2d at 723.

183. *Id.* at 724.

184. *Id.* at 723.

185. *Id.* Kogan, borrowing from the concept announced by Justice Souter in his concurring opinion in *Davis*, specifically said "the 'clarification' approach puts this judgment call into the hands of the party that is most competent to make itCthe individual suspect." *Id.*

186. *Owen*, 696 So. 2d at 723.

187. *Id.*

188. *Id.* at 723-24.

Justice Kogan again cited to Justice Souter's concurrence in *Davis* where he said:

[T]he margin of difference between the clarification approach . . . and the one the Court adopts is defined by the class of cases in which a suspect, if asked, would make it plain that he meant to request counsel While these lost confessions do extract a real price from society, it is one that *Miranda* itself determined should be borne.¹⁸⁹

Justice Kogan, in agreement with Justice Souter, did not see the clarification approach as an impediment to effective interrogation techniques. Moreover, Justice Kogan denounced the threshold standard of clarity approach as often disregarding the rights of the accused.¹⁹⁰ While he specifically criticized the *Davis* majority's opinion on this issue, Justice Kogan simultaneously rejected the Grimes majority's adoption of such an analysis.¹⁹¹ He found two particular faults with the *Davis* rationale.

First, from Kogan's viewpoint, the *Davis* majority, while acknowledging that suspects in a custodial interrogation setting may often be effected by such elements as intimidation, a limited grasp of the language, and linguistic skills, wrongfully dispelled these factors as acceptable risks "in light of the protections already afforded these suspects by the *Miranda* warnings."¹⁹² Justice Kogan began his analysis by claiming that *he* found two faults with that rationale, but he actually went on with criticism quoted from Justice Souter.¹⁹³

In essence Justice Kogan, through Justice Souter, expressed his disfavor with employing a heightened level of communication necessary to invoke the rights of the accused when these individuals often struggle with language barriers, lack of education, and fear and intimidation brought on by the sometimes overwhelming setting of a police interrogation.¹⁹⁴ On this, Justice Kogan concluded "*Davis* and the majority in the instant case place a hurdle in front of those individuals who are the most likely to have difficulty surmounting that

189. *Id.* (quoting *Davis v. United States*, 512 U.S. 452, 453 (1994) (Souter, J., concurring)).

190. *Id.* at 724. Kogan stated that "[i]n my opinion, the 'threshold standard of clarity' approach does not adequately account for [the rights of the accused] and consequently tips the scale in favor of law enforcement interests." *Owen*, 696 So. 2d at 724.

191. *Id.*

192. *Id.* (quoting *Davis v. United States*, 512 U.S. 452, 460 (1994)).

193. *Id.*

194. *Id.* (quoting *Davis v. United States*, 512 U.S. 452, 469-70 (1994) (Souter, J., concurring)).

hurdle and successfully invoking their rights.”¹⁹⁵ In response to this problem, he advocated continuing to require officers to ask clarifying questions after an ambiguous invocation of one’s rights.¹⁹⁶

Second, Justice Kogan faulted the *Davis* majority’s finding and the majority’s following of the notion that simply the reading of one’s *Miranda* rights compensated for any hardships bestowed on the accused by applying the threshold standard of clarity approach.¹⁹⁷ He, again using Souter’s words from *Davis*, feared that once a suspect’s initial, perhaps, ambiguous request is ignored by police, the suspect will be hesitant to assert another request be it equivocal or unequivocal, thinking his next plea will also fall on deaf ears.¹⁹⁸ Kogan reemphasized his feelings that the clarification approach is best suited to address the needs of the police, society, and the accused.¹⁹⁹

Justice Kogan finalized his opinion with disdain for the majority’s refusal to apply the clarification approach and reaffirm *Owen* based on the authority bestowed on them by the Florida Constitution.²⁰⁰ Specifically, Kogan disagreed with the majority’s opinion that their decisions following *State v. Craig*²⁰¹ were based on federal rulings such as *Mosley* and *Edwards*, and that those federal cases were the primary reasons for the shift from the threshold standard of clarity approach to the clarification approach.²⁰² Justice Kogan said, “any change that might have occurred in the Florida law on this issue subsequent to *Craig* was not solely the result of decisions from the United States Supreme Court. It is my belief that article I, section 9 of our state constitution played a significant part in resolving this issue.”²⁰³

In sum, Justice Kogan would have answered the certified question in the negative, since he felt the clarification approach is the best approach to use in Florida and, much like the Appellee in his brief, that the Florida Constitution serves as an independent basis to reaffirm *Owen*.²⁰⁴

195. *Owen*, 696 So. 2d at 724.

196. *Id.*

197. *Id.*

198. *Id.* This is a paraphrasing of Justice Souter’s argument from *Davis*, where he said “in contravention of the ‘rights’ just read to him by his interrogator, he may well see further objection as futile.” *Davis*, 512 U.S. at 472-73 (1994).

199. *Owen*, 696 So. 2d at 724.

200. *Id.* at 725.

201. 237 So. 2d 737 (Fla. 1970). In *Craig*, the court refused to apply the clarification approach. *Id.*

202. *Owen*, 696 So. 2d at 725.

203. *Id.*

204. *Id.*

X. CONCLUSION

Pursuant to a suspect's equivocal invocation of the right to remain silent, interrogating police officers in Florida are no longer *required* to ask clarifying questions.²⁰⁵ The key to the majority's decision in *Owen*, as well as in *Davis*, seems to be the word "required." Both courts acknowledged that clarifying one's wishes upon an ambiguous statement to possibly assert *Miranda* rights will often be good police practice.²⁰⁶ Consequently, in Florida, clarification is not mandatory in such a situation, although it still seems to be preferred. In this day and age where the "get tough on crime" attitude is so prevalent, the majority's decision to give police more leeway in interrogations seems appropriate.

Justices Shaw and Kogan voiced concerns with the difficulty in applying the clearly invoke standard in such a diverse community that exists throughout Florida. They seem to worry that the uneducated migrant workers cry of, "No quiero hablar,"²⁰⁷ will be ignored. Justice Shaw, however, fashioned an adequate solution to the problems that may be faced due to language and educational barriers. His suggestion of applying a reasonable person test is a commendable one. In a society as diverse as Florida, it is likely the police force will reflect the surrounding community, at least making the language barrier not such an obstacle with which to contend. On the other hand, asking whether a reasonable person in this situation would find this individual as invoking his right to remain silent provides a test that will help overcome educational and other barriers. The key to Shaw's approach being effective is that for all surrounding circumstances to be accounted for when assessing whether *Miranda* rights have been asserted. The adoption of what Kogan referred to as the "threshold standard of clarity" approach coupled with Shaw's subjective reasonable person test will provide the necessary protections for Florida's criminal suspects, the police, and society at large.

Beth Connolly

205. *Id.*

206. *Id.*; see also *Davis*, 512 U.S. at 452.

207. "I don't want to talk" in Spanish.