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**Constitutional Law—ELECTRONIC SURVEILLANCE IN PRISON:
ARE ANY CONSTITUTIONAL RIGHTS VIOLATED?—*State v. Calhoun*,
479 So. 2d 241 (Fla. 4th DCA 1985)**

I. INTRODUCTION

Electronic surveillance of prisoners' conversations is a law enforcement tool used throughout the United States. A valuable security measure, the practice has survived constitutional and statutory challenges in numerous factual settings.¹ However, on rehearing *State v. Calhoun*,² the Fourth District Court of Appeal recently upheld constitutional and statutory challenges to the admissibility into evidence of secretly videotaped conversations between prisoners. The Fourth District incorporated the trial court's order of suppression,³ and stated that the police had violated the defendant's fifth and sixth amendment rights by making a surreptitious recording of a conversation between two inmates. The decision also was based on the Florida constitutional provision barring unreasonable interception of private communication,⁴ as well as a statutory prohibition against certain interceptions and disclosures of oral communications.⁵

Surprisingly, the court failed to comment on its initial, well-reasoned opinion, which had found the tape recording admissible.⁶ In fact, the majority opinion on rehearing is the almost verbatim dissent of Judge Barkett to the original opinion.⁷ Although the result may be the "right" one, Judge Barkett's reasoning is unconvincing. In this Note, the author will analyze the facts, discuss and critique the two opinions, and suggest alternative theories that the Fourth District might have used to reach the same result.

1. See, e.g., *United States v. Hearst*, 563 F.2d 1331, 1346 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978) (conversation in jail visiting room); *Brown v. State*, 349 So. 2d 1196 (Fla. 4th DCA 1977), cert. denied, 434 U.S. 1078 (1978) (conversation in back seat of a police car); *People v. Myles*, 379 N.E.2d 897 (Ill. 1978) (telephone conversation). But see *In re Kozak*, 256 N.W.2d 717 (S.D. 1977) (telephone conversation between an inmate and his attorney).

2. 479 So. 2d 241 (Fla. 4th DCA 1985), vacating 10 Fla. L.W. 2176 (Fla. 4th DCA Sept. 27, 1985).

3. *Id.* at 243.

4. FLA. CONST. art. I, § 12.

5. FLA. STAT. § 934.03 (1985).

6. *State v. Calhoun*, 10 Fla. L.W. 2176 (Fla. 4th DCA Sept. 27, 1985), vacated, 479 So. 2d 241 (Fla. 4th DCA 1985). In contrast, Judge Walden cited this opinion as explanation for his dissent. *Calhoun*, 479 So. 2d at 246 (Walden, J., dissenting).

7. *Calhoun*, 10 Fla. L.W. at 2178 (Barkett, J., dissenting).

II. *State v. Calhoun*

David Calhoun, the defendant, and his brother were being held in jail on various charges when Calhoun became a suspect in a separate armed robbery. Detectives brought Calhoun to an interview room in the sheriff's office which was equipped with a concealed videotape camera and a microphone. After he was read his *Miranda* rights, Calhoun asked to speak to his brother before talking to the detectives.⁸ The detectives granted his request and left the two brothers alone in the interview room, ostensibly for a private conversation. The detectives then monitored that conversation. In about five minutes, Calhoun's brother was removed from the room and Calhoun was again read his *Miranda* rights. This time Calhoun indicated that he wanted to remain silent and asked to see his attorney.⁹ In a last attempt to get information, the police again placed Calhoun's brother in the interview room and secretly recorded and videotaped the conversation for "investigative purposes."¹⁰ No court order authorized the intercept. At trial, the court granted Calhoun's motion to suppress the recorded statements, admissions, and confessions. The state appealed to the Fourth District, which initially reversed the trial court's order.

The Fourth District rejected the assertion that the videotaping was an unreasonable search and seizure which violated the Florida Constitution. It reasoned that a prisoner has no reasonable expectation of privacy in jail and, thus, no constitutional privacy protection.¹¹ The Florida statute against unlawful interception of an oral communication was held not violated because, like the constitutional provision, the statute applies only to persons with a reasonable expectation of privacy.¹² Regarding Calhoun's claim that his fifth amendment right to remain silent pursuant to *Miranda v. Arizona*¹³ had been violated, the court decided that because there had been no interrogation by police officers, no *Miranda* violation arose. Finally, Calhoun's assertion that his sixth amendment right to counsel had been violated proved unsuccessful. Previous Florida case law provides that unless the statements complained of are made to an officer of the state or a state agent, there is no sixth

8. *Calhoun*, 479 So. 2d at 242.

9. *Id.*

10. *Id.* at 243.

11. *Calhoun*, 10 Fla. L.W. at 2176.

12. FLA. STAT. § 934.02(2) (1985).

13. 384 U.S. 436 (1966).

amendment violation.¹⁴ Because Calhoun's brother was not a state agent and did not solicit information from Calhoun, the court held there had been no violation of Calhoun's right to counsel.¹⁵

Three months later, however, after a rehearing, the Fourth District rendered a second opinion which affirmed the trial court's suppression. While conceding that the interview room alone did not justify a reasonable expectation of privacy, the court found that Calhoun's specific situation was unlike that of previous defendants involved in similar cases: "[T]he defendant had a clear expectation of privacy because such an expectation was deliberately fostered by the police officers. . . . [They gave] every indication that the conversation was to be secure and private."¹⁶

Having established the defendant's privacy expectation, the court invoked the fourth amendment right to privacy and also cited the Florida Constitution, which protects private conversations from being recorded.¹⁷ Furthermore, the court stated that absent consent or a court order, a willful interception was unlawful under section 934, Florida Statutes. The Fourth District also recognized fifth amendment grounds for suppressing the tape recordings, emphasizing that upon being read his *Miranda* rights, Calhoun invoked his right to silence and his right to an attorney. The court found that when the police put Calhoun and his brother together again, they were indirectly interrogating Calhoun in violation of his expressed right to remain silent.¹⁸ Finally, without discussion, the court found that Calhoun's sixth amendment right to counsel was violated.¹⁹

III. FOURTH AMENDMENT ISSUES

The fourth amendment guarantees an individual's right to privacy by prohibiting "unreasonable searches and seizures."²⁰ While

14. *Calhoun*, 10 Fla. L.W. at 2177-78 (citing *Bottoson v. State*, 443 So. 2d 962 (Fla. 1983), *cert. denied*, 105 S. Ct. 223 (1984)).

15. *Id.* at 2178.

16. *Calhoun*, 479 So. 2d at 243.

17. The court based its constitutional decision on FLA. CONST. art. I, § 12: "*The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated.*" *Calhoun*, 479 So. 2d at 243 (emphasis in opinion).

18. *Id.* at 245.

19. *Id.* (The court cited to *Edwards v. Arizona*, 451 U.S. 477 (1981), a case decided on the basis of the fifth, not the sixth, amendment to the United States Constitution.).

20. The fourth amendment provides:

the United States Supreme Court has held that electronic surveillance of citizens is subject to fourth amendment coverage,²¹ protection in the prison setting has been limited. This restriction rests on two theories: prisons are not protected areas, and prisoners do not have a reasonable expectation of privacy.

The protected area concept was first mentioned by the United States Supreme Court in *Lanza v. New York*,²² where the police surreptitiously recorded a visiting room conversation between Lanza and his jailed brother. The majority found it "obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day."²³ In 1967, however, in *Katz v. United States*²⁴ the Court declared that "the Fourth Amendment protects people, not places. . . . [W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."²⁵ Although *Katz* repudiated the protected areas analysis epitomized by *Lanza*, courts consistently followed *Lanza* and upheld the admission of secretly monitored conversations in jails or police stations.²⁶

In 1974, however, the Supreme Court held in *Wolff v. McDonnell*²⁷ that a prisoner does not surrender all of his constitutional rights at the prison gates. "[T]hough his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country."²⁸ Since *Wolff*, virtually every federal appellate court addressing the question has concluded that there is some fourth amendment protection in

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

21. See *Katz v. United States*, 389 U.S. 347 (1967).

22. 370 U.S. 139, 142 (1962).

23. *Id.* at 143.

24. 389 U.S. 347 (1967).

25. *Id.* at 351-52.

26. See generally Giannelli & Gilligan, *Prison Searches and Seizures: "Locking" the Fourth Amendment out of Correctional Facilities*, 62 VA. L. REV. 1045, 1055-58 (1976).

27. 418 U.S. 539 (1974).

28. *Id.* at 555-56.

prison.²⁹ The United States Court of Appeals for the Fifth Circuit considered this question in *United States v. Lilly*.³⁰ Although the decision did not deal with electronic surveillance, the court's fourth amendment analysis is applicable to all types of searches and seizures.

The *Lilly* court was concerned with the degree of fourth amendment protection afforded inmates when they returned to prison after unsupervised absences.³¹ The defendant had attempted to smuggle contraband into prison in a body cavity. The court found that a prisoner could not be denied all fourth amendment protection because he could then be subjected to whatever form of search and seizure a prison employee might care to conduct, no matter how intrusive. It concluded that a "prisoner loses only those rights that must be sacrificed to serve legitimate penological needs."³² Thus, even though a warrant is not required to conduct a search or seizure in prison, the government has the burden of justifying the reasonableness of its action given all the facts and circumstances.³³ The governmental interest in administering prisons must justify the intrusion in each case, and this governmental interest must be more than just general law enforcement needs, such as searches directed at solving a particular crime. Governmental interests justifying intrusion include protecting guards and inmates, controlling contraband, and preventing escapes.³⁴

A recent United States Supreme Court case, however, may limit the *Lilly* requirement that a legitimate penological need necessi-

29. See, e.g., *United States v. Mills*, 704 F.2d 1553, 1560-61 (11th Cir. 1983), cert. denied, 467 U.S. 1243 (1984); *United States v. Chamorro*, 687 F.2d 1, 4-5 (1st Cir.), cert. denied, 459 U.S. 1043 (1982); *United States v. Lilly*, 576 F.2d 1240, 1245-46 (5th Cir. 1978). The commentators also agree on this subject. See, e.g., Giannelli & Gilligan, *supra* note 26; Singer, *Privacy, Autonomy, and Dignity in the Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degradation Process in Our Prisons*, 21 BUFFALO L. REV. 669 (1972); Comment, *Electronic Surveillance in California Prisons after DeLancie v. Superior Court: Civil Liberty or Civil Death?*, 22 SANTA CLARA L. REV. 1109 (1982).

30. 576 F.2d 1240 (5th Cir. 1978).

31. *Id.*

32. *Id.* at 1244. This view was later followed by the United States Court of Appeals for the Eleventh Circuit in *United States v. Mills*, 704 F.2d 1553, 1560-61 (11th Cir. 1983), cert. denied, 467 U.S. 1243 (1984).

33. *Lilly*, 576 F.2d at 1245. The *Lilly* court found this burden to be fair because the prison administration is in a better position to prove the reasonableness of its actions than a prisoner is to prove to the contrary. *Id.* It is a longstanding rule that the government bears the burden of proving reasonableness in situations where neither a warrant nor probable cause are necessary to conduct a search or seizure. See, e.g., *United States v. Afanador*, 567 F.2d 1325 (5th Cir. 1978); *United States v. Edwards*, 441 F.2d 749 (5th Cir. 1971).

34. See Giannelli & Gilligan, *supra* note 26, at 1071.

tate the search. *Hudson v. Palmer*³⁵ involved a prison inmate whose cell was the subject of a shakedown search. The Supreme Court held that, although prisoners enjoy many constitutional protections,³⁶ "[t]he recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions."³⁷ The Court found that the need for security would *always* be paramount to the prisoners' expectation of privacy in their cells.³⁸

In a separate opinion, Justice Stevens questioned the majority's refusal to recognize any privacy or possessory interest of the inmate, regardless of how remote the threat to prison security.³⁹ He asserted that the majority's "perception of what society is prepared to recognize as reasonable is not based on any empirical data."⁴⁰ Further, the majority recognized no reasonable possessory interests of prisoners and "that the Fourth Amendment has no application at all to a prisoner's 'papers and effects.'"⁴¹

By failing to require that prison officials show legitimate penological objectives, the Court in *Hudson* would give them absolute discretion to conduct prison searches. Does this decision mark the end of all fourth amendment rights for prisoners? The case law has not yet answered this question. It may be that the *Hudson* rule is limited to seizures made in prisoners' cells. It is also possible that *Hudson* will be applicable only in situations where a prisoner's papers or effects are seized. However, if *Hudson* also applies to the interception of communications, the case may signal the death knell for any fourth amendment arguments by prisoners.

Recent Florida cases discussing privacy interests of prisoners have generally followed federal fourth amendment analysis. In

35. 468 U.S. 517 (1984). The prisoner in this case argued that the search of his locker and cell by a prison official was unreasonable. The district court disagreed and granted summary judgment for the prison official. On appeal, the United States Court of Appeals for the Fourth Circuit held that an inmate has a limited privacy right in his cell entitling him to protection against searches conducted solely to harass. See *Palmer v. Hudson*, 697 F.2d 1220 (4th Cir. 1983), *rev'd*, 468 U.S. 517 (1984).

36. The Court mentioned the first amendment religious freedoms and the eighth amendment protections against cruel and unusual punishment as examples of constitutional protections that apply to prisoners. *Hudson*, 468 U.S. at 523.

37. *Id.* at 526.

38. *Id.* at 528.

39. *Id.* at 542-43 (Stevens, J., concurring and dissenting).

40. *Id.* at 549.

41. *Id.* at 555.

Brown v. State,⁴² the Fourth District applied the rule promulgated by the United States Supreme Court in *Lanza*: a prisoner has no reasonable expectation of privacy and officials may exercise constant surveillance, including eavesdropping on prisoners' conversations.⁴³ The Florida Supreme Court, in *Wells v. State*,⁴⁴ reviewed fourth amendment protection in the prison context in a case concerning the search of a prison visitor. A prison employee had received tips that the visitor was bringing marijuana to an inmate. The court cited *Lanza* for authority that the defendant in *Wells* had no reasonable expectation of privacy. In contrast, the *Wells* court seemed to adopt the standard in *Wolff v. McDonnell*⁴⁵ and *United States v. Lilly*,⁴⁶ that a search conducted for legitimate penological reasons is valid. The court noted that the search at issue in *Wells* was conducted "for the limited purpose of discovering whether [the defendant] was carrying contraband into the prison."⁴⁷ Justice Sundberg cited *Lilly* in his concurrence and emphasized that the pretext of jail security should not be used as an excuse for unlimited abuse of constitutional rights.⁴⁸

Another case resolved by the standards set forth in *Wolff* and *Lilly* is a decision from the Third District Court of Appeal dealing with body cavity searches of inmates. In *Vera v. State*,⁴⁹ prison officials received information from a confidential source that the defendant, an inmate on work detail, would bring contraband into the prison concealed in a body cavity. The Third District upheld the subsequent search of the prisoner. The court found that although the government is not required to obtain a warrant or establish probable cause to conduct a prison search, the government has the burden of showing the reasonableness of the search.⁵⁰ Additionally, the court noted the legitimate penological interests of the prison officials in maintaining prison security. The court found the need "to preserve internal order and discipline, maintain se-

42. 349 So. 2d 1196 (Fla. 4th DCA 1977), cert. denied, 434 U.S. 1078 (1978). See *infra* notes 80-81 and accompanying text.

43. In 1984, the Fifth District agreed with the *Brown* court in a factually similar situation. See DiGuilio v. State, 451 So. 2d 487 (Fla. 5th DCA 1984), rev'd on other grounds, 10 Fla L.W. 430 (Fla. Aug. 29, 1985).

44. 402 So. 2d 402 (Fla. 1981).

45. 418 U.S. 539 (1974). See *supra* notes 27-29 and accompanying text.

46. 576 F.2d. 1240 (5th Cir. 1978). See *supra* notes 30-34 and accompanying text.

47. *Wells*, 402 So. 2d at 405.

48. *Id.* at 407-08 (Sundberg, C.J., concurring specially).

49. 400 So. 2d 1008 (Fla. 3d DCA 1981).

50. *Id.* at 1010.

curity, and rehabilitate prisoners" justified the body cavity search based on the information related to prison officials by the reliable confidential source.⁵¹ The court was careful to limit its holding to the facts of the case, which were that the prison officials were presented with reliable information as to a genuine threat to prison security. Thus, the officials' interest in maintaining prison security will not always, absent other factors, justify a search.

Although *Wells* and *Vera* were decided in 1981, both followed the federal fourth amendment analysis of prison searches and seizures enunciated in *Wolff* and *Lilly*. Furthermore, future Florida cases that deal with this issue will also be forced to follow the federal view. The reason for this is that the Florida constitutional prohibition against unreasonable searches and seizures was amended in 1982. The amendment required that the state courts' interpretation of Florida's prohibition against unreasonable searches conform to the United States Supreme Court's interpretation of the fourth amendment.⁵²

Apparently, the Fourth District in *Calhoun* was unaware of the 1982 amendment. The court cited the Florida Constitution as giving more protection than the United States Constitution to private communications.⁵³ It distinguished prior Florida cases as being decided on federal constitutional grounds.⁵⁴ Judge Barkett, writing for the majority, stated that a reasonable expectation of privacy was deliberately fostered by the police officers when they complied with Calhoun's request to see his brother and then exited the room, leaving the brothers alone.⁵⁵ Judge Barkett placed great emphasis on the defendant's subjective expectation of privacy. This interpretation of privacy rights in jail is unprecedented in Flor-

51. *Id.*

52. The Florida Constitution provides:

The right of the people to be secure in their persons, houses, papers and effects against . . . unreasonable interception of private communications by any means, shall not be violated. . . . This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.

FLA. CONST. art. I, § 12. See also *State v. Lavazzoli*, 434 So. 2d 321 (Fla. 1983) (discussing retroactivity of amendment which mandates conformity of Florida's search and seizure requirements with the Supreme Court's interpretation of the fourth amendment).

53. *Calhoun*, 479 So. 2d at 244.

54. *Id.*

55. *Id.* at 243.

ida.⁵⁶ Surely, every defendant who makes incriminating statements when left alone with another person does so because he has been led to believe that no one else will be listening. However, the parameters of what is considered to be a reasonable expectation of privacy are not defined by the defendant's belief alone.

The *Calhoun* court stated that because the conversation took place in an interview room did not diminish its privacy.⁵⁷ However, the court seemed to ignore that although the fourth amendment does protect "people and not places," reference to the place where the right is being asserted is essential to the application of the objective standard for determining the reasonableness of the expectation of privacy.⁵⁸ Thus, in an effort to exclude the tape recorded conversations, the Fourth District adopted a haphazard analysis of fourth amendment rights as applied to prisoners.

Perhaps the decision would rest on more solid ground had the court discussed the fact that the detectives monitored the conversation for investigative purposes, not for prison security reasons. After *Wells* and *Lilly*, there is an argument that a search must be conducted for legitimate penological purposes and not just for general law enforcement reasons.⁵⁹ The Fourth District did not discuss this line of cases, even though it did emphasize the trial court's finding that the tape recording was "for investigative purposes, not just for security."⁶⁰

IV. STATUTORY ISSUES

Section 934.03, Florida Statutes, sets out the requirements for the interception and disclosure of oral communications. The statute makes it unlawful, with certain exceptions, for any person willfully to intercept, use, or disclose any wire or oral communication.⁶¹ An "oral communication" is defined in chapter 934 as "any oral communication uttered by a person exhibiting an expectation

56. Indeed, only one other court has found a right of privacy violation based on the fact that the police lulled the defendant into thinking that the conversation was private. See *North v. Superior Court of Riverside County*, 502 P.2d 1305 (Cal. 1972).

57. *Calhoun*, 479 So. 2d at 244.

58. *Katz v. United States*, 389 U.S. 347, 361 (Harlan, J., concurring).

59. See *supra* notes 30-36 and accompanying text.

60. *Calhoun*, 479 So. 2d at 243.

61. An exception occurs where there is prior consent of all parties or a court order.

that such communication is not subject to interception *under circumstances justifying such expectation.*"⁶²

In *State v. Inciarrano*,⁶³ the Florida Supreme Court discussed the legislative intent behind this language. It found that the legislature intended to prohibit the interception of conversations made with a reasonable expectation of privacy. According to the court, a reasonable expectation of privacy incorporates not only the subjective expectation of the person conversing but also an expectation that society would recognize as reasonable under the circumstances.⁶⁴ The statutory definition of "oral communication" therefore establishes the parameters of the statutory prohibition against interception of oral communications. If there is no reasonable expectation of privacy, then recording the conversation is not proscribed by the statute.⁶⁵

The Fourth District in *Calhoun* did not analyze the statute this way. It concluded that because there was no court order authorizing the intercept, and neither conversant had knowledge of or consented to the intercept, the intercept was unreasonable.⁶⁶ That interpretation is dubious in light of the Florida Supreme Court's construction of the statute. The Fourth District should also have discussed whether society would recognize a reasonable expectation of privacy. If so, then section 934.03 would proscribe the interception.

V. FIFTH AMENDMENT ISSUES

The fifth amendment protects each person from being compelled to incriminate himself in a criminal case.⁶⁷ In the landmark case of *Miranda v. Arizona*,⁶⁸ the United States Supreme Court discussed this privilege and created a rule requiring police to advise arrested persons of their rights under the fifth amendment.⁶⁹ These procedural safeguards were established to alleviate the coercive atmo-

62. FLA. STAT. § 934.02(2) (1985) (emphasis added).

63. 473 So. 2d 1272 (Fla. 1985).

64. *Id.* at 1275.

65. See *DiGuilio v. State*, 451 So. 2d 487, 490 (Fla. 5th DCA 1984), *rev'd on other grounds*, 10 Fla. L.W. 430 (Fla. Aug. 29, 1985).

66. *Calhoun*, 479 So. 2d at 243.

67. The fifth amendment states, in part, that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

68. 384 U.S. 436 (1966).

69. *Id.* at 479.

sphere inherent in custodial interrogation.⁷⁰ The court ordered that, prior to any questioning, a suspect "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 the right to the presence of an attorney, either retained or appointed."⁷¹ Any waiver of these rights must be made voluntarily, knowingly, and intelligently.⁷² If the suspect asserts "in any manner and at any stage of the process" his right to remain silent or requests that an attorney be present during questioning, the interrogation must cease.⁷³

In order for the fifth amendment to be invoked in the *Miranda* context, there must be interrogation. In *Rhode Island v. Innis*,⁷⁴ the Supreme Court addressed the meaning of "interrogation" under the *Miranda* rule. Justice Stewart, writing for the majority, stated that custodial interrogation refers not only to the express questioning of a suspect in custody but also to its "functional equivalent."⁷⁵ The Court held the functional equivalent to be "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."⁷⁶ The Court explained that the interrogation "must reflect a measure of compulsion above and beyond that [which is] inherent in custody itself."⁷⁷ The test for determining this level of compulsion focuses primarily on the perceptions of the suspect without regard to objective proof of the intent of the police.⁷⁸

70. The coercive atmosphere inherent in custodial interrogation exerts pressure on a suspect to utter incriminating statements and thus endangers the suspect's fifth amendment privilege against self-incrimination. *Id.* at 461. "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . cannot be otherwise than under compulsion to speak." *Id.* The reading of the *Miranda* warnings was intended to dispel the compulsion inherent in a police-dominated atmosphere. *Id.* at 469.

71. *Id.* at 444.

72. *Id.*

73. *Id.* at 444-45.

74. 446 U.S. 291 (1980).

75. *Id.* at 300-01.

76. *Id.* at 301.

77. *Id.* at 300.

78. *Id.* at 301. The Court noted, however, that police intent is not irrelevant, because it may indicate whether the police should have known their words or actions would evoke an incriminating response. "In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect." *Id.* at 301 n.7.

In *Calhoun* there is no doubt that the defendant was in custody, but it is not as clear whether there was any interrogation because there was no questioning by or conversation with the police. Of course, there is an argument that the police, by placing the two brothers alone in the interview room, should have known that their actions were likely to elicit an incriminating response. In fact, Judge Barkett asserted that Calhoun's brother became an agent of the state and thus participated in "interrogation" of the defendant.⁷⁹ Calhoun's brother, however, was not employed by the state, and was not acting at the direction of any state agent.

In *Brown v. State*,⁸⁰ the Fifth District Court of Appeal faced an analogous situation. Following his arrest, Brown and another person were placed in the back seat of an empty police cruiser. Their conversation was secretly recorded. The court found no fifth amendment violation because "[t]he incriminating statements made in the course of this conversation were not responsive to any process of interrogation."⁸¹

Not every incriminating statement that is a result of police action, either directly or indirectly, is a result of interrogation. As stated in *United States ex rel. Church v. DeRobertis*:

Unless an element of potential trickery or overbearing by the police is part of the definition of "nonverbal interrogation," almost anything that produces a confession would be interrogation. *Innis* itself rejects such a test of but-for causation. Suppose the police put a Bible in a suspect's cell, or permit him to attend a religious service at his request. Or suppose they simply leave paper and pencil in his cell. Are these things "interrogation"? But for the paper and pencil, the suspect could not write out his written confession, yet there is nothing about the action of leaving writing implements in the cell that comes close to "compulsion" as that word is used in the privilege against self-incrimination.⁸²

There was nothing about the action of placing Calhoun's brother in the interview room at Calhoun's request that would meet the level of compulsion required for a fifth amendment violation.

79. *Calhoun*, 479 So. 2d at 245.

80. 349 So. 2d 1196 (Fla. 4th DCA 1977), *cert. denied*, 434 U.S. 1078 (1978).

81. *Id.* at 1197-98. See also *DiGuilio v. State*, 451 So. 2d 487, 490 (Fla. 5th DCA 1984), *rev'd on other grounds*, 10 Fla. L.W. 430 (Fla. Aug. 29, 1985) (conversation between defendant and another person in the back seat of police car "not made in response to interrogation").

82. 771 F.2d 1015, 1019 (7th Cir. 1985).

VI. SIXTH AMENDMENT ISSUES

As discussed earlier, the Fourth District in *Calhoun* stated that the defendant "had expressly invoked his Fifth Amendment right to remain silent and his Sixth Amendment right to counsel."⁸³ Later in the decision,⁸⁴ the court based the alleged sixth amendment violation on *Edwards v. Arizona*,⁸⁵ a case decided on the basis of the fifth, not the sixth, amendment. The court was clearly confused.

The sixth amendment right to counsel is not invoked but, instead, attaches automatically as soon as a suspect is formally charged, or at the initiation of adversarial judicial criminal proceedings.⁸⁶ After the sixth amendment right attaches, absent a proper waiver,⁸⁷ there may be no interrogation of a defendant without his attorney present. In Florida, there is support for the proposition that the sixth amendment right to counsel attaches at first appearance.⁸⁸ Additionally, there is support for the proposition that the attachment of the sixth amendment right to counsel in one case against the defendant does not mean that the police are prohibited from questioning the defendant about other crimes in which he is merely a suspect.⁸⁹

In *Calhoun*, the defendant was merely a suspect in a crime for which the police wanted to question him.⁹⁰ He had not been charged, nor had there been a first appearance in the matter. No sixth amendment issues were implicated.

VII. CONCLUSION

From the preceding discussion, it should be clear that the Fourth District's decision in *Calhoun* is grounded in tenuous analysis. The court seems to strive for a fair result without properly considering all the case law. Nevertheless the facts of the case do indicate that the detectives led Calhoun to believe that they respected his right to silence. Then they placed Calhoun's brother in the interrogation room, expecting that the two would continue

83. *Calhoun*, 479 So. 2d at 244 (emphasis in original).

84. *Id.* at 245.

85. 451 U.S. 477 (1981).

86. *Massiah v. United States*, 377 U.S. 201, 205 (1964).

87. *Montgomery v. State*, 176 So. 2d 331 (Fla. 1965), *cert. denied*, 384 U.S. 1023 (1966).

88. *State v. Douse*, 448 So. 2d 1184, 1185 (Fla. 4th DCA 1984).

89. *See Lofton v. State*, 471 So. 2d 665, 667 (Fla. 5th DCA 1985).

90. The court stated that Calhoun "was in jail on an unrelated charge when he became a suspect in this case." *Calhoun*, 479 So. 2d at 242.

their previous conversation about the armed robbery. Such trickery should be condemned, and the courts should develop case law to address this type of action.

Unfortunately, the sixth amendment and the cases construing it were not applicable because there had been no initiation of adversarial judicial proceedings. Thus, the sixth amendment right to counsel had not attached. Similarly, unless one is willing to accept Judge Barkett's contention that Calhoun's brother became an agent of the state,⁹¹ the fifth amendment would not come into play. Although Calhoun was given his *Miranda* rights, and although he was in custody at the time of the conversation, the interrogation necessary to invoke the fifth amendment was not present.

An analysis that might be used in the future to condemn similar police behavior should be based on the fourth amendment. There exists in current case law the proposition that prisoners do have some fourth amendment rights. There are qualifications placed on the motives that will justify searches and seizures in prisons. An exemplary analysis is the Fifth Circuit's determination that, in order for a prison search to be valid, the government must demonstrate a legitimate penological need. Florida case law seems implicitly to adopt this idea. Protection of other inmates, for example, would be a legitimate justification for search and seizure. However, monitoring a conversation as in *Calhoun*, " 'for investigative purposes, not just for security,' " ⁹² should not be a valid motive. The courts in Florida should further the reasoning put forth by the Fifth and Eleventh Circuits regarding prison searches, and by doing so, bring clarity to an area of fourth amendment protection that has much potential for abuse.

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91. *Id.*

92. *Calhoun*, 479 So. 2d at 243 (emphasis in original).