THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 85,652

HOWARD VINCENT DECK,

Respondent.

PETITIONER'S JURISDICTIONAL BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

STEVEN J. GUARDIAN0
SR. ASST. ATTORNEY GENERAL
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COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Respondent (defendant) was convicted of 3 counts of sexual battery on a child, 1 count of attempted sexual battery on a child, and two counts of lewd, lascivious or indecent acts on a child, Defendant was sentenced to concurrent sentences of life imprisonment with a mandatory term of 25 years. The primary issue at trial and on appeal was the admissibility under federal constitutional law of a portion of the investigative interview wherein defendant confessed to the above crimes in detail. There is no factual dispute that defendant committed these acts.

On December 22, 1994, the Fifth District Court of Appeal (5th DCA) issued a decision which reversed defendant's convictions and sentences and remanded for a for a new trial. The 5th DCA held that its decision was controlled by the Florida Supreme Court's decision in Owen v. State, 560 So. 2d 207 (Fla.), cert. denied 498 U.S. 855, 111 S.Ct. 152, 112 L.Ed.2d 118 (1990), which construed the right to remain silent under the Fifth Amendment of the United States Constitution (App. A).

On February 10, 1995, the 5th DCA granted the State's motion for rehearing, withdrew its previous decision, and issued a unanimous decision affirming defendant's convictions and sentences based on Davis v. United States, ___ U.S. ___, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). In its decision, the 5th DCA expressly noted that defendant had not made any argument based on the right against self-incrimination enunciated in Article I, Section 9 of the Florida Constitution (App. B).

On March 24, 1995, the 5th DCA granted defendant's motion for rehearing,

withdrew its previous decision, and issued a decision reversing defendant's convictions and sentences. This time the 5th DCA premised its decision on Travlor v. State, 596 So. 2d 957 (Fla. 1992), notwithstanding that appellant "failed to raise the argument available to him under Article I, section 9 of the Florida Constitution at the trial level or in his appellate briefs. .." (App. C).

A timely motion for rehearing and certification was denied on April 24, 1995. On May 2, 1995, the State timely filed a notice to invoke the discretionary jurisdiction of this Honorable Court and a motion to stay mandate.

SUMMARY OF JURISDICTIONAL ARGUMENT

The 5th DCA's decision expressly construes the right to remain silent provisions of the state and federal constitutions (Art. I, § 9, Fla. Const.; U.S. Const. amend. V). In addition, the 5th DCA's decision expressly and directly conflicts with decisions of this Court that constitutional issues in a criminal trial may be waived. In light of the above, and the undisputable fact concerning the 5th DCA's "equivocalness" in reaching a decision, discretionary jurisdiction should be granted. See Art. 5, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(ii) & (iv).

ARGUMENT

POINT 1

THE 5TH DCA'S DECISION EXPRESSLY CONSTRUES A PROVISION OF THE STATE AND FEDERAL CONSTITUTIONS.

The Florida Supreme Court hasdiscretionary jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution to review a decision of a district court of appeal that expressly construes a provision of the state or federal constitution. See also Fla. R. App. P. 9.030(a)(2)(A)(ii). In the instant case, the 5th DCA expressly construed the right to remain silent under both state and federal constitutions.

As pointed out by the 5th DCA in its decision, the question raised by the appeal was; "Did Deck's equivocal invocation of his Fifth Amendment right to remain silent -- I can't talk about it anymore -- require the interrogating officer to terminate further questioning except that which was designed to clarify the suspect's wishes?" See Deck v. State, No. 93-2623 (Fla. 5th DCA March 24, 1995) at pages 2-3. The 5th DCA noted that prior to Davis v. United States, ___ U.S. ___, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1 994), the interrogation of a defendant following his equivocal invocation of his right to remain silent would be held violative of the Fifth Amendment. However, as a result of Davis (which did not involve an equivocal request to remain silent, but an equivocal request for counsel), the 5th DCA held that the Fifth Amendment right to remain silent does not require officers to ask clarifying questions, especially where the record clearly shows that the defendant had been informed of his rights immediately prior to questioning and knew exactly what was required to stop

further questioning.

Thus, the Fifth DCA construed the right to remain silent provision of the Fifth Amendment to the United States Constitution as not requiring law enforcement officers to ask clarifying questions in response to a defendant's equivocal invocation of his right to remain silent. There can be no dispute that the 5th DCA's decision (in fact, all three of them) expressly construed a provision of the federal constitution.

After completing its express construction of the federal constitutional right to remain silent provision, the 5th DCA then expressly construed Article I, section 9 of the Florida Constitution (notwithstanding the 5th DCA's express acknowledgement that defendant had failed to raise this argument at he trial level or in his appellate briefs). The 5th DCA expressly construed Article I, section 9 so as to require officers to immediately stop upon an equivocal invocation of the right to remain silent. See Traylor v. State, 596 So.2d 957 (Fla. 1992). Thus, it is clear that the 5th DCA's decision expressly construes a provision of the Florida Constitution.

The 5th DCA has expressly construed provisions of both the state and federal constitutions. Because of the important nature of such a construction, especially in light of the persuasive authority and practical reasoning of Davis, and the effect on criminal prosecution of this case and cases similarly situated, this Honorable Court should exercise its discretion to review the decision.

Finally, it is pointed out that a sister court, the Fourth District Court of Appeal, has certified a question as a matter of great public importance involving the other issue this Court may wish to confront:

DO THE PRINCIPLES ANNOUNCED BY THE UNITED STATES SUPREME COURT IN DAVIS APPLY TO THE ADMISSIBILITY OF CONFESSIONS IN FLORIDA, IN LIGHT OF TRAYLOR?

See State v. Owen, 20 Fla. L. Weekly 0963 (Fla. 4th DCA April 1 9, 1995)(App. D). The undersigned is authorized to represent that the State is presently seeking resolution of this question in the Florida Suprems Court. Therefore, it would be appropriate for the Florida Supreme Court to accept review of this case as well. See Jollie v. State, 405 So. 2d 418 (Fla. 1981).

POINT 2

THE 5TH DCA'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THE SUPREME COURT ON THE SAME QUESTION OF LAW.

Petitioner also seeks discretionary review with this Honorable Court under another provision of Article V, Section 3(b)(3) of the Florida Constitution which provides that the Florida Supreme Court may review a district court of appeal decision if it "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." See also Fla. R. App. P. 9.030(a)(2)(A)(iv). In the instant case, the 5th DCA's opinion expressly and directly conflicts with the well-known rule of law that constitutional errors which are not of a fundamental character are waived unless timely and properly objected to in the trial court, Ray v. State, 403 So. 2d 956, 960 (Fla. 1981); Clark v. State, 363 So. 2d 331, 333 (Fla. 1978)("An improper comment on a defendant's exercise of the right to remain silent is constitutional error, but it is not fundamental error."); Sanford v. Rubin, 237 So, 2d 134, 137 (Fla. 1970).

On page 4 of the decision sought to be reviewed, the 5th DCA expressly and directly acknowledged that the defendant "failed to raise the argument available to him under Article I, section 9 of the Florida Constitution at the trial level or in his appellate briefs..." Notwithstanding this apparent waiver, the 5th DCA erroneously considered and applied state constitutional law under Traylor v. State, 596 So. 2d 957 (Fla. 1992). Conflict with this most basic rule of appellate practice is readily apparent. Therefore supreme court jurisdiction on this basis should be granted. See Hardee v.

State, 534 So. 2d 706 (Fla. 1988)(supreme court accepted review based on a finding that a "fair implication" of the previous district court of appeal cases was contrary to the holding of the district court decision under review.); Ford Motor Company v. Kikis, 401 So. 2d 1341, 1342 (Fla. 1981)("discussion of the legal principles which the [district] court applied provides a sufficient basis for a petition for conflict review. It is not necessary that the court expressly identify conflicting district court or supreme court decisions in its opinion to create an 'express' conflict under Section 3(b)(3).").

The 5th DCA's decision is in express and direct conflict with not only Ray, Clark and Sanford, but a plethora of supreme court and district court cases that have relied upon that most basic principle of appellate practice that constitutional errors may be waived even if the defendant would have prevailed. See e.g., Monsour v. State, 572 So. 2d 18 (Fla. 4th DCA 1990)(failure to raise that defendant's sentence would be a violation of Article X, section 9 was waived notwithstanding that "basic fairness" doctrine requiring that a person should be sentenced for a crime in accordance with the law as it existed on the date of the offense).

Conflict also can be shown in another manner. In its decision, the 5th DCA stated:

> Traylor expressly supports the argument of the appellant, raised by his motion for rehearing, that a fundamental right created by the state constitution must be respected even if no similar right is recognized by the federal courts. Traylor at 983.

Deck v. State, No. 93-2623 (Fla 5th DCA March 24, 1995) at page 4. It is pointed out that the 5th DCA's citation to page 983 is not to the holding of the majority

opinion but a concurrence in part and a dissenting in part.

The above quotation seems to imply that the failure to raise this issue is one of fundamental error, and therefore may be raised regardless of it not being raised below or in the briefs submitted on appeal. This also conflicts with well-established case law that an issue regarding the right to remain silent is not fundamental error. Clark, 363 So. 2d 331, 333 (Fla. 1978)("An improper comment on defendant's exercise of his right to remain silent is constitutional error, but it is not fundamental error). See also Harris v. State, 564 So. 2d 1211 (Fla. 3d DCA 1990)(right to remain silent encompassed within Fifth Amendment privilege against self-incrimination is personal to the defendant; objection by codefendant does not preserve the issue for appellate review); Noble v. State, 543 So. 2d 402 (Fla. 4th DCA 1989)(State's playing of tape-recorded statement in which defendant invoked his right to remain silent was not fundamental error). Ineffective assistance of trial counsel or appellate counsel to raise an issue or make a specific legal argument does not constitute fundamental error. In addition, the ineffective assistance of trial counsel or appellate counsel in raising this issue does not amount to fundamental error.

The effect of allowing the 5th DCA's decision to stand without permitting discretionary review would be devastating. The 5th DCA decision ignored a most basic rule of appellate law (waiver of constitutional error). It should be reversed.

CONCLUSION

This Honorable Court should grant discretionary jurisdiction because the 5TH DCA's decision expressly construes a provision of the state and federal constitutions and because the 5th DCA's decision expressly and directly conflicts with decisions on the same question of law out of this Court and other district courts of appeal. Therefore this Court should exercise jurisdiction to considers the merits of petitioner's argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petitioner's Jurisdictional Brief has been furnished by U.S. Mail to counsel for respondent, Richard G. Canina, Law Firm of Mitchell & Canina, 930 South Harbor City Blvd., Suite 500, Melbourne, FL 32901, this 5th day of May, 1995.

STEVEN J. GUARDIAN0
Of Counsel

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

SUPREME COURT CASE NO.
5TH DCA CASE NO. 93,2623

v.

HOWARD VINCENT DECK,

Respondent.

_____/

APPENDIX TO PETITIONER'S JURISDICTIONAL BRIEF

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1994

NOT FINAL UNTIL THE TIME EXPIRES TO FILE-REHEARING MOTION, AND, IF FILED, DISPOSED OF.

HOWARD VINCENT DECK,

Appellant,

v.

CASE NO.: 93-2623

STATE OF FLORIDA,

Appellee.

Opinion filed December 22, 1994

Appeal from the Circuit Court
for Brevard County,
Harry Stein, Judge.

Richard G. Canina of Law Firm of Mitchell & Canina, P.A., Melbourne, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, Myra J. Fried and Steven J. Guardiano, Assistant Attorneys General, Daytona Beach, for Appellee.

COBB, J.

The appellant, Howard Vincent Deck, was convicted and sentenced for multiple counts of sexual offenses against a minor. A paramount factor in the prosecutor's case at jury trial was the introduction into evidence of an investigative interview with Deck conducted by one Officer Bevil of the Brevard County Sheriff's Department.

The dispositive issue on appeal is the question of the admissibility of that portion of the interview which occurred after the following exchange between Bevil and Deck:

AGENT BEVIL: When was the first time?

MR. DECK: I don't know. I can't talk about it anymore.

AGENT BEVIL: Is it bothering you?

MR. DECK: Yeah, it's bothering me.

AGENT BEVIL: Okay.

MR. DECK: Bothering me.

AGENT BEVIL: You want me to get to the truth? Do you want me to get to the truth?

MR. DECK: I want to go to the bathroom, that is the truth. I can, you know, I --

AGENT BEVIL: Do you want to go to the bathroom or do you want to continue to talk about it and get all the rest of it out?

MR. DECK: That's all of it. That is all of it. I don't know what they're doing no. I don't know where we're --

AGENT BEVIL: I'm, I'm trying to get -- I'm trying to get to this specific information. You know what happened. You couldn't be totally intoxicated enough not to remember several events that are taking place.

(T. 734).

The opinion of the Florida Supreme Court in Owen v. State, 560 So. 2d 207 (Fla.), cert. denied, 498 U.S. 855, 111 S. Ct. 152, 112 L. Ed. 2d 118 (1990), controls our decision here. In that case the suspect, in response to an inquiry by his interrogator, said, "I'd rather not talk about it." At that point the police did not explore whether this was an invocation of Owen's right to remain silent or merely a desire not to talk about a particular detail. Instead, they urged him to clear matters up, as did Officer Bevil dealing with Deck

in the instant case. Thereafter, Owen responded to further questioning with inculpatory answers -- as did Deck.

In reversing Owen's conviction on the basis of the inadmissible statements given after the response, "I'd rather not talk about it," the court cited the well-established rule that a suspect's equivocal assertion of a Miranda right terminates any further questioning except that which is designed to clarify the suspect's wishes. Owen at 211. Officer Bevil made no inquiry as to whether Deck wished to terminate the interview.' The Owen court expressly relied upon the prior case of Long v. State, 517 So. 2d 664 (Fla. 1987), cert. denied, 486 U.S. 1017, 108 S. Ct. 1754, 100 L. Ed. 2d 216 (1988) and cases cited therein.

In an effort to avoid a reversal per Owen, the state in the instant case took the position at oral argument that the trial court's error was harmless in light of several damaging concessions by Deck earlier in the interview. Having carefully reviewed the entire interview, we cannot say, beyond a reasonable doubt, that admission of that portion of the interview subsequent to the equivocal Miranda assertion was harmless error. Chapman v. State, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L. Ed. 2d 705 (1967).

Accordingly, we reverse the convictions and sentences below and remand for new trial.

REVERSEDANDREMANDED.

SHARP, W. and GRIFFIN, JJ., concur.

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[1]Later in the interview, after sufficient inculpatory answers had been elicited and Deck again equivocally invoked his Miranda right to terminate the interview, Bevil asked the appropriate clarifying question as to whether Deck wished to stop the interview, to which the response was "Yes."

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1995

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

HOWARD VINCENT DECK,

Appellant,

v. CASE NO.: 93-2623

STATE OF FLORIDA,

Appellee.
/

Opinion filed February 10, 1995

Appeal from the Circuit Court
for Brevard County,
Harry Stein, Judge.

Richard G. Canina of Law Firm of Mitchell & Canina, P.A. Melbourne, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Myra J. Fried and Steven J. Guardiano, Assistant Attorneys General, Daytona Beach, for Appellee.

ON MOTION FOR REHEARING

COBB, J.

We grant the state's motion for rehearing, withdraw the opinion issued in this case under date of December 22, 1994, and substitute therefor the following opinion:

The appellant, Howard Vincent Deck, was convicted and sentenced for multiple counts of sexual offenses against a minor. A paramount factor in the prosecutor's case at jury trial was the introduction into evidence of an investigative interview with Deck conducted by one Officer Bevil of the Brevard County Sheriff's Department.

The dispositive issue on appeal is the question of the admissibility of that portion of the interview which occurred after the following exchange between Bevil and Deck:

> AGENT BEVIL: When was the first time?
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> MR. DECK: I don't know. I can't talk about it anymore.
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> AGENT BEVIL: Is it bothering you?
>
> MR. DECK: Yeah, it's bothering me.
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> AGENT BEVIL: Okay.
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> MR. DECK: Bothering me.
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> AGENT BEVIL: You want me to get to the truth? Do you want me to get to the truth?
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> MR. DECK: That's all of it. That is all of it. I don't know what they're doing no. I don't know where we're --
>
> AGENT BEVIL: I'm, I'm trying to get -- I'm trying to get to this specific information. You know what happened. You couldn't be totally intoxicated enough not to remember several events that are taking place.

The question raised by this appeal is: Did Deck's equivocal invocation of his Fifth Amendment right to remain silent -- "I can't talk about it anymore" -- require the interrogating officer to terminate further questioning except that which was designed to clarify the suspect's wishes? The answer to this question was readily apparent prior to the advent of the decision of the United States Supreme Court in Davis v. United States, U . S . _____, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), which was issued on June 24, 1994.

Prior to that time, case law of the Florida Supreme Court clearly established that the answer to the above question was yes. See Owen v. State, 560 So. 2d 207 (Fla.), cert. denied, 498 U.S. 855, 111 S. Ct. 152, 112 L. Ed. 2d 118 (1990) and Lona v. State, 517 So. 2d 664 (Fla. 1987), cert. denied, 486 U.S. 1017, 108 S. Ct. 1754, 100 L. Ed. 2d 216 (1988).

Based upon Owen and Long, and the United States Supreme Court opinions upon which they were predicated,[1] we would have held that the instant interrogation of Deck, following his equivocal invocation of his right to remain silent (which was ignored), was improper and, accordingly, we would have reversed his convictions. Davis, however, has precluded that result. It has dramatically altered the prior rule in regard to the obligation of an interrogating officer confronted with a suspect's equivocal reference to a Miranda right, in that case a Fifth Amendment right to counsel prior to the filing of a criminal charge against the suspect. In a five-to-four majority opinion authored by Justice O'Connor, the Supreme Court held that "after a knowing and voluntary waiver of Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." 114 S. Ct. at 2356. The majority opinion expressly declined to adopt a rule requiring officers to ask clarifying questions, and stated:

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

114 S. Ct. at 2356.

We are not persuaded by the appellant's attempt to distinguish Davis on the basis that it dealt with a defendant's right to counsel as opposed to the issue herein, which concerns

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[1] See Edwards v. Arizona, 451 US, 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981); Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980); Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

a defendant's right to remain silent. In the context of the invocation of a Miranda right during police interrogation, that is a distinction without a difference, as recently observed in Coleman v. Sinaletary, 30 F. 3d 1420 (11 th Cir. 1994). Therein, relying upon Davis, the Eleventh Circuit held that there is no reason to apply a different rule to equivocal invocations of the right to remain silent than that enunciated in Davis in regard to the right to counsel. See also United States v. Buckley, 36 F. 3d 1106 (10th Cir. 1994).

We note that neither Owen nor Long was predicated upon, or referred to, the right against self-incrimination enunciated in Article I, Section 9, of the Florida Constitution. Nor is any argument in that regard advanced by the appellant herein.[2]

Accordingly, the convictions and sentences of the appellant are affirmed.

AFFIRMED.

SHARP, W. and GRIFFIN, JJ., concur.

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[2] Compare State v. Hoey, 881 P. 2d 504, 523 (Haw. 1994).

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1995

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING **MOTION, AND, IF FILED, DISPOSED OF.**

HOWARD VINCENT DECK,

Appellant,

v.

CASE NO.: 93-2623

STATE OF FLORIDA,

Appellee.

Opinion filed March 24, 1995

Appeal from the Circuit Court
for Brevard County,
Harry Stein, Judge.

Richard G. Canina of Law Firm of Mitchell & Canina, P.A., Melbourne, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Myra J. Fried and Steven J. Guardiano, Assistant Attorneys General, Daytona Beach, for Appellee.

ON APPELLANT'S MOTION FOR REHEARING

COBB, J.

We grant the appellant's motion for rehearing, withdraw the opinion issued in this case under date of February 10, 1995, and substitute therefor the following opinion:

The appellant, Howard Vincent Deck, was convicted and sentenced for multiple counts of sexual offenses against a minor. A paramount factor in the prosecutor's case at jury trial was the introduction into evidence of an investigative interview with Deck conducted by one Officer Bevil of the Brevard County Sheriff's Department.

The dispositive issue on appeal is the question of the admissibility of that portion of the interview which occurred after the following exchange between Bevil and Deck:

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> AGENT BEVIL: I'm, I'm trying to get -- I'm trying to get to this specific information. You know what happened. You couldn't be totally intoxicated enough not to remember several events that are taking place.

Officer Bevil made no inquiry as to whether Deck wished to terminate the interview after the latter's equivocal assertion of his right to remain silent. Later in the interview, after sufficient inculpatory answers had been elicited and Deck again equivocally invoked his Miranda right to terminate the interview, Bevil asked the appropriate clarifying question as to whether Deck wished to stop the interview, to which the response was "Yes."

The question raised by this appeal is: Did Deck's equivocal invocation of his Fifth

Amendment right to remain silent -- "I can't talk about it anymore" -- require the interrogating officer to terminate further questioning except that which was designed to clarify the suspect's wishes? The answer to this question was readily apparent prior to the advent of the decision of the United States Supreme Court in Davis v. United States, U . S . ____, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), which was issued on June 24, 1994. Prior to that time, case law of the Florida Supreme Court clearly established that the answer to the above question was yes. See Owen v. State, 560 So. 2d 207 (Fla.), cert. denied, 498 U.S. 855, 111 S. Ct. 152, 112 L. Ed. 2d 118 (1990) and Lona v. State, 517 So. 2d 664 (Fla. 1987), cert. denied, 486 U.S. 1017, 108 S. Ct. 1754, 100 L. Ed, 2d 216 (1988)

Based upon Owen and Long, and the United States Supreme Court opinions upon which they were predicated,[1] the instant interrogation of Deck, following his equivocal invocation of his right to remain silent (which was ignored), would be held violative of the Fifth Amendment to the United States Constitution. Davis, however, has dramatically altered the prior federal rule in regard to the obligation of an interrogating officer confronted with a suspect's equivocal reference to a Miranda right, which in Davis involved a Fifth Amendment right to counsel prior to the filing of a criminal charge against the suspect. In a five-to-four majority opinion authored by Justice O'Connor, the Supreme Court held that "after a knowing and voluntary waiver of Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." 114 S. Ct. at 2356. The majority opinion expressly declined to adopt a rule requiring officers to ask

[1] See Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981); Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980); Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

clarifying questions, and stated:

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

114 S. Ct. at 2356.

Neither Owen nor Lnnq was predicated upon, or referred to, the right against self-incrimination enunciated in Article I, Section 9, of the Florida Constitution. Subsequent to those cases, however, the Florida Supreme Court, pursuant to the primacy doctrine, directly addressed the issue of the effect of an equivocal assertion of a Miranda right when considered in light of the Florida Constitutional provision. In Traylor v. State, 596 So. 2d 957, 966 (Fla. 1992), the court stated:

> 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 begun. must immediately stop. (Emphasis supplied).

The Hawaii Supreme Court reached a similar conclusion in State v. Hoey, 881 P. 2d 504,523 (Haw. 1994).

Although Deck failed to raise the argument available to him under Article I, section 9 of the Florida Constitution at the trial level or in his appellate briefs, we feel that our consideration and application of the Traylor case in the instant appeal is warranted. See Fla. R. Crim. P. 9.140(f) ("In the interest of justice, the court may grant any relief to which any party is entitled"). Traylor expressly supports the argument of the appellant, raised by his motion for rehearing, that a fundamental right created by the state constitution must be respected even if no similar right is recognized by the federal courts. Traylor at 983.

The state has also argued that, even if the trial court erred in failing to exclude the investigative interview with Deck that occurred after the exchange quoted above, such error

was harmless in light of several damaging concessions by Deck earlier in the interview. Having carefully reviewed the entire interview, we cannot say, beyond a reasonable doubt, that admission of that portion of the interview subsequent to the equivocal Miranda assertion was harmless. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). We find that admission of the interview evidence constituted reversible error.

Accordingly, we reverse the convictions and sentences below and remand for new trial.

REVERSED AND REMANDED.

SHARP, W. and GRIFFIN, JJ., concur.

Case No. 88-24269 24. Opinion filed April 19, 1995. Appeal from the Circuit Court for Broward County; George A. Brescher, Judge. Counsel: Steven Goerke of Steven Goerke, P.A., Hollywood, for appellants. R.A. Nunez, Miami Lakes, for appellees.

(DELL, C.J.) Haim and Varda Polani (appellants) appeal from an order denying their motion to vacate a default final judgment filed pursuant to rule 1.540(b), Florida Rules of Civil Procedure. They contend the trial court erred in denying their motion because lack of notice had rendered the judgment void. We agree and thus reverse.

In 1988, Bobby and Dorothy Payne, for the use and benefit of Prudential Property & Casualty Insurance Company, (appellees) sued appellants for damages resulting from an automobile accident.' Appellees effected service on appellants at 20314 N.E. 34th Court in North Miami Beach, Florida. Appellants responded with an answer and affirmative defenses. On July 10, 1990, the trial court mailed the pretrial order and order setting trial to appellants' attorney.

Subsequently, counsel for appellants filed a motion to withdraw asserting that for months he had been unable to directly communicate with appellants, although he had indirectly communicated with them through Haim Polani's partner, Elihu Ben Aziz. On September 5, 1990, the trial court granted counsel's motion to withdraw and ordered that all future pleadings and correspondence be sent to appellants in care of Elihu Ben Aziz at his North Miami Beach address. On October 11, 1990, appellees' attorney sent a notice of hearing on appellees' motion for final judgment to appellants' former address, rather than mailing notice to the address specified in the court order. Thereafter, appellants' failure to appear culminated in the trial court's entry of a default final judgment against them.

Almost two years later, appellants obtained new counsel who filed a rule 1.540(b) motion to set aside the default final judgment on the ground that it was void for lack of notice. In the affidavit accompanying the motion, Haim Polani asserted that neither he nor his wife had received notice of the hearing, that in October 1990 neither lived at the address where appellees served notice and that they had resided in a foreign country for most of the previous two years. He further attested that he had become aware of the final judgment only recently when denied a driver's license renewal, and "[h]ad notice been provided at the address set forth in this Court's Order on Alan L. Arons' Motion to Withdraw, my wife and I would have presently [sic] our defenses to this action."

Appellees opposed the motion based on the passage of time, appellants' failure to monitor the status of the pending action and appellants' failure to assert that they had a meritorious defense to the entry of the final judgment. Appellees argue for the first time on appeal that there is no evidence appellants would have received the notice had it been sent to the address specified in the court order,

In *Watson* v. *Watson*, 583 So. 2d 410 (Fla. 4th DCA 1991), this court reversed the entry of a final judgment following the trial court's failure to send notice of the pretrial hearing and nonjury trial to the correct address. This court explained:

> It is well settled that a judgment entered without notice to a party is void. As we stated in ***Taylor v. Bowles, 570 So.*** 2d 1093, 1094 (Fla. 4th DCA 1990), "[w]hen a party has no notice of a trial date, the trial court abuses its discretion when it proceeds with a final hearing."

Watson, 583 So. 2d at 411 (citations omitted); ***accord Pecille v. Broward Restaurant Equip. Exchange,*** Inc., 639 So. 2d 997 (Fla. 4th DCA 1994) (reversing final judgment where notice of hearing resulting in the final judgment was sent to an incorrect address). Here, appellees sent notice of the hearing that resulted in the default final judgment to the incorrect address. As a result, appellants failed to receive notice and the final judgment is void. ***See Pecille, 639 So.*** 2d at 997; ***Watson, 583 So.*** 2d at 411.

We reject appellees' contention that appellants failed to timely file their motion to set aside the final judgment. Although rule 1.540(b) imposes a one-year limitations period for filing certain motions to vacate, parties seeking relief from a judgment that is void are subject only to a "reasonable time" requirement. Rule 1.540(b), Fla. R. Civ. P. (1994); ***Osceolu Farms Co. v. Sanchez,*** 238 So. 2d 477,479 (Fla. 4th DCA 1970). Based on Mr. Polani's statement in his affidavit, he learned of the default judgment when attempting to renew his driver's license, and then he and his wife promptly filed their motion to vacate. Appellees did not contest that assertion or present contrary evidence to the trial court, and in the absence of same, we must hold that the trial court erred when it failed to vacate the default final judgment.

Accordingly, WC reverse the trial court's order denying appellants' motion to vacntc the default final judgment and remand this cause for further proceedings.

REVERSED and REMANDED, (STONE and STEVENSON, JJ., concur.)

'The patties provided this court with an approved statement of the lower court proceedings pursuant to rule 9.200. Florida Rules of Appellate Procedure (1994).

* * *

Criminal law-Statements of defendant--State's petition for writ of certiorari challenging trial court's refusal to consider defendant's confession admissible after state supreme court held that defendant's confession was invalid because defendant bad invoked *Miranda*, albeit equivocally-Certiorari denied even though U.S. Supreme Court held that police need not stop questioning defendant unless there is clear assertion of right to counsel-Question certified whether principles announced by U.S. Supreme Court in *Davis v. U.S.* apply to admissibility of confessions in Florida, in light of *Truylor* v. *State*—In exceptional circumstances, appellate court may reconsider and correct erroneous rulings notwithstanding tbat such rulings have become law of the case

STATE OF FLORIDA, Petitioner, v. DUANE OWEN, Respondent. 4th District. Case No. 94-2885. L.T. Case No. 84-4014 CFA02. Opinion filed April 19, 1995. Petition for writ of certiorari to the Circuit Court for Palm Beach County; Edward Rogers, Judge. Counsel: Robert A. Buttcnvorth, Attorney General, Tallahassee, and Celia A. Terenzio, Assistant Attorney General, West Palm Beach, for petitioner. Carey Haughwout of Ticmey & Haughwout, West Palm Beach, for respondent.

(KLEIN, J.) In Owen v. ***State,*** 560 So. 2d 207 (Fla. 1990), the Florida Supreme Court reversed respondent's conviction because it concluded that his confession was erroneously admitted into evidence contrary to ***Miranda v. Arizona, 384*** U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Between that reversal and respondent's retrial, the United States Supreme Court clarified ***Miranda*** in ***Davis v. U.S., -U.S.*** ___, 114 S.Ct. 2350, 129 L. Ed. 2d 362 (1994), so as to make respondent's confession admissible. Prior to retrial the state moved the trial court, pursuant to ***Davis,*** to reconsider the admissibility of respondent's confession, but the trial court held it inadmissible. The state now seeks certiorari relief. We deny the state's petition, but certify the issue of admissibility as one of great public importance.

Respondent was convicted of burglary, sexual battery, and first degree murder, and his confession was the "esscncc" of the state's case. ***Owen,*** 560 So. 2d at 211. He never rcqucstcd counsel, but because during his confession he said things like "I don't want to talk about it," in response to questions about a particular detail of the crime, our supreme court reversed, stating:

> The responses were, at the least, an equivocal invocation of the *Miranda* right to terminate questioning, which could bc clarified. It was error for the police to urge appellant to continue his statement.

Justice Grimes dissented, nsscrting that ***Miranda*** as interprctcd by ***post-Miranda*** decisions of the federal courts, did nor require this result. The prcscicncc of this dissent, in which Chief Justice Ehrlich concurred, did not become apparent until the

United States Supreme Court concluded in Davis that the police need not stop questioning a defendant unless there is a clear assertion of the right to counsel:

> [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.
>
> To recapitulate: 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 the suspect invokes the right to counsel at **any** time, the police must immediately cease questioning him until an attorney is present. But we are unwilling to create a third layer ofprophylaxis to prevent police questioning when a suspect ***might*** want a lawyer. Unless the suspect actually requests an attorney, questioning may continue.

Davis, 114 S.Ct. at 2356-57.

If we were certain that ***Davis*** was the law in Florida, and if this specific confession had not already been held inadmissible by the Florida Supreme Court, we would grant certiorari, because the pretrial refusal to admit this confession would be a departure from the essential requirements of law for which the state would have no adequate remedy by review. ***State v. Pettis, 520 So.*** 2d 250 (Fla. 1988).

The first "if," which is whether ***Davis*** is the law in Florida, is more complicated than would appear from simply reading *Miranda* and its progeny. Between Owen, which was decided in ***1990,*** and ***Davis,*** which was decided in 1994, the Florida Supreme ***Court,*** in *Traylor* ***v. State, 596 So.*** 2d 957, 961 (Fla. 1992), recognized that:

> Under our federalist system of government, states may place more rigorous restraints on government intrusion than the federal charter imposes; they may not, however, place more restrictions on the fundamental rights of their citizens than the federal Constitution permits. ***Prune Yard Shopping Ctr. v. Robins, 447*** U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980).

Like the present case, ***Traylor*** involved the admissibility of a confession, and in that case, after discussing federalism and the fact that the Declaration of Rights in the Florida Constitution includes, in article I, section 9, a right against self-incrimination, our supreme court stated:

> Based on the foregoing analysis of our Florida law and the experience under ***Miranda*** and its progeny, we hold that to ensure the voluntariness of confessions, the Self-incrimination Clause of Article I, Section 9, Florida Constitution, requires that prior to custodial interrogation in Florida suspects must be told that they have a right to remain silent, that anything they say will be used against them in court, that they have a right to a lawyer's help, and that if they cannot pay for a lawyer one will be appointed to help them.
>
> Under Section ***9, if the suspect indicates in any manner that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop.***

Traylor, 596 So. 2d at 967 (footnote omitted) (emphasis added).

It thus appears that while the statements made by Owen during his confession would not make his confession inadmissible under ***Davis,*** his confession might still be inadmissible under ***Traylor.*** Yet the Florida Supreme Court relied heavily on federal law when it made its pronouncements about the admissibility of confessions in *Traylor*. Accordingly, the significance of ***Davis is*** unclear. We therefore conclude that this question should be certified as one of great public importance.

Although it is the law of the case that this specific confession is inadmissible, if the supreme court accepts our certification of the question of great public importance, it can revisit that issue:

> [A]n appellate court does have the power to reconsider and correct erroneous rulings notwithstanding that such rulings have become the law *of* the case. ***Strazzula v. Hendrick,*** 177 So. 2d 1, 4 (Fla. 1965). Reconsideration is warranted only in exceptional circumstances and where reliance on the previous decision would result in manifest injustice.

Preston v. ***State,*** 444 So. 2d 939,942 (Fla. 1984).

We conclude that the exceptional circumstances for reconsideration are present here. Accordingly, although we deny certiorari, we certify the following question as one of great public importance:

> DO THE PRINCIPLES ANNOUNCED BY THE UNITED STATES SUPREME COURT IN ***DAVIS*** APPLY TO THE ADMISSIBILITY OF CONFESSIONS IN FLORIDA, IN LIGHT OF *TRAYLOR*?

(GUNTHER and STONE, JJ., concur.)

* * *

Criminal law-Forfeiture-Delay between time claimants requested preliminary hearing on probable cause for forfeiture and time when hearing could have occurred if claimants' counsel had not needed postponement rendered forfeiture proceeding invalid as denial of due process-Sheriff% office's act of informing claimants over ten days after request for hearing of method of obtaining hearing was insufficient to shift responsibility for delay to claimants

RON COCHRAN, Sheriff of Broward County, Appellant, v. ROBERT HARRIS AND MARCUS HARRIS, Appellee. 4th District. Case No. 93-3537. L.T. Case No. 93-21329 12. Opinion filed April 13, 1995. Appeal from the Circuit Court for Broward County: James M. Reasbeck, Judge. Counsel: Abigail F. Morrison and Heidi N. Shulman of Whitelock, Soloff & Rodriguez. Fort Lauderdale, for appellant. David W. Collins of the Law Office of David W. Collins. Fort Lauderdale, for appellee.

(KLEIN, J.) The trial court dismissed this forfeiture proceeding' because it concluded that the delay between claimant's request for a preliminary hearing on probable cause, and the occurrence of the hearing, constituted a denial of due process. We affirm.

When the Florida Supreme Court determined that the Florida Contraband Forfeiture Act, §§ 932.701-707, Fla. Stat., was facially constitutional in ***Department of Law Enforcement v. Real Properly,*** 588 So. 2d 957,965 (Fla. 1991), it nevertheless found the act lacking in procedural safeguards and established, among other things, probable cause hearings:

> After the ex parte seizure of persona1 property, the state must immediately notify all interested parties that the state has taken their property in a forfeiture action; and that they have the right to request a postseizure adversarial preliminary hearing. If requested, the preliminary hearing shall be held as soon as is reasonably possible to make a de novo determination as to whether probable cause exists to maintain the forfeiture action; and to determine whether continued seizure of the property is the least restrictive means warranted by the circumstances to protect against disposal of the property pending final disposition. Again, as with real property forfeitures, this initial stage should be expeditiously completed, and ***we anticipate that the adversarial preliminary hearing, if requested, will take place within ten days of the request.***

(Emphasis added).

In response to ***Real Property,*** the legislature amended the Act to provide, when personal property has been seized, that if a claimant requests a preliminary hearing, it "shall be held within 10 days after the request or as soon as practicable." Section 932.703(2)(a), Fla. Stat. (1992).[2]

The sequence of relevant events in this case began on July 21, 1993 when, during the execution of a search warrant, deputies from the Broward County Sheriff's office seized currency, along with drugs and weapons, in a residence occupied by the claimants. Claimants filed their request for a preliminary hearing as to the currency on July 29, and a sheriff's staff attorney contacted claimants on August 11, to inform them of the procedure to set a hearing. Claimants' counsel tiled a request for a hearing on August 17. He next wrote a letter to the court on August 19, stating that he had been unsuccessful in reaching the judge's office by telephone. In the letter, counsel requested that a prelim-