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THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

vs. CASE NO.:

HOWARD VINCENT DECK,

Respondent.

RESPONDENT'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

The Respondent adopts the Statement of the Case and Facts as set forth in Petitioner's Jurisdictional Brief.

SUMMARY OF REPLY TO JURISDICTIONAL ARGUMENT

The final decision of the Fifth DCA was decided under the doctrine of stare decisis, in applying the principle of law set forth in Travlor v. State, 596 So.2d 957 (Fla. 1992) to the facts in Respondent's case which were substantially the same. The decision of the Fifth DCA followed the binding precedent of the Travlor, court, and did not expressly construe the constitutional right of the Respondent to remain silent under Article 1, Section 9, of the Florida Constitution.

The decision of the Fifth DCA does not expressly or directly conflict with decisions of this Court or any other District Court of Appeal constitutional issue that in a criminal trial can be waived when not properly objected to.

This Court in Castor v. State, 365 So.2d 701 (Fla. 1978), set forth in detail the basis for the rule that a reviewing Court will not generally consider points raised for the first time on appeal as follows:

> "The requirement of contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity ta correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually."

In the case sub iudice the Defendant objected to the admission of his statements made during his custodial interrogation at every stage of the trial proceeding, to wit:(l)

At a pre-trial Motion to Suppress Hearing; (2) At trial just prior to the Court admitting the statement into evidence; and, (3) At a post-trial hearing on Defendant's Motion for a New Trial. Albeit, the objection was primarily framed and argued under Federal Constitutional Fifth Amendment Rights of the accused. However, the Federal Appellate decisions were at that time in accord with the decisions of the Florida Supreme Court in construing the Defendant's Fifth Amendment Rights as set forth 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), and the principle of law announced in Travlor, supra, interpreting under the doctrine of primacy this same right provided Respondent under Article 1, Section 9, Florida Constitution. The five-to-four majority decision in Davis v. United States, ___ U.S. __, 114 S.Ct. 2350, 129 L.Ed. 2d 362. (1994), which intrinsically altered the prior Federal decisions regarding this rule was issued on June 24, 1994 and was not raised by the petitioner until after the opinion of the Fifth DCA was rendered on December 22, 1994, by way of Motion for Rehearing.

The trial Judge in this case was on notice of the Defendant's objection at every critical stage of the proceeding and was provided with opportunity to correct his ruling.

Under these circumstances the decision of the Fifth District Court of Appeal to address this suppression issue under Defendant's belated argument derived from Article 1, Section 9 of the Florida Constitution was fully warranted.

ARGUMENT

POINT I

THE DECISION OF THE FIFTH DCA DID NOT EXPRESSLY CONSTRUE A PROVISION OF THE STATE AND FEDERAL CONSTITUTION.

The Respondent's position is that the Fifth DCA interpreted his right against self-incrimination as enunciated in Article 1, Section 9, of the Florida Constitution as construed by this Court in Traylor v. State, 596 So.2d 957, 966 (Fla. 1992), in which this 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."

The decision of the Fifth DCA in this case was following the binding precedent of this court in Traylor, supra, and the Court did not expressly construe a provision of the state constitution, to wit: Article 1, Section 9, Florida Constitution.

Admittedly the Respondent did not specifically rely on Article 1, Section 9, in presenting his argument at the trial level or in his Appellate Briefs. However, it should not be overlooked that the State of Florida did not raise its Fifth Amendment argument under the five-to-four majority decision in Davis, supra, until it filed its initial Motion for Rehearing in response to Respondent's favorable decision before the Fifth DCA.

Judge Kogan, in his concurring opinion in Bouters v. State, 20 Fla. L. Weekly S187, 188, remarked that he would analyze the

Bouters case "entirely under the Florida Constitution in keeping with the doctrine of primacy announced in Travlor v. State, 596 So.2d 957 (Fla. 1992)." At least in Judge Kogan's recent opinion the Travlor, supra, pronouncement about the admissibility of confession remains the law of Florida.

This Court's decision in Travlor, supra, is not the first time that its pronouncement did not follow a Federal test. In State v. Kinchen, 490 So.2d 21 (Fla. 1985), this Court refused to abandon "the fairly susceptible" standard previously set by the Court in favor of adopting the less demanding Federal test concerning comments on a Defendant's failure to testify.

It is also submitted that the five-to-four divided Court in Davis, supra, is not the "persuasive authority and practical reasoning" as advanced by the State, but was an opinion that expressed diverse views of all the sitting justices of the U.S. Supreme Court.

There is no compelling argument that this Court's well reasoned opinion in Travlor, supra, should be re-examined in light of the U.S. Supreme Court's decision in Davis, supra. The State had previously requested the Fifth DCA to certify this question as of great public importance and for this Honorable Court to revisit this issue in conjunction with the decision in Davis, supra. The District Court declined the invitation.

POINT II

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE FIFTH DCA AND ANOTHER DISTRICT COURT OR OF THE SUPREME COURT ON THE SAME QUESTION OF LAW.

Respondent does not take issue with the rule that constitutional errors which do not raise to the level of fundamental error are waived unless timely objected to at trial. It is the Respondent's position; (1) That under the circumstances of this case the Respondent's objection before the trial court properly preserved the issue for Appellate review; (2) That Respondent's exercise of his right to remain silent was a constitutional fundamental due process right that could be considered on appeal even though no specific objection had been raised in the trial court; and (3) That the consideration and application of the principle of law set forth in Travlor, supra, to this case by the Fifth DCA was warranted.

In Hopkins v. State, 632 So.2d 1372 (Fla. 1994) this Court was called upon to review a decision of the First DCA which in part had concluded the Defendant's general objection at the trial was not adequate to preserve the issue for Appellate review, this Court stated:

> [3] "In the instant case, the district court held that Hopkins' "very general objection," which was "'couched in terms of a confrontation rights argument,'" was not sufficient to preserve for review the issue of whether the trial court's finding satisfied the requirements of section 92.54(5). *Hopkins,* 608 So.2d at 36 (quoting the State's characterization of the objection). Prior to the child's testimony by closed circuit television, Hopkins' defense counsel made the following objection:

> I would like to renew my previous objection objecting to this witness be[ing] allowed to testify outside of the presence of the jury and outside of the presence of Mr. Hopkins. And also object to [our] not being present to the jury to receive their reactions at the time that they view this testimony outside the presence-
>
> [4] Under the circumstances of this case, we find that this objection properly preserved the issue for Appellate review. Although the objection did not specifically address the sufficiency of the factual findings under section 92.54, it properly raised the issue of Hopkins' constitutional right "to be confronted with the witnesses against him." U.S. Const. amend VI; see *also* art. I, S 16(a), Fla. Const. ("In all criminal prosecutions the accused...shall have the right...to confront at trial adverse witnesses...").

In Williams v. State, 611 So.2d 1337 (Fla. 2d DCA 1993) the State argued that the Defendant had failed to preserve his right to Appeal the Bruton issue because he had failed to object at trial under the Bruton rule. The Appellate court responded:

> "The transcript of the trial concerning this issue is at best confusing and at worst a mess. Some statements by the attorneys are unintelligible apparently because of being inaccurately or mistakenly reported and transcribed. It is true that *Bruton* as such is not mentioned. It is evident to us however, that appellant's trial counsel was clearly expressing objections to the admission of Hill's confession because appellant had been denied the right to cross-examine and confront his co-defendant confessor. The state simply argued, and convinced the trial judge, that the 1990 amendment to section 90.804(2)(c) eliminated any such objection without regard to the overriding principle that a statute cannot abrogate an accused's constitutional right."

The decisions in both Hopkins and Williams, supra,

established a clear and rational support for the conclusion that under the circumstances of this case the Respondent's trial objections properly preserved the issue for Appellate review.

Furthermore, it was the State of Florida that took a fortuitous advantage by raising the decision by the Davis, Court, for the Appellate Court's consideration just days before being jurisdictionally foreclosed from arguing the decision. In fact the Davis case was never argued by the State in its Appellate Brief or at oral argument which was held on December 6, 1994, notwithstanding the fact the Davis opinion was issued on June 24, 1994. The first mention of the Davis, decision was contained in the State's initial Motion for Rehearing filed on December 28, 1994.

Terminally, under the facts and circumstances of this case the Fifth DCA was correct in applying the principle of law announced in Traylor to the facts and issues of this case "in the interest of justice" to which Respondent was entitled.

CONCLUSION

This Honorable Court should refuse to take discretionary jurisdiction because the decision of the Fifth DCA was decided under the doctrine of stare decisis in applying this Court's opinion in Traylor, supra, to the issue presented. Secondly, the decision of the Fifth DCA is not in conflict with any decisions by this Court or sister district Court's of Appeal. Therefore, it is submitted that this Court should not exercise is discretionary jurisdictional in this matter.

Respectfully submitted,,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Steven J. Guardiano, Sr. Assistant Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Florida 32118, this 25 day of May, 1995.

RICHARD G. CANINA
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