OA 2-3-95

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CASE NO.: 85, 652

DISTRICT COURT OF APPEAL
FIFTH DISTRICT -NO: 93-2623

HOWARD VINCENT DECK,

Respondent.

ON THE DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT
AND THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR
BREVARD COUNTY, FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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AUTHORITIES CITED

STATEMENT OF THE CASE AND FACTS

The Respondent adopts the Statement of the Case and Facts as set forth in Petitioner's Initial Brief on the merits

SUMMARY OF ARGUMENT

The Respondent's failure to specify his legal argument on Article I, Section 9, of the Florida Constitution at the trial level or in his initial briefs did not waive his argument from Appellate review. In Deck I, Exhibit A of Petitioner's Appendix, the lower court in reversing the Respondent's conviction based its decision on this Court's opinion 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) . The Petitioner, in Deck I, never raised the application of **Davis v. United States,** 512 U.S. 452 114 S.Ct. 2350, 129 L.Ed.2d 362 1994 in its initial brief or during oral argument which occurred on December 6, 1994, notwithstanding the fact that the **Davis** opinion was issued on June **24, 1994**. The first mention of the **Davis** decision was contained in the Petitioner Motion for Rehearing filed on December 28, 1994. Justice was well served by the lower courts leveling the playing field by permitting the Respondent to address those new issues as raised by the Petitioner.

Additionally, the decision of the United States Supreme Court as announced in **Davis v. United States,** 512 U.S. 452 as adopted by the Florida Supreme Court in **Owen v. State, 696** So.2d 715 (Fla. 1997), should be applied prospectively to the Respondent and he should be granted a new trial.

POINT I

RESPONDENT'S FAILURE TO SPECIFY HIS LEGAL ARGUMENT ON ARTICLE I, SECTION 9, OF THE FLORIDA CONSTITUTION AT THE TRIAL LEVEL OR IN HIS BRIEFS DID NOT EFFECTIVELY WAIVE THE ARGUMENT FROM APPELLATE REVIEW

ARGUMENT

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 to 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. **Castor,** **365** So.2d at 703.

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 v. United States,** 596 So.2d 957 (Fla. 1992), 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,** 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed. 2d 362. (1994), which intrinsically altered the prior Federal decisions regarding the application of 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 filing its Motion for Rehearing. It clearly appears that justice was well served by the Fifth District Court of Appeals leveling the playing field by permitting the Respondent in turn to file his Motion for Rehearing asserting the **Travlor,** principle of primacy in opposition to the application of the **Davis,** refinement to a Defendant's equivocal revocation of his or her **Miranda** rights.

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 ample 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.

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 **Traylor**, 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..."). **Hopkins, 632** So.2d at 1375.

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. **Williams,** 611 So.2d at 1339.

The decisions in both **Hopkins** and **Williams,** 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 application of the decision in **Davis**, in its Motion for Rehearing, 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.

POINT II

WHETHER THE DECISION OF THE UNITED STATES SUPREME COURT ANNOUNCED IN **DAVIS V. UNITED STATES**, 512 U.S. 452 (1994) AND AS ADOPTED BY THE FLORIDA SUPREME COURT IN **OWEN V. STATE**, 696 SO.2D 715 (1997), SHOULD BE GIVEN PROSPECTIVE OR RETROACTIVE APPLICATION TO THE CASE AT BAR.

ARGUMENT

This Court by granting the Respondent an opportunity to brief and orally argue the merits of his appeal, has placed the Respondent in a quandry as to the specific issue the Court desires the Respondent to address. In searching for an issue that is both germane to this appeal and would foreseeably benefit the Respondent if he were to receive a favorable ruling by this Court, one must focus on the issue of the prospective versus retroactive application of the Davis, decision.

The Respondent contends that the decision of the United States Supreme Court announced in Davis, should be limited to prospective application, and not forfeit the Respondent's right to a new trial as initially granted by the Fifth District Court Appeal in its opinion dated December 27, 1994.

At the time of Respondent's conviction and sentence by the trial court, the case law established by this Court held that Respondent's equivocal invocation of his right to remain silent, which was totally disregarded by his inquisitioners, was improper requiring reversal of the Respondent's conviction entitling him to a new trial. Before the advent of Davis, that was the decision of the Fifth District Court of Appeal in Respondent's direct appeal.

However, the District Court on the State's Motion for Rehearing, which for the first time cited the Davis decision, was of the opinion that it was compelled to apply the **Davis** Court's refinement of the rule 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," and reversed its prior ruling and reinstate the Respondent's conviction and sentence. The District Court, in effect, gave retroactive application to the **Davis,** rule as it applied to the Respondent in this case.

Seldom does a change in decisional law require retroactive application. In Witt v. State, 387 So.2d 922 (Fla), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), this Court Stated:

> In contrast to these jurisprudential upheavals are evolutionary refinements in the criminal law, affording new or different standards for admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters. Emergent rights in these categories, or the retraction of former rights of this genre, do not compel an abridgment of the finality of judgments. To allow them that impact would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit. **Witt,** 787 So.2d at 925.

In **State v. Glenn,** 558 So.2d 4, (Fla. 1990), this Court went on to discuss the refinement of prospective or retroactive applications of new pronouncements of the law, as follows:

Balancing the importance of decisional finality against ensuring fairness and uniformity in individual **cases** is even more fundamental to determining whether a change of decisional **law** requires retroactive application. The credibility of the criminal justice system depends upon both fairness and finality. Johnson v. State, 536 S0.2d 1009 (Fla 1988). Deciding whether a change in decisional law is a major constitutional change or merely an evolutionary refinement is reflective of the balancing process between these two important goals of the criminal justice system.

. . .

Therefore, the doctrine of finality should be abridged only when a more compelling objective, such as ensuring fairness and uniformity in individual adjudications, is present. In practice, because of the strong concern for decisional finality, this Court rarely finds **a** change in decisional law to require retroactive application. **See** **State v. Washinston, 453** So.2d **389** (Fla. **1984). Accord** **McCuiston v. State,** 534 S0.2d 1144 (Fla. 1988) (decline to retroactively apply **Whitehead v. State, 498** S0.2d 863 (Fla. 1986), which held that finding **a** defendant to be an habitual offender is not **a** legally sufficient reason for departure from sentencing guidelines); **Jones v. State,** 528 S0.2d 1171 (Fla. 1988) (decline to retroactively apply **Haliburton v. State,** 514 So.2d 1088 (Fla. 1987), which held that police failure to comply with attorney's telephonic request not to question a defendant further until that attorney could arrive was a violation of due process); **State v. Stafford, 484** So.2d 1244 (Fla. 1986) (declined to retroactively apply **State v. Neil,** 457 So.2d 481 (Fla. 1984), which changed the long-standing rule in Florida that a party could never be required to explain the reasons for exercising 300 So.2d 674 (Fla. 1974) (declined to retroactively apply **Miranda v. Arizona,** 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), which established that police must warn arrested persons of their right to remain silent before questioning those persons). Glenn, 558 So.2d at 6.

This Court continues to strictly temper retroactive application of new decisional rules. Leo v. State, 685 So.2d 1275 (Fla. 1996) refused to give retroactive effect to **Coney v. State,** 653 So.2d 1009 (Fla.), (Defendant has right to be physically present at the site where challenges are exercised, stating, "Unless we explicitly state otherwise, a rule of law which is to be given prospective application does not apply to those cases which have been tried before the rule was announced."); **Allen v. State,** 662 So.2d 323 (Fla. 1995) (giving prospective application to the **Koon** procedure which is to be followed when a Defendant, against his attorney's advise, refuses to permit the presentation of mitigating evidence in the penalty phase, held Koon became final three months after the sentencing of **Allen** occurred and was not applicable); **Harvey v. Dugger**, 656 So.2d 1253 (Fla. 1995) (declined to give this Court's decision in **Scull** retroactive application, which had held that only crimes committed before murder could be considered in determining whether there was a significant criminal history and prior criminal activity, as mitigating circumstances in capital murder case); Green **v. State,** 641 So.2d 391 (Fla. 1994) (held prior judicial decision in **Fenelon v. State, 594** So.2d 292 (Fla. 1992) Jury instruction permitting inference of guilt from Defendant's flight did not apply retroactively to Green whose trial was subsequent to the Court's decision); and, **Lyles v. State, 576** So.2d 706 (Fla. 1991) (declined to give retroactive application to **Ree v. State,** 565 So.2d 1329 (Fla. 1990) that required contemporaneous written findings supporting departure sentence **at**

time of sentencing to Lyles who was sentenced on April 7, 1989.

In State v. LeCroy, 461 So.2d 88 (Fla. 1984), this Court was called upon to review suppression by the trial court of Defendant's statements made after Defendant had requested and was appointed counsel on the basis of a violation of Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). This Court went on to reason:

> First, neither the trial court nor the district court had the benefit of Solem v. Stumes, ---U.S. ----, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984). Therein, the Court reasoned that retroactive application of the Edwards per se rule to collateral relief proceedings would not serve the purpose of deterring police misconduct as contemplated by the exclusionary rule, Accordingly, the Court declined to hold that Edwards was retroactive. The Court was careful to say that it was not addressing the issue of retroactive application of Edwards to cases on direct appeal, such as we have here. Nevertheless, applying the rationale of Solem, we do not see how the purpose of the exclusionary rule, deterring police misconduct, will be served by retroactively applying Edwards to police conduct which occurred prior to its issuance. The Solem court expressly acknowledged that Edwards established a new rule, that the police could not be faulted for failing to anticipate its per se approach, that a waiver of the right to counsel could be voluntary even if the police initiated contact after counsel was requested, that Edwards has little to do with the truth-finding function, that is would be unreasonable to expect the police to have followed the bright line of Edwards prior to its announcement, and that retroactive application would have a disruptive effect on the administration of justice. We agree in all respects and hold that Edwards is not retroactively applicable to cases on direct appeal. LeCroy, 461 So.2d at 92.

As in Solem, in which the Supreme Court declined to give

retroactive application to **Edwards** because it would not serve to deter police misconduct, it is clear that the **Davis** majority decision would not be given retroactive application by the United States Supreme Court for similar reasons.

Furthermore, in applying the principles of **Witt,** it is clearly evident that the **Davis** decision is an evolutionary refinement of the law as it relates to the equivocal invocation by **a** Defendant to terminate **a** custodial interrogation and it should not **have** retroactive application. Thus, it should inevitably follow, that the **Davis** refinement rule should not be applied retroactively to the Respondent, and as in LeCroy, should not have retroactive application during the course of Respondent's direct appeal.

CONCLUSION

WHEREFORE, for the foregoing reasons and argument the Respondent would urge this Honorable Court to reinstate the original decision of the Fifth District Court of Appeal issued under date of December 22, 1994, and remand the Respondent's case to the trial court for a new trial.

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 4th day of December, 1997.

RICHARD G. CANINA
Attorney for Respondent