IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,781

STATE OF FLORIDA, Appellant,

vs.

DUANE OWEN, Appellee.

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

BRIEF FOR AMICUS CURIAE, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, INC.

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STATEMENT OF THE CASE

Respondent was convicted in 1987 of burglary, sexual battery, and first degree murder. The "essence of the case against him" was statements elicited from him during police interrogation. Owen v. State, 560 So.2d 207, 211 (Fla.), cert. denied, 498 U.S. 855 (1990). During interrogation Owen's responses were "at the least, an equivocal assertion of the Miranda right to terminate questioning." Id. This Court therefore reversed respondent's conviction, citing "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." Id.

Two legal developments subsequently occurred, prior to respondent's retrial. First, in Traylor v. State, 596 So.2d 957 (Fla. 1992), the Court endorsed the principle of giving primacy to the state constitution. Applying that principle, Traylor interpreted the self-incrimination clause of Article I, Section 9 of the Florida Constitution independently from the Fifth Amendment of the federal constitution, and stated that under Art. I., § 9, interrogation must stop when a suspect indicates in any manner he does not want to be interrogated. Second, in Davis v. U.S., 114 S.Ct. 2350 (1994), the U.S. Supreme Court held that the self-incrimation clause of the Fifth Amendment of the United States

Constitution does not require termination of questioning when a suspect makes an equivocal invocation of a Miranda right. The present appeal addresses the impact of Traylor and Davis on the present action.

SUMMARY OF ARGUMENT

Davis v. United States, 114 S.Ct. 2350 (1994), should have no application when determining the admissibility of confessions under the Florida Constitution. Traylor v. State, 596 So.2d 957 (Fla. 1992), requires that the self-incrimination clause of Article I, Section 9 of the Florida Constitution be interpreted independently from its federal counterpart. Traylor held that Article I, Section 9 of the Florida Constitution -- not its federal counterpart -- requires cessation of interrogation when a suspect indicates he wants questioning to stop. Davis does not the alter the protections inherent in Florida's own state constitution. See Deck v. State, 653 So. 2d 435 (Fla. 5th DCA 1995).

ARGUMENT

I. THE PRINCIPLES ANNOUNCED BY THE UNITED STATES SUPREME COURT IN DAVIS DO NOT APPLY TO THE ADMISSIBILITY OF CONFESSIONS IN FLORIDA, IN LIGHT OF TRAYLOR.

A. Traylor Requires That the Florida Constitution be Given Primacy.

In Traylor v. State, 596 So.2d 957 (Fla. 1992), this Court stated:

> When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitituion and to give independent legal import to every phrase and clause contained therein.

596 So.2d at 962. Applying that model, and recognizing that "state courts and constitutions have traditionally served as the prime protectors of their citizens basic freedoms" (596 So.2d at 961), the Court went on to evaluate the admissibility of a defendant's confession exclusively under Article I, Sections 9 and 16, of the Florida Constitution. The Court did not rely on the federal constitution as the basis for its analysis.

The analytical framework adopted by this Court in Traylor -- considering first the state constitution -- is consistent with an emerging body of decisions by other state high courts. See, e.g., West v. Thomson Newspapers, 872 P.2d 999, 1006 (Utah 1994)(citing Traylor)("We are persuaded that the primacy model is the best method to address the interests at stake. . . . By looking first to state constitutional principles, we act in accordance with the original purpose of the federal system."); Autran v. State, 887 S.W.2d 31, 36 (Tex.Ct.App. 1994)(citing Traylor); State v. Young, 867 P.2d 593 (Wash. 1994); Arnold v. City of Cleveland, 616

N.E.2d 163, 169 (Ohio 1993)("We believe the [state] constitution is a document of independent force."); State v. Perry, 610 So.2d 746, 751 (La. 1992)("When the Founding Fathers assembled this nation, they recognized the primacy of the states in protecting individual rights."); Davenport v. Garcia, 834 S.W.2d 4, 11 (Tex. 1992); Commonwealth v. Edmunds, 586 A.2d 887, 894-95 (Pa. 1991)("It is both important and necessary that we undertake an independent analysis of the [state] constitution, each time a provision of that fundamental document is implicated.); State v. Moore, 404 S.E.2d 845, 848 (N.C. 1991); State v. Johnson, 719 P.2d 1248, 1255 (Mont. 1992); Large v. Superior Court, 714 P.2d 399, 405 (Ariz. 1986); City of Portland v. Jacobsky, 496 A.2d 646, 648 (Me. 1985); State v. Chaisson, 486 A.2d 297, 301 (N.H. 1984); State v. Coe, 679 P.2d 353, 359 (Wash. 1984).[1]

A number of U.S. Supreme Court justices have endorsed the view that state constitutions are the principal sources of individual rights. See, e.g., Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv.L.Rev. 489 (1977); O'Connor, Trends in the Relationship Between Federal and State Courts from the Perspective of a State Court Judge, 22 Wm.& Mary L. Rev. 489 (1981); Burger, Year-End Report on the Judiciary 18 (1981); Delaware v. Van Arsdall, 475 U.S. 673, 701-07 (1986) (Stevens, J., dissenting). Clearly, state courts courts may place

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[1] As of 1986, eleven other states construed the self-incrimination clauses of their state constitutions independently of the federal Fifth Amendment holdings. Traylor, 596 So.2d at 961 n.2. In Florida most recently, see Deck v. State, 653 So.2d 435 (Fla. 5th DCA 1995).

stricter limits on government conduct under state constitutional provisions than under the federal constitution. See California v. Greenwood, 486 U.S. 35, 43 (1985)("Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."); Mills v. Rogers, 457 U.S. 291, 300 (1982)(holding that if a state confers constitutional protections "beyond those minimally required by the Constitution of the United States, ...the minimal requirements of the Federal Constitution would not be controlling.").

By employing a primacy model in this case and others,[2] the Court is not broadening protections under the state constitution. Instead, the Court is ensuring that essential guarantees of the Florida Constitution are given their intended effect, and that the meaning of language in the constitution's provisions are determined properly by a state high court. "No court is more sensitive or responsive to the needs of the diverse localities within a state, or the state as a whole, than that state's own high court." Traylor, 596 So. 2d at 591. By giving vitality to the state constitution, moreover, the Court brings an important measure of stability to the law. Adherence to an independent body of state constitutional law will ultimately prevent the type of uncertainty that the present appeal entails.

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[2] See, e.g., Snipes v. State, 651 So.2d 108, 110 (Fla. 1995); Willacy v. State, 640 SO.2d 1079, 1083 (Fla. 1994); In re Matter of Dubreuil, 629 So.2d 819, 822 (Fla. 1993); Allred v. State, 622 So.2d 984 (Fla. 1993); State v. Guess, 613 So.2d 406, 407 (Fla. 1992); Phillips v. State, 612 So.2d 557 (Fla. 1992).

B. Under Art. I, § 9 of the Florida Constitution, If a Suspect Indicates in any Manner He Does Not Want to be Interrogated, Interrogation Must Stop.

Section 9 of Florida's Declaration of Rights provides: "No person shall be . . . compelled in any criminal matter to be a witness against himself." Art. I, § 9, Fla. Const.[3]

> The essence of this basic constitutional principle is `the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labors of its officers, not by the simple ... expedient of forcing it from his lips.'

Estelle v. Smith, 451 U.S. 454, 463-63 (1981)(citation omitted). The privilege against self-incrimination, along with other fundamental rights guaranteed under Article I of the Florida Constitution, warrants special vigilance by this Court. Traylor, 596 So.2d at 963.

The state maintains on the this appeal that respondent's self-incriminating statements during police interrogation "should not entail a discussion of either state or federal constitutional law," suggesting that all that is at issue is a "federal procedural rule." Initial Brief of Appellant, at 8. Traylor clearly holds the opposite:

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[3] Florida's Declaration of Rights provision "reflects the ultimate breadth of the common yearnings for freedom" among the people of this state, and not simply the "common denominator of freedom that can prudently be administered throughout all fifty states" that is reflected in the federal constitution's bill of rights. Traylor, 596 So. at 962 (noting that unique factors such as formative history, and state customs, traditions, and practices inhere in the meaning of states' bill of rights provisions).

> The common law principles governing confessions and other self-incriminating statements have long been matters of constitutional import in Florida. . . . [We have] reaffirmed both the constitutional status of Florida confession law under our Declaration of Rights and the broad scope of the constitutional privilege on numerous occasions.

The Court in Traylor went on to specifically hold:

> 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 already has begun, must immediately stop. . . . [A]ny statement obtained in contravention of these guidelines violates the Florida Constitution and may not be used by the state.

596 So. 2d at 966 (emphasis added). Simply put, Traylor means what it says. Accord Deck v. State, 653 So.2d 435 (Fla. 5th DCA 1995).

Changing the parameters of the Florida Constitution because there is a shift in federal case law would rob the primacy doctrine of its intended meaning and effect. See, e.g., Davenport v. Garcia, 834 S.W.2d 4, 11-12 (Tex. 1992)(noting that a state court should not "interpret the constitution of its state merely as a restatement of the Federal Constitution."); State v. Kennedy, 666 P.2d 1316, 1323 (Or. 1983)(A state's constitutional guarantees are meant to be "truly independent of the rising and falling tides of federal case law."). Under the primacy model, Davis v. U.S., 114 S. Ct. 2350 (1994), should have no greater weight than opinions from other state high courts construing similar clauses to those in the Florida constitution.

Courts have employed three basic approaches when a custodial suspect makes an equivocal assertion of the privilege againt self-incrimination or the right to counsel. The prevailing view, reflected in the Court's decision in State v. Owen, 560 So. 2d 207, has been that when a suspect makes an equivocal statement, the scope of interrogation must be immediately narrowed to clarifying the request. See, e.g., State v. Hoey, 881 P.2d 504 (Haw. 1994); State v. Robinson, 427 N.W.2d 217 (Minn. 1988); People v. Benjamin, 732 P.2d 1167 (Colo. 1987); Hall v. State, 336 S.E.2d 812 (Gr. 1985); Carter v. State, 702 P.2d 826 (Idaho 1985); Hampel v. State, 706 P.2d 1173 (Alaska 1985) ("Permitting clarification of an accused's request is necessary to protect his rights without unduly interfering with reasonable police practice."). The U.S. Supreme Court, in Davis v. U.S., 114 S.Ct. at 2356, acknowledged that the majority approach constitutes "good police practice," but nonetheless declined to implement it as a federal constitutional rule.

A second approach, articulated in Traylor, requires immediate cessation of questioning altogether after an equivocal request. See, e.g., Ochoa v. State, 573 S.W.2d 796 (Tex. Crim. App. 1978); People v. Superior Court, 542 P.2d 1390 (Cal.), cert. denied, 429 U.S. 816 (1976); and cases cited at State v. Hoey, 881 P.2d at 521. The latter approach reflects the fundamental importance of the privilege against self-incrimination and the right to counsel, and that to accomplish their intended purposes, those rights must be broadly construed. Traylor, 596 So.2d at 965.

The third approach, expressed by courts in several different ways, basically requires that a custodial suspect's statement meet a certain threshold of clarity before interrogation must cease. Prior to Davis v. U.S., this approach might involve a finding that a defendant's statement did not rise to the level of even an "equivocal" request, see e.g., Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989), or simply was not sufficiently self-evident in its nature to warrant the police officer's concern. See People v. Krueger, 412 N.E.2d 537 (Ill. 1980), cert. denied, 451 U.S. 1019 (1981) (Not "every reference to an attorney, no matter how vague, indecisive or ambigous, should constitute an invocation of the right to counsel."). The U.S. Supreme Court endorsed an extreme, brightline version of this last approach in Davis v. U.S., 114 S.Ct. 2350, holding that police officers have no obligation to stop interrogation unless a suspect's statement involving a Miranda right is unequivocal. 114 S.Ct. at 2356.

Having already subscribed to the majority approach in this case five years ago, and having later articulated a more strict per se approach under the Florida Constitution in Traylor, the Court should not now retrench and adopt the type of incompatible analysis undertaken in Davis v. U.S. Unlike the U.S. Supreme Court, this Court clearly can and should consider and incorporate "good police practices" in interpreting the meaning of Art. I, § 9 of the Florida Constitution, and it would be

astonishing were the Court not to do so.[4]

It is objectively unreasonable to place a burden on ordinary citizens, who are entitled to plain language explanations of their rights prior to interrogation, to then invoke those rights during interrogation with complete precision. Outside of courtooms and briefs, the reality is that common speech in many contexts is often imprecise and ambiguous. In Florida, the large number of minority and ethnic groups ensures that speech patterns are diverse, and in some instances tend to avoid direct assertions or confrontations. See Ainsworth, In a Different Register: The Pragmatics of Powerlessness in Police Interrogation, 103 Yale L.J. 259, 318 (1993). A standard that requires all citizens to invoke the privilege against self-incrimination with perfect clarity ignores the real dynamics of many police interrogations, and would in effect deny a fundamental right under the Florida Constitution to many of its citizens.

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[4] Notably, in Davis v. U.S., law enforcement groups apparently did not even advocate the position adopted by the U.S. Supreme Court. The International Association of Chiefs of Police, Inc., the National District Attorneys Association, and the National Sheriffs Association, filed an amicus brief endorsing the majority approach adopted by this Court in State v. Owen, noting it "'is a common sense resolution of the problem. It fully accommodates the rights of the subject, while at the same time preserving the interests of law enforcement and the public welfare.'" Davis, 114 S.Ct. 2350, at n.1 (Souter, J., concurring).

CONCLUSION

For all the foregoing reasons, amicus curiae American Civil Liberties Union Foundation of Florida, Inc., respectfully urges the Court answer the certified question in the negative.

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 Robert A. Butterworth, Attorney General and Celia A. Terenzio, Assistant Attorney General, Department of Legal Affairs, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299; and Carey Haughwout, Esq., 324 Datura Street, Suite 250, West Palm Beach, Florida 33401 this 28th day of August, 1995.

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