IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 85,781

DUANE OWEN,

Respondent.

AMICUS CURIAE BRIEF BY FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (FACDL) ON BEHALF OF RESPONDENT

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

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ATTORNEY AS AMICUS CURIAE ON BEHALF OF RESPONDENT

AND ON BEHALF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (FACDL)
THOMAS POWELL, PRESIDENT, FACDL, TALLAHASSEE, FL

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PRELIMINARY STATEMENT

FACDL adopts the designations noted in Petitioner's brief. FACDL, to avoid unnecessary duplication of Respondent's Answer Brief, will address only the law of the case issue presented by the certified question. FACDL fully adopts Respondent's arguments on the substantive issue of whether the confession in this case is inadmissible under the prior decision by this Court in this case and Traylor v. State, 596 So. 2d 957 (Fla. 1992).

SUMMARY OF ARGUMENT

The doctrine of law of the case should bar a reconsideration of this Court's opinion in this case in 1990. This Court's opinion in 1990 was not directly inconsistent with the subsequent decision by the United States Supreme Court in Davis v. United States, 512 U.S. ___, 114 S.Ct. 2350, 129 L.Ed2d 362 (1994). The United States Supreme Court in Davis, supra, did not address the same question presented by this case. In Davis, the question was an equivocal request for counsel; in this case the respondent clearly indicated he wanted to end questioning. Therefore, the doctrine of law of the case would prevent a reconsideration of this case in light of Davis.

Even if Davis were applicable to this case, this Court's subsequent decision (but before Davis) in Traylor v. State, 59 So.2d 956 (Fla. 1992) governs this case. In Traylor, supra, this Court gave greater protection to criminal Defendants than the United States Supreme Court in Davis. Consequently, Davis is not applicable to this cause and the doctrine of law of the case prevents a reconsideration of the decision in this case. A court should ignore the doctrine of law of the case only when a subsequent ruling on the same issue makes the prior decision manifestly unjust. There was no subsequent decision on the same issue by the United States Supreme Court in Davis which makes this Court's prior decision unjust.

ARGUMENT

THE DOCTRINE OF LAW OF THE CASE SHOULD BAR A RECONSIDERATION OF THE PRIOR DECISION BY THIS COURT - THE SUBSEQUENT DECISION IN Traylor v. State, 596 So.2d 957 (Fla. 1992), ELIMINATES ANY NEED TO RELY UPON THE DECISION OF THE UNITED STATES SUPREME COURT IN Davis v. United States, 512 U.S. ___, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), AND Davis v. United States, supra, IS NOT INCONSISTENT WITH THIS CASE (RESTATED).

A. The issue in this cause - Does Davis v. United States, supra, apply to this case?

In Owen v. State, 560 So. 2d 207 (Fla. 1990), this Court decided Respondent's confession was inadmissible. After the decision in this case, this Court decided Traylor v. State, supra. After the decision in Traylor, the United States Supreme Court decided Davis v. United States, supra.

The Fourth District Court of Appeal certified a question to this Court concerning whether the decision in Davis v. United States, requires this Court to reconsider its decision in this case of 1990, in light of the doctrine of law of the case. Before FACDL can discuss the doctrine of law of the case, this Court must consider whether Davis v. United States even applies to this cause.

The Fourth District Court of Appeal certified the question based upon a logical error - that Davis v. United States is applicable to this case and is inconsistent with this Court's ruling in 1990. The Fourth District Court of Appeal assumed that Davis was applicable to this case. However, Davis is not directly applicable (under the law of the case doctrine discussed below it must be directly applicable) to this case because Davis involves the request for counsel and this case involves the right to terminate questioning. The United States Supreme Court in Davis did not address the issue of this case -

whether the statements, "I'd rather not talk about it," and "I don't want to talk about it," are an invocation of the right to terminate questioning. In Davis, supra, the United States Supreme Court held that the statement, "Maybe I should talk to a lawyer," was not an unequivocal invocation of the right to counsel which required an immediate end to questioning.

The Davis court also decided it was proper for the police to clarify whether Davis wanted a lawyer. 114 S. Ct. at 2357. Consequently, in Davis, the issue was whether such an equivocal request for a lawyer required immediate cessation of questioning. This Court in 1990 in this case decided that an equivocal request to terminate questioning did not require immediate cessation of questioning. Therefore, this holding is consistent with Davis. This Court held that the police could clarify the statement, but it was error for the police to urge Respondent to continue his statement. 560 So. 2d at 211. Consequently, this case is not inconsistent with the holding in Davis - Davis simply held that an equivocal request for counsel did not require immediate cessation of questioning - the police could clarify the situation.

FACDL recognizes that Davis did not hold that the police must clarify the situation. However, under the facts of this case (two indications of a desire to stop questioning and no attempt to clarify, coupled with the police urging Respondent to confess), this Court's ruling in 1990 is still not inconsistent with Davis. In 1990, this Court merely held that an equivocal request (to terminate questioning) permitted the police to clarify the situation, but not to continue to urge Respondent to confess. This Court had previously followed this same line of reasoning in 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).

The decision in Davis is not directly applicable to this case because Davis involved the request for counsel - "Maybe I should talk to a lawyer," and this case involved the invocation of the right to end questioning - "I don't want to talk about it," - "I'd rather not talk about it.". The obvious differences in the nature of the statements in this case - "I don't want to talk, I'd rather not talk" - and the statement in Davis - "Maybe I should talk to a lawyer" - also make Davis not directly applicable to this case.

Even if Davis is applicable to this case, it is not consistent with the holding in this cause. The Fourth District Court of Appeal erroneously assumed that Davis, supra, would require reversal of this Court's decision in 1990. This Court in 1990 did not decide whether Respondent's "equivocal" request to terminate questioning required immediate cessation of questioning. (The precise question addressed in Davis).

This Court in 1990 decided that the failure of the police to clarify whether Respondent wanted to end questioning, coupled with the urging by the police to confess further, was a violation of the Miranda rights. The decision in Davis is consistent with this view because the United States Supreme Court directly held it was entirely proper for the police to clarify whether Davis, in fact, wanted a lawyer. 114 S. Ct. at 2357. Consequently, if Davis is applicable, by analogy, to this case, it would not require a reconsideration of this case because: 1) the Court in Davis did not decide the issue presented by this case; and 2) the decision in Davis is not inconsistent with this Court's decision in this case.

B. The effect of the decision in Traylor v. State, supra.

Even if this Court rejects the above argument about Davis v. United States, there still is no need to reconsider the prior decision in this case. The decision in Traylor v. State, supra, requires adherence to the prior decision in this case. In the opinion below by the Fourth District Court of Appeal, the Court acknowledged that Traylor may have afforded greater protection in this area than the United States Supreme Court in Davis. In Traylor, this Court unquestionably based its decision on Florida Constitutional law, not United States Supreme Court decisions.

The reference by the decision below to this Court's heavy reliance upon federal cases is illogical - the unambiguous intent of this Court in Traylor was to establish Florida Constitutional rights; this Court made it manifestly clear that the basis of its decision was the primacy of the Florida Constitution. Consequently, FACDL simply cannot understand the rationale of the Fourth District Court of Appeal. The Court in Traylor acknowledged the prerogative of this Court to give more protection to citizens under the Florida Constitution than the protection afforded by the United States Supreme Court under the United States Constitution.

This Court in Traylor clearly and unequivocally held that under Article I, Section 9, of the Florida Constitution, "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". 596 So. 2d at 966.

Under the decision in Traylor, the decision in this case in 1990 was unquestionably correct. Respondent indicated in any manner that he did not want to be interrogated;

Respondent stated - "I don't want to talk about it." - "I'd rather not talk about it." These statements were an indication of a desire not to be interrogated. Consequently, the decision in Traylor is the controlling precedent in this case - not Davis v. United States, supra.

One could even argue that Traylor, *sub silentio*, overruled the decision in this case that the police may clarify a statement of the desire to end questioning. For the purposes of this case, it is not necessary to decide that question. Under either the rationale of this Court's decision in this case in 1990 or Traylor, supra, the confession in this case was inadmissible. As the basis for these decisions is the interpretation of the Florida Constitution (Traylor) or a view of the United States Constitution which is not inconsistent with Davis (the prior ruling in this case), this Court does not have to reconsider this case in light of Davis v. United States.

C. The doctrine of law of the case.

The Fourth District Court of Appeal certified the question to this Court based upon the exception to the doctrine of law of the case that a court can reconsider a prior opinion if reliance upon the prior decision would result in manifest injustice. Preston v. State, 444 So. 2d 939 (Fla. 1984); Strazzula v. Hendrick, 177 So. 2d 1 (Fla. 1965). The decision below found the exceptional circumstances of manifest injustice, due to the erroneous conclusions that: 1) the confession in this case would be inadmissible under Davis v. United States; and 2) Traylor did not control this case as a matter of Florida Constitutional law, apart from any minimum requirements established by the United States Supreme Court in Davis v. United States, supra.

As FACDL discussed above, the confession in this case would not automatically be inadmissible under Davis because: 1) the Davis decision did not address the precise issue in this case; and 2) the Davis court acknowledged that an equivocal request for counsel did not require immediate cessation of questioning, but permitted a clarification of the request. Therefore, the exact rationale for reconsideration of this case is not present under the doctrine of law of the case.

A manifest injustice under the doctrine of law of the case must involve a subsequent ruling on the exact point in the prior decision - this fact can make reliance upon the prior decision unjust. A court should not reconsider a ruling merely as a second opportunity to review the question and possibly reach a different result. **See** Jacobson v. Humana Medical Plan, Inc., 636 So. 2d 120 (Fla. 3d DCA 1994); Morales v. State, 613 So. 2d 922 (Fla. 3d DCA 1993), (intervening decision by Supreme Court made prior sentence illegal); University of Florida v. Massie, 602 So. 2d 516 (Fla. 1992), (manifest injustice must be based upon erroneous ruling of law, not a re-review of facts); Schick v. Department of Agriculture, 599 So. 2d 641 (Fla. 1992), (law of case doctrine involves previously decided points of law); Brunner Enterprises, Inc. v. Department of Revenue, 452 So. 2d 550 (Fla. 1984), (no party entitled to reconsideration of issue, court may reconsider if strict adherence to point of law would create manifest injustice).

Davis v. United States, supra, does not necessarily make the confession in this case admissible because Davis does not involve the precise issue/ruling presented in this case. Consequently, the doctrine of law of the case bars a reconsideration of the issue in light of Davis. Only when a subsequent decision on the same point of law makes a

prior decision unjust does an exception to the law of the case exist. Otherwise, any time a subsequent decision seems to apply to a prior decision, then the doctrine of law of the case would apply. Under these circumstances, the principles of finality and the avoidance of piecemeal litigation would not be in effect. **See** Taylor v. Searcy, Denney, et. al, 651 So. 2d 97 (Fla. 4th DCA 1994); Strazzulla v. Hendricks, supra.

This Court would create uncertainty in judgments if it allows a reconsideration of a prior decision by this Court merely because a United States Supreme Court decision is analogous or seems to apply to the situation. The subsequent decision by the United States Supreme Court must directly overrule the prior decision of this Court.

This Court in Brunner Enterprises, Inc. v. Department of Revenue, supra, addressed this exact question. In Department of Revenue (DOR) v. Brunner Enterprises, Inc., 390 So.2d 713 (Fla. 1980), this Court had decided that a gain from an out-of-state sale of stock by a foreign corporation doing business in Florida was taxable under Florida law. This Court also approved of a specific formula to calculate the amount of income for the corporation's tax case. Subsequently, the United States Supreme Court in ASARCO, Inc. v. Idaho State Tax Commission, 458 U.S. 307, 102 S. Ct. 3103, 73 L. Ed. 2d 787 (Fla. 1982), reached a decision directly contrary to the decision in DOR v. Brunner Enterprises, Inc., supra, 452 So. 2d at 552. Therefore, this Court held that the doctrine of law of the case did not apply. (Id.)

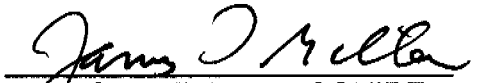
In this case, there is no subsequent United States Supreme Court holding which is directly contrary to the decision in this case. Even the decision of the Fourth District in this case acknowledges (albeit erroneously, as noted above) that "it appears that the

confession in this case would not be inadmissible under Davis." This is not enough for an exception to the doctrine of law of the case. For the doctrine to not apply, the opinion in Davis must be directly contrary to the holding in this case. Consequently, the doctrine of law of the case should bar this Court from a reconsideration of its prior holding in this case.

CONCLUSION

This Court should answer the certified question no because: 1) the decision in Traylor, supra, makes the decision in Davis, supra, inapplicable under the protections of the Florida Constitution as applied to this case; and 2) under the facts of this case, the doctrine of the law of this case bars a reconsideration of the prior ruling on Respondent's confession.

Respectfully submitted,



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ATTORNEY AS AMICUS CURIAE FOR RESPONDENT

ON BEHALF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (FACDL)

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been delivered, by mail, to Celia Terenzio, Assistant Attorney General, Department of Legal Affairs, 1655 Palm Beach Lakes Blvd., Ste. 300, West Palm Beach, FL 33401-2299 and to Carey Haughwout, 324 Datura Street, Ste. 250, West Palm Beach, FL 33401, this 16th day of August, 1995.

James T. Miller