IN THE SUPREME COURT OF FLORIDA

Case No. 85,781

STATE OF FLORIDA,

Appellant,

vs.

DUANE OWEN,

Appellee.

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

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PRELIMINARY STATEMENT

The Appellant, State of Florida, was the Petitioner in the Fourth District Court of Appeal and shall be referred to as "State" herein. The Appellee, DUANE OWEN, was the Respondent in the Fourth District Court of Appeal and shall be referred to as "OWEN" or "Defendant" herein.

An Appendix has been provided containing the Motion filed in the trial court which is the subject of this appeal, the trial court's order, and record excerpts of the interrogation, which was filed with this Court during OWEN'S initial appeal in this case (Supreme Court No. 68,549). References to the Appendix shall be designated as (App. _____).

STATEMENT OF THE CASE

OWEN takes issue with the State's assertion that this Court previously held that OWEN'S statement to the interrogating officers "I'd rather not talk about it" was an equivocal invocation of his right to remain silent. This Court never determined whether, in fact, it was equivocal. Rather, this Court stated: "The responses were, at the least, an equivocal invocation of the Miranda right to terminate questioning, which could only be clarified." 560 So.2d at 211 (emphasis added). Instead of clarifying, law enforcement simply urged OWEN to continue his statement.

Furthermore, OWEN later said during the interrogation "I don't want to talk about it." This Court never reached the question of the propriety of further questioning after that statement, finding that interrogation should have terminated, or been restricted to clarifying questions, after the initial statement of "I'd rather not talk about it."

Upon remand from this Court, the State filed a "Motion to Revisit the Florida Supreme Court's Ruling Reversing the Trial Court's Original Order Denying Defendant's Motion to Suppress." (App. A). The State in this motion requested the trial court to permit the introduction of OWEN'S confession. No evidence was presented; rather, it was a legal argument predicated upon Davis v. United States, _____ U.S. _____, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). The trial court denied this motion. (App. B).

The State thereafter, sought certiorari jurisdiction in the Fourth District Court of Appeal requesting the Court to reinstate the original order denying the motion to suppress the confession. The Fourth District Court of Appeal accepted jurisdiction, denied the Petition, but certified as a question of great public importance the following:

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

The State now seeks in this Court review of the Fourth District Court of Appeal's denial of the Petition for Writ of Certiorari and further requests this Court to reinstate OWEN'S conviction and sentence of death.

STATEMENT OF THE FACTS CONCERNING OWEN'S CONFESSION

The issue in this case concerns OWEN'S statements during an interrogation by law enforcement. This Court summarized the facts in Owen v. State, 560 So.2d 207 (Fla. 1990), as follows:

> On June 21, after the Boca Raton Police presented the fingerprint evidence and the similarity of the crime to earlier burglary rapes to which OWEN had confessed, he acknowledged his guilt and responded to further questions. Thereafter, the Delray Beach Police took up questioning on the instant crime. After police presented evidence on the "matched" footprints, alluded to evidence they expected to develop and the close similarity of the crime to the Boca Raton murder and earlier burglaries and rapes, OWEN closely studied the footprint impression and appeared to acknowledge the conclusiveness. However, when police inquired about a relatively insignificant detail, he responded with "I'd rather not talk about it." Instead of exploring whether this was an invocation of the right to remain silent or merely a desire not to talk about the particular detail, the police urged him to clear matters up. He was soon responding with inculpatory answers and asking questions of his own. After further exchanges and a question on another relatively insignificant detail, OWEN responded with "I don't want to talk about it." Again, instead of exploring the meaning of the response, the police pressed him to talk.

560 So.2d at 210-211.

After OWEN initially stated "I'd rather not talk about it", the law enforcement officers apparently perceived that OWEN was not going to discuss the murder and attempted to convince him of the reasons that he should discuss the murder. Specifically,

OWEN was told that a confession would "make it easier on the parents" (App. 1078), that "people are scared" (App. 1079), that it was all over although OWEN was very good in covering his tracks (App. 1079), that he should live up to his responsibility to be a man and live up to his agreement with law enforcement to talk to them (App. 1083), that OWEN should "be a man about it" (App. 1085), that OWEN should make things right for the people of Delray (App. 1085), and that in all fairness it was time to give the police officers something (App. 1086). OWEN continued to evade the primary questioning concerning the homicide. Law enforcement continued to ask him questions about the details such as where the bicycle he rode to the scene of the homicide was placed. At that point, OWEN said "I don't want to talk about it." (App. 1095). Law enforcement's response was as follows:

> OFFICER LINCOLN: Don't you think it's necessary to talk about it, Duane?
>
> Two months have gone by already, Duane.
>
> That's a long time for people to work. It's a long time for you to hold it within yourself. It's a long time for people to wonder.
>
> OFFICER WOODS: And be scared.
>
> OFFICER LINCOLN: Don't you think it's time to put all that to rest?
>
> I think you do.

OFFICER WOODS: It's all over. You might as well.

You can't get around all this stuff.

You got no out.

OFFICER LINCOLN: This isn't going to disappear.

OFFICER WOODS: Do you like the guys from Boca more than you like us?

Shortly thereafter, OWEN began responding to questions concerning details surrounding the homicide.

SUMMARY OF ARGUMENT

This Court's original opinion in Owen v. State is the law of the case and should bar reconsideration of the mandate issued in 1990. There has been no change in the law which is binding on this Court or which is applicable to the facts of this case. The United States Supreme Court opinion in Davis v. United States applies to the invocation of the right to counsel. The instant case concerns the right to terminate questioning. Further, it is not applicable to the facts of this case since OWEN unequivocally invoked his right to terminate questioning.

Finally, Davis does not alter the law in Florida. The Florida Constitution, Art. 1, §9, embodies the right to terminate questioning if the suspect indicates in any manner that he or she does not want to be interrogated. Traylor v. State, 596 So.2d 957 (Fla. 1992). In this case, as this Court previously held, OWEN indicated he did not want to answer questions. Law enforcement's failure to respect this invocation renders the confession inadmissible.

ARGUMENT

I. THIS COURT SHOULD NOT RECONSIDER ITS PRIOR DECISION IN OWEN V. STATE

The State is seeking in this appeal to have this Court reconsider its prior decision reversing and remanding this case for a new trial. The procedural posture of this case is unique. This Court issued its mandate in May, 1990. A Petition for Writ of Certiorari was filed by the State seeking review of this Court's opinion in the United States Supreme Court. The Petition was denied. State v. Owen, 498 U.S. 855, 111 S.Ct. 152, 112 L.Ed.2d 118 (1990). Thereafter, while this case was pending in the trial court, the Supreme Court issued its opinion in Davis v. United States, _____ U.S. _____, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), holding that an ambiguous or equivocal request for counsel does not require law enforcement to cease questioning; rather, after a knowing and voluntary waiver of Miranda rights, law enforcement may continue questioning until a suspect clearly requests an attorney. Davis at 2355-2356.

The State then moved the trial court to permit use of the confession that this Court held was inadmissible because of OWEN'S invocation of his right to remain silent. The trial court denied this motion and the State filed a Petition for Writ of Certiorari in the Fourth District Court of Appeal. The Fourth District denied the Petition but certified the question to this Court as to the applicability of Davis in Florida and to the facts of this case.

A. The Fourth District Court of Appeal erred by accepting jurisdiction as the Petition did not establish jurisdiction for issuance of a Writ of Certiorari.

Common law certiorari to review a non-final order in a criminal case is an extraordinary remedy available only under very limited circumstances. As pointed out in the 1977 Committee Notes to Rule 9.130 of the Florida Rules of Appellate Procedure,

> [i]t is extremely rare that erroneous interlocutory rulings can be corrected by resorting to common law certiorari. It is anticipated that since the most urgent interlocutory orders are appealable under this rule, there will be very few cases where common law certiorari will provide relief.

Certiorari is an exceptional remedy available only to review those non-final orders that (1) constitute a substantial departure from the essential requirements of law, (2) cause a material injury to a party throughout subsequent proceedings, and (3) cause an injury for which there will be no adequate remedy after final judgment. State v. Pettis, 520 So.2d 250 (Fla. 1988); Dairyland Ins. Co. v. McKenzie, 251 So.2d 887 (Fla. 1st DCA 1971); Gulf Cities Gas Corp. v. Cihak, 201 So.2d 250 (Fla. 2d DCA 1967). In Combs v. State, 436 So.2d 93, 96 (Fla. 1983), the Court limited application of certiorari to those cases where "there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." As the following analysis demonstrates, the restrictive standard governing certiorari review does not apply to this case.

The Fourth District Court of Appeal held that this Court could change the law of the case in exceptional circumstances and that if Davis applies to the facts of this case and if Davis

controls in Florida in light of Traylor, exceptional circumstances exist to reconsider the law of the case. Given the uncertainties inherent in the Fourth District's analysis, certiorari jurisdiction did not lie to review the trial court's order denying the "Motion to Revisit the Florida Supreme Court's Ruling Reversing the Trial Court's Original Order Denying Defendant's Motion to Suppress." The order under review was not a departure from the essential requirements of law. A finding that the order is a departure from the essential requirements of law is a jurisdictional prerequisite to the consideration of whether the excluded evidence would substantially impair the ability of the State to prosecute its case. State v. Pettis, 520 So.2d 250, 253 (Fla. 1988).

The practical effect of permitting certiorari review in the circumstances presented in the instant case is that in any prolonged litigation, an appellate court's rulings would be subject to constant change and review depending on rulings from higher courts that have questionable application. As demonstrated herein, the application of Davis to the instant facts is questionable and requires a relitigation of the facts in order to determine the application. Therefore, following the mandate originally issued in this case was not a violation of the clearly established principle of law. As such, the Fourth District Court of Appeal lacked jurisdiction to even issue the writ requested by the State.

B. The "law of the case" doctrine does not provide a basis to reconsider this Court's opinion in Owen v. State, 560 So.2d 207 (Fla. 1990).

Perhaps the leading case discussing "law of the case" is Brunner Enterprises, Inc. v. Dept. of Revenue, 452 So.2d 550 (Fla. 1984). However, Brunner, does not mandate a change in the law of the case given the specific facts and the issues in this case.

In Brunner, this Court addressed the appropriate procedure for modification of the law of the case. Brunner concerned an effort by the Department of Revenue to assess a tax deficiency for failing to include income earned by a corporation in another state. On direct appeal, the Supreme Court held that the income earned by an out of state sale by a foreign corporation doing business in Florida was taxable under a specified formula of apportionment. Dept. of Revenue v. Brunner Enterprises, Inc., 390 So.2d 713 (Fla. 1980). Subsequent to this decision, the United States Supreme Court reached a decision directly contrary to the holding in that case. In Asarco Inv. v. Idaho State Tax Commission, 458 U.S. 307, 102 S.Ct. 3103, 73 L.Ed. 2d 787 (1982), the United States Supreme Court found that the inclusion of such income and the formula method of apportionment violated the federal due process clause. The trial court ruled that it would not alter the initial decision of the Florida Supreme Court, despite Asarco, and the First District Court of Appeal certified the question to the Supreme Court.

Although this Court granted review, it held that, consistent with prior cases, "no party is entitled as a matter of right to have the law of the case reconsidered, and a change in the law of the case should only be made in those situations where strict adherence to the rules would result in 'manifest injustice'." Brunner, 452 So.2d at 552-553 (citations omitted). See, also, Henry v. State, 649 So.2d 1361 (1994).[1]

The court in Brunner further held that if the Supreme Court opinion in Asarco had been decided prior to Dept. of Revenue v. Brunner, they would have been bound to follow the Supreme Court's pronouncement and would have decided the case differently. Therefore, the court held that the intervening decision did provide one of the exceptional situations to support a modification of the law of the case.

The instant case presents a very different situation. The State argues that Davis v. United States, _____ U.S. _____, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994) provides a basis upon which to find exceptional circumstances. However, even if Davis had been decided prior to the initial appeal, it does not mandate a different result. Specifically, contrary to the situation in Brunner, Davis does not alter the law in Florida nor is it clearly applicable to the facts of this case.

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[1] In Henry the court held that the law of the case doctrine precluded reconsideration of the Motion to Suppress unless a subsequent hearing or trial developed material changes in the evidence or where exceptional circumstances existed whereby reliance upon the previous decision would result in manifest injustice.

In Davis, the court addressed "how law enforcement officers should respond when a suspect makes a reference to counsel that is insufficiently clear to invoke the Edwards[2] prohibition of further questioning." Davis at 2353. The issue in this case concerns the propriety of continued questioning after the Defendant said "I'd rather not talk about it." The leading case on this issue, as discussed further in this brief, is Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) which the Supreme Court neither cited nor discussed in Davis.

The facts of Davis are also quite different than the facts of the instant case. In Davis, the defendant was being questioned concerning a homicide. At some point during the interview, the defendant said "Maybe I should talk to a lawyer." The testimony at the suppression hearing was that law enforcement immediately:

> [m]ade it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer and he said, [']No, I'm not asking for a lawyer,' and then he continued on and said, 'No, I don't want a lawyer.'

Thereafter, a short break was taken, the defendant was reminded again of his right to remain silent and right to counsel and the interview continued. At a later point, the defendant said

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[2] Edwards v. Arizona, 451 U.S. 477 (1981), wherein the court held that law enforcement officers must immediately cease questioning a suspect who has clearly asserted his right to have counsel present during custodial interrogation.

"I think I want a lawyer before I say anything else" and questioning was terminated. Davis at 2352.

The lower court denied the Motion to Suppress and it was affirmed on appeal. The Supreme Court granted certiorari to address the Petitioner's contention that all questioning should have ceased upon the mention of an attorney.

The Supreme Court rejected this contention: "we decline Petitioner's invitation to extend Edwards and require law enforcement officers to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney." Davis at 2354. Rather, the court held that after a knowing and voluntary waiver of Miranda rights, "law enforcement may continue questioning until and unless the suspect clearly requests an attorney." Davis at 2355.

Applying Davis to the instant case, it is clear that there are a number of distinctions. First, it did not concern the right to terminate questioning. Second, the Court in Davis recommended that law enforcement clarify whether an individual is, in fact, requesting counsel so as to avoid the question as to whether a statement is unequivocal. Finally, the Davis opinion does not alter or modify the law in Florida based on the Florida Constitution. Art. 1, §9, Florida Constitution.

Therefore, unlike the situation presented in Brunner Enterprises, Inc. v. Dept. of Revenue, supra, Davis does not provide a basis for changing the law of the case since even if Davis had been decided prior to this Court's opinion in the prior

appeal in this case, there is no reason to believe the result would be different. In order to find that the opinion in Davis requires a change in the law of the case, this Court would first have to conclude that (1) Davis applies with equal force to the right to remain silent and to terminate questioning; (2) the statements "I'd rather not talk about it." and "I don't want to talk about it." are equivocal; (3) the Florida Constitution should be interpreted consistent with Davis.

The established principle of law in Florida, embodying both the United States Constitution and the Florida Constitution is that if a suspect indicates, in any manner, that he does not want to be interrogated, interrogation must immediately stop. Traylor v. State, 596 So.2d 957 (Fla. 1992). Davis does not alter this principle.

II. OWEN'S INVOCATION OF HIS RIGHT TO REMAIN SILENT WAS NOT EQUIVOCAL.

The State asserts that this Court concluded that OWEN'S response "I'd rather not talk about it" was equivocal and therefore precluded further questioning except to clarify the Defendant's wishes. Actually, this Court held that "the responses were at the least an equivocal indication of the Miranda right to terminate questioning..." Owen v. State, 560 So.2d at 211 (emphasis added). Therefore, contrary to the State's argument, this Court did not

conclude that the response was actually equivocal.[3] Furthermore, OWEN later responded with "I don't want to talk about it." Despite this statement, "the police pressed him to talk." Owen 560 So.2d at 211.

Black's Law Dictionary defines equivocal as "having a double or several meanings or senses. Synonymous with ambiguous." Sixth Ed., Centennial Ed., 1991.

In Long v. State, 517 So.2d 664 (Fla. 1987) this Court discussed what equivocal meant:

> When a person expresses both a desire for counsel and a desire to continue the interview without counsel, further inquiry is limited...

517 So.2d 667 (citations omitted). See also Cannady v. State, 427 So.2d 723 (Fla. 1983) (wherein Court held that statement "I think I should call my lawyer." while also repeatedly confessing to the crime indicated both the desire for counsel and the desire to continue talking with the police. Police properly clarified the defendant's wishes and obtained additional written waiver.); State v. Winniger, 427 So.2d 1114 (Fla. 3rd DCA 1983) (Defendant's request to go home was an invocation of right to remain silent; if law enforcement was in doubt as to the defendant's intentions further inquiry should have been limited to clarifying the defendant's wishes).

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[3] OWEN recognizes that in dicta, this Court stated in a separate appeal from a separate conviction that OWEN's statement was equivocal. See, Owen v. State, 596 So.2d 985, ftnt. 3 (Fla. 1992).

There is no part of "I'd rather not talk about it" that expresses the desire to continue to answer questions or has double or several meanings. It is a polite and appropriate means of conveying a desire to remain silent. It does not convey a desire to continue to answer questions or indecision in the exercise of the preference to remain silent. However, if as a result of the tone used, or mannerisms displayed, police had some question as to what was intended, clarification might have been appropriate. Law enforcement apparently realized that OWEN was invoking his right to remain silent since, rather than clarify, they felt compelled to convince him of the reasons he should confess.

Instead of inquiring as to what he meant, OWEN was challenged with "Why?" and then told he could make it easier on the victim's parents and a town full of frightened babysitters. (App. 1078-1079). Police flattered him, provided him with the irrefutable evidence, and cajoled him with his "responsibility to be a man". (App. 1079-1085). This is precisely the type of badgering and cajoling the Miranda Court was concerned with when it declared that the right to cut off questioning must be "scrupulously honored." 384 U.S. at 479.

Finally, OWEN said "I don't want to talk about it." This is about as clear as anyone could express a desire to remain silent. "I want to talk about it" would certainly be considered an unequivocal waiver of the right to remain silent; likewise, "I don't want to talk about it." is unequivocal. The fact that OWEN

eventually answered questions, after further insistence by the police, cannot be used to show a knowing and intelligent waiver. Smith v. Illinois, 469 U.S. 91, 98 (1984) ("An accused's post-request responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself."); State v. Winniger, 427 So.2d 1114, 1116 (Fla. 3rd DCA 1983) ("It is sophistry to suggest that the act of answering questions after the invocation of the right to remain silent, an act deemed by Miranda to be the product of 'compulsion, subtle or otherwise,' 384 U.S. at 474, can be used to show that the defendant really did not mean it when he earlier indicated his desire to remain silent.").

The State's efforts to minimize the importance of the procedural safeguards required by Miranda v. Arizona, 384 U.S. 436, 16 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and Traylor v. State, 596 So.2d 957 (Fla. 1992) reveals shocking insensitivity to the purpose of these safeguards. The privilege against self-incrimination is a sacred privilege guaranteed by both the Florida and United States Constitution. The Court in Miranda recognized that "one of our Nation's most cherished principles that the individual may not be compelled to incriminate himself" required procedural safeguards in order to insure respect in the inherently coercive setting of the custodial interrogation. The Miranda warnings were designed to guarantee that individuals are made aware of their rights, and "show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it." 384 U.S.

at 468. The Court concluded that statements taken after the individual invokes his privilege "cannot be other than the product of compulsion, subtle or otherwise." 384 U.S. at 474. The critical safeguard in protecting an individual's right to remain silent is that any exercise of the right be "scrupulously honored." 384 U.S. at 479.

Although established in Miranda it was in Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), that the Court delineated the scope of "the right to cut off questioning." Reiterating that this right serves as an essential check on "the coercive pressures of the custodial setting" by enabling the suspect to "control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation", 423 U.S. at 103-104, the Mosley Court reaffirmed Miranda's requirement that "the interrogation must cease" when the person in custody "indicates in any manner" that he wishes to remain silent. 423 U.S. at 101-102.

The Court concluded in Mosley that the police properly terminated questioning upon the defendant's invocation but could reiniate questioning after a lapse in time and change in location, respecting the desire not to speak about the matters for which the suspect invoked his right, and readvising the suspect of his rights.

> This is not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts

to wear down his resistance and make him change his mind.

423 U.S. at 105-106.

In stark contrast is the situation presented in this case. Here there was no respect given to OWEN'S desire not to answer questions, no termination of the questioning, and repeated efforts were made to convince him to answer the same question he had refused to answer:

OFFICER LINCOLN: -- that I have to know, Duane.

A couple pieces of the puzzle don't fit.

How did it come down?

Were you looking at that particular house or just going through the neighbor?

THE DEFENDANT: **I'd rather not talk about it.**

OFFICER WOODS: **Why?**

OFFICER LINCOLN: **Why?**

You don't have to tell me about the details if you don't want to if you don't feel comfortable about that.

Was it just a random thing?

Or did you have this house picked out?

That's what I'm most curious about?

Things happen, Duane.

We can't change them once they're done

THE DEFENDANT: No.

OFFICER LINCOLN: But you can sure make it easier on two parents that need to know.

OFFICER WOODS: And a whole town full of babysitters that are afraid to go outside.

That's how the kids make all their money in the summer.

OFFICER LINCOLN: Had you ever been to that house before?

(App. 1077-1078).

* * *

OFFICER LINCOLN: Scared of something they can't control.

You know how you are in a situation you can't control, sometimes you are frightened.

I know I am.

That's what those people feel.

See, and they are going to have to know that they have no reason to be scared anymore.

Had you been to that house before, Duane?

THE DEFENDANT: That tells you right there.

OFFICER LINCOLN: I'll show you again.

THE DEFENDANT: **That answers my question.**

OFFICER LINCOLN: Before that night?

I know you were there that night.

Had you ever been there before?

It had to happen.

So you got to accept it.

OFFICER WOODS: Yeah.

It's all over.

And you were good too.

(App. 1079).

* * *

OFFICER LINCOLN: Was that your first time at the house Duane?

Talk to me.

I know you want to.

And you can see that this isn't bullshit. This is evidence. You are confronted.

Now, tell me.

(App. 1081).

* * *

OFFICER LINCOLN: I'm going to tell you and I'm going to say it just one more time, because I'm getting tired of telling you how good you are.

(App. 1082).

* * *

OFFICER LINCOLN: You're the man.

You wanted somebody to tell it to you, prove it to you and you got it.

Now, I think you've got the responsibility to be a man and live up to your end of the thing.

See, we've done our thing. We've gone as far as we can.

We're professionals.

But I have a couple questions still. I'm curious. That's why I'm asking you the questions.

And you can straighten them out for me.

Had you ever been to that house before?

Some of the guys think that you had and some don't.

(App. 1083).

* * *

OFFICER LINCOLN: Duane, be a man about it now.

This is evidence.

The three of us are sitting here.

That's true.

This is -- this is not a dream. This is not a hypothesis. This is something that's happened.

And the fact that you did this crime is something that happened.

It happened.

OFFICER WOODS: You can't change that.

OFFICER LINCOLN: But I do think you do have a responsibility too that you can recognize to try to make things right for the people of Delray.

(App. 1085).

* * *

OFFICER LINCOLN: I have given you something here, Duane. I think it's time you gave me something.

Because fair is fair and right is right.

(App. 1086).

* * *

OFFICER LINCOLN: I think it's time you gave me a little bit back.

Did you know Mr. and Mrs. Helm (phonetic) who owned the house there?

Had you ever seen them before?

OFFICER WOODS: Had you?

The game is over, Duane.

You know there's no more -- there's no more nip and tuck and chase and hunting and fishing and checking us out. Because you did. And we came through. We found something. Something solid.

It's no more game.

What are **you thinking about?**

A lot of stuff bouncing around in there.

OFFICER LINCOLN: Had you ever been there before, Duane?

(App. 1088-1089).

* * *

OFFICER LINCOLN: Did you know Mr. and **Mrs.** Helm, Duane, the people who owned the house?

THE DEFENDANT: No.

OFFICER LINCOLN: So you never been there before?

See, that's what I thought.

Now, was **I right?**

THE DEFENDANT: No, I never been there before.

(App. 1091).

* * *

THE DEFENDANT: I don't want to talk about it.

OFFICER LINCOLN: Don't you think it's necessary to talk about it, Duane?

Two months have gone by already, Duane.

That's a long time. **It's** a long time for people to work. It's a long time for you to

hold it within yourself. It's a long time for people to wonder.

OFFICER WOODS: And be scared.

OFFICER LINCOLN: Don't you think it's time to put all that to rest?

I think you do.

OFFICER WOODS: It's all over. You might as well.

You can't get around all this stuff.

You got no out.

OFFICER LINCOLN: This isn't going to disappear.

OFFICER WOODS: Do you like the guys from Boca more than you like us?

(App. 1095).

* * *

The State characterizes the police conduct in this case as involving no wrong doing since it was a violation of the "technical" rules of Miranda and not actual coercion. However, the failure to respect an exercise of the "sacred privilege" to remain silent is wrong doing. The callous disregard for the invocation of one's right cannot be tolerated. The concern evidenced by the Miranda Court continues to exist in the stationhouse setting today: the inherently coercive atmosphere. Confessions obtained as a result of coercion, whether initially by threats or promises, or by

disregarding one's exercise of the privileges guaranteed by our constitutions have no place in the administration of our criminal justice.

It is instructive to review cases wherein the request has been held to be equivocal. See, for example, Cannady v. State, 427 So.2d 723 (Fla. 1983) ("I think I should call my lawyer." while also repeatedly confessing to the crime, evincing a desire to continue speaking with the police); State v. Panetti, 891 S.W.2d 281 (Tex. 1994) ("Should I be answering these questions without my lawyer or does it matter, or I mean I - I give up anyway."); Higgins v. State, 879 S.W.2d 424 (Ark. 1994) ("Do you think I need an attorney?"); State v. Morris, 880 P.2d 1244 (Kan. 1994) ("I'm not sure what I want to do."); Martin v. Wainwrisht, 770 F.2d 918 (11th Cir. 1985) ("can't we wait until tomorrow"); Davis, supra ("Maybe I should talk to a lawyer.").

The "I think", "maybe", "should I", all evince an indecision of whether to waive rights or invoke rights. In comparison, there is nothing about OWEN'S responses which indicate a desire to continue to answer questions. OWEN'S statements were not equivocal so as to permit law enforcement to simply attempt to convince him not to invoke his rights. Cf, Anderson v. Smith, 751 F.2d 96, 103 (2nd Cir. 1984) (When defendant said he didn't want to talk, police said "Why?". Court held "Indeed in asking why Anderson refused to talk, the lieutenant implicitly acknowledged that Anderson's decision was clear.").

This Court initially properly concluded that OWEN'S responses were sufficient to place the police officers on notice that he was exercising his right to remain silent. Any questions concerning this exercise of his right to remain silent perhaps could have been clarified; however, pressuring him to speak evinces a total disregard for OWEN'S constitutional rights. As such, this Court properly held the confession obtained subsequent to the invocation of the right to remain silent must **be** suppressed.

OWEN'S responses were sufficiently unequivocal, and concerned the right to cut off questioning, not the right to counsel, so as to remove this case from the dictates of Davis. Therefore, this Court should affirm the denial of the Petition for Writ of Certiorari.

III. FLORIDA LAW BASED ON THE FLORIDA CONSTITUTION, PROVIDES AN INDEPENDENT BASIS FOR THIS COURT'S DECISION IN OWEN V. STATE.

The Florida Constitution provides:

> No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

Art. 1, §9, Fla. Const.

In Traylor v. State, 596 So.2d 957 (Fla. 1992), this Court discussed at length the protections afforded by the Florida Constitution which may be greater than those protections provided by the Fifth Amendment of the United States Constitution. The

court held "when called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state constitution and to give independent legal import to every phrase and clause contained therein." 596 So.2d at 962 (footnote omitted).

In Traylor, the court affirmed that the Florida Constitution requires that prior to custodial interrogation suspects must be informed of their right to remain silent and right to consult with an attorney. The court explicitly stated:

> Under §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. If the suspect indicates in any manner that he or she wants the help of a lawyer, interrogation must not begin until a lawyer has been appointed and is present or if it has already begun, must immediately stop until a lawyer is present.
>
> * * * *
>
> A prime purpose of the above safeguards is to maintain a bright-line standard for police interrogation; any 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).

Clearly, the statement "I'd rather not talk about it" is an indication that the defendant does not want to be interrogated. As such, interrogation must immediately cease. In the instant case, law enforcement's failure to respect Mr. OWEN'S indication that he did not want to answer questions mandated suppression of

his confession pursuant to the Florida Constitution as well as the federal constitution.

In a similar context, this Court has refused to interpret Art. 1 §9 as narrowly as the United States Supreme Court has interpreted the Fifth and Sixth Amendments. In Haliburton v. State, 476 So.2d 192 (Fla. 1985) on remand, 514 So.2d 1088 (1987) the court reversed the defendant's conviction finding that further questioning without informing the defendant that an attorney hired by a sister wanted to see him, was a violation of his Miranda rights. Initially, the court relied upon Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) and Miranda v. Arizona, 384 U.S. 436, 16 S.Ct. 1602, 16 L.Ed.2d 694 (1966). However, the United States Supreme Court in the companion case of Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986), held that interrogation must cease only if the individual specifically states that he wants an attorney.

The Supreme Court likewise vacated Haliburton and remanded the cause for reconsideration in light of Burbine. Florida v. Haliburton, 475 U.S. 1078 (1986). On remand, this Court rejected this limitation, finding that the Florida Constitution provided greater protection and that in this context the Florida Constitution required the defendant to be notified that an attorney was available for him. Failure to so notify the defendant was a violation of Art. 1 §9 and mandated suppression of his confession. 514 So.2d 1088, 1090.

It is notable that in Davis, supra the United States Supreme Court relied upon Moran v. Burbine, 475 U.S. 412 (1986), in holding that if the statement concerning an attorney fails to meet the requisite level of clarity, law enforcement is not required to cease questioning. This limited interpretation has been specifically rejected by this Court in Haliburton and likewise must be rejected in the instant case.

The State's effort to distinguish Haliburton is unavailing. The State asserts that the distinction lies with this Court's finding that the confession was involuntary. This simply is not accurate. This Court's initial opinion is based upon a violation of the defendant's Miranda rights. 476 So.2d at 194. In Haliburton II the Court found that the failure to advise the defendant that an attorney was present was a violation of the due process guaranteed by the Florida Constitution. In the instant case, this Court held that despite the initial waiver of the right to remain silent, the defendant invoked that right and law enforcement's failure to respect the invocation rendered the subsequently obtained confession inadmissible. In Haliburton I and reaffirmed in Haliburton II the Court held that in order for the right to counsel to be meaningful, a defendant must be told when an attorney who has been retained on his behalf is trying to advise him. 476 So.2d at 194. Likewise, in order for the right to remain silent to be meaningful, a defendant's invocation of that right must be respected. The due process clause of the Florida Constitution requires that respect. Travlor v. State, supra.

The State argues the needs of law enforcement to obtain confessions as a policy reason to relax the procedural safeguards established in Travlor as a constitutional imperative. This very argument was rejected in Travlor, where this Court fully recognized the benefits to law enforcement of confessions, but nonetheless affirmed the necessity of protecting the fundamental rights of Florida citizens:

> Special vigilance is required where the fundamental rights of Florida citizens suspected of wrongdoing are concerned, for here society has a strong natural inclination to relinquish incrementally the hard one and stoutly defended freedoms enumerated in our Declaration in its effort to preserve public order.

596 So.2d at 963.

Furthermore, this Court in Travlor reiterated "the federal constitution thus represents the floor for basic freedoms; the state constitution, the ceiling."

There are sound policy reasons to continue to interpret the Florida Constitution in a manner that requires law enforcement to clarify invocations of the right to remain silent in the event there is any question as to the suspect's intent. The "bright line rule" would be obliterated by any other interpretation. Instead, law enforcement and the courts would be forced to apply various standards, reasonings, and linguistic formulas for determining whether a statement is unequivocal. The bright line standard can only be maintained if law enforcement understands that questions as to what is intended by an apparent invocation are clarified at the time of the interrogation, rather than left to the Monday

quarterbacks in the courtroom. Acknowledging this benefit, the majority in Davis even concluded that clarifying an equivocal assertion is good police procedure which ensures respect for constitutional rights. 114 S.Ct. at 2355. The dissent in Davis addressed this issue specifically:

> Our cases are best respected by a rule that when a suspect under custodial interrogation makes an ambiguous statement that might reasonably be understood as expressing a wish that a lawyer be summoned (and questioning cease), interrogators' questions should be confined to verifying whether the individual meant to ask for a lawyer. While there is reason to expect that trial courts will apply today's ruling sensibly (without requiring criminal suspects to speak with the discrimination of an oxford don) and that interrogators will continue to follow what the Court rightly calls "good police practice" (compelled up to now by a substantial body of state and circuit law), I believe that the case law under Miranda does not allow them to do otherwise.

Souter, J., dissenting with concurrence of Blackmun, J., Stevens, J., Ginsburg, J. See also, Smith v. Illinois, 469 U.S. 101 (Rehnquist, J., dissenting) (noting that statements are rarely "crystal clear... [D]ifferences between certainty and hesistency may well turn on the inflection with which words were spoken, especially where [a] statement is isolated from the statements surrounding it).

The facts of this case amply demonstrate the potential difficulties in later determining what is unequivocal. "I'd rather not talk about it." is a polite means of conveying an individual's preference to remain silent. Is polite the same as equivocal? It is certainly not ambiguous or unclear.

Affirming this Court's original opinion in Owen is consistent with this Court's holding in Traylor and State v. Craig, 237 So.2d 737 (Fla. 1970), which the State urges this Court to adopt. In Craig, this Court held that the defendant's conduct demonstrated a clear and unambiguous intent to waive his right to counsel. In Owen, this Court held that the Defendant's conduct did not demonstrate a clear and unambiguous intent to waive his right to remain silent. The focus should be on whether a knowing and intelligent waiver of fundamental constitutional rights has been made by a defendant. To shift the focus to require a clear and unambiguous intent to assert rights places constitutional rights in a posture to be exercised only by the articulate, intelligent or well-informed. Such disparate treatment of the fundamental rights of all Florida citizens is not consistent with this Court's opinion in Travlor v. State or the history of jurisprudence in this State.

OWEN'S right to remain silent, as guaranteed by Art. 1, §9 of the Florida Constitution was violated when he indicated he did not want to be interrogated any further. As such, this Court properly reversed his conviction and remanded this case for a new trial with directions that the statements elicited after OWEN invoked his rights could not be used against him.

CONCLUSION

For the reasons stated herein, this Court should answer the certified question in the negative. The doctrine of the law of the case should bar reconsideration of the mandate issued in this case. Further, the constitutional interpretation contained in Davis should not be applied to the facts of this case or the constitution of the State of Florida.

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 Celia Terenzio, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, FL 33401 and James T. Miller, 233 E. Bay Street, Suite 920, Jacksonville, FL 32202 this 22nd day of August, 1995.

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