IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

APPELLANT,

vs.

DUANE OWEN,

APPELLEE.

CASE NO. 85,781

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

State of Florida, was the petitioner in the trial court and will be referred to herein as "petitioner" or "the state". Duane Owen was the respondent in the trial court and will be referred to herein as "Owen" or "the respondent."

STATEMENT OF THE CASE AND FACTS

Duane Owen was initially convicted and sentenced to death in 1987 for rape and strangulation of Karen Slattery. Owen claimed that his confession should have been suppressed because it was the result of improper psychological coercion and it was obtained in violation of the procedural rules of Miranda v. Arizona, 384 U.S., 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694 (1966). Owen v. State, 560 So. 2d 207, 210 (Fla.1990). This Court expressly rejected Owen's argument that his confession was the result of psychological coercion. To the contrary, this Court found respondent's confession to be voluntary. Owen, 560 So. 2d at 210. However, this Court determined that respondent's confession should have been suppressed because of a technical violation of Miranda. Specifically this Court held that Owen's equivocal responses during interrogation, precluded any further questioning by the police. At most the police were only permitted to ask questions in an attempt to clarify Owen's ambiguous responses. This holding was predicated on an interpretation of both Miranda and Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L. Ed. 2d 378 (1981).

While on remand, the United States Supreme Court issued its opinion in United States v. Davis, 512 U.S. __, 1129 L. Ed. 2d , 114 S.Ct. __ (1994). The Court determined that equivocal responses by a defendant do not invoke the rule of Miranda and Edwards. Unless a defendant makes an unequivocal request for counsel, questioning may continue. Based on Davis the state moved the trial court to reinstate the confession. That request

was denied. The state then sought certiorari review in the Fourth District Court of Appeals.[1] Although the district court denied the state's petition, it certified the following question:

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

[1] The state also sought certiorari review in this Court. This Court denied review. State v. Owen, Case No. 84,589.

SUMMARY OF ARGUMENT

This Court should answer the certified question in the affirmative. United States v. Davis, 512 U.S. __, 129 L. Ed. 2d 362, 114 S.Ct. __ (1994), should be applied in the instant case and in Florida generally. This Court's original opinion was predicated solely on an interpretation of a federal rule. Reversal was not predicated upon a violation of either the state or federal constitutions. Davis illustrates that this Court's interpretation of that federal rule was erroneous. Consequently this Court should apply United States Supreme Court's interpretation/limitation of its own rules.

ARGUMENT

ISSUE

DO THE PRINCIPLES ANNOUNCED IN DAVIS APPLY TO THE ADMISSIBILITY OF CONFESSIONS IN FLORIDA, IN LIGHT OF TRAYLOR; THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE AFFIRMATIVE.

On direct appeal to this Court from his original conviction and sentence, Owen argued that his confession was inadmissible because it was (1) the result of psychological coercion and (2) it violated the technical requirements of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694 (1966). Owen v. State, 560 So. 2d 207, 210 (Fla. 1990). This Court flatly rejected his first argument, finding that the confession was voluntarily made. Owen, 560 So. 2d at 210. On the second point, this Court agreed, finding a technical violation of Miranda. Id, at 211. Since this Court could not conclude that suppression of his confession was harmless error, Owen's conviction was vacated. Id.

During the pendency of respondent's retrial, the United Supreme Court issued its opinion in United States v. Davis, 512 U.S. __, 114 S.Ct. 2350, 129 L. Ed. 2d 362 (1994). In Davis, the Court determined that an equivocal request for an attorney in reference to Miranda warnings does not require the cessation of an interrogation. Ambiguous statements from a defendant do not require the police to limit all further questioning to an inquiry regarding the meaning of the equivocal response. The Court refused to expand the rule of Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L. Ed. 2d 378 (1981).

On July 25, 1994, in light of Davis, the state filed a motion in the trial court to admit Owen's statement at the retrial. Relief was denied on September 27, 1994. The state sought certiorari review in the Fourth District Court of Appeal. The district court determined:

> If we were certain that Davis was the law in Florida, and if this specific confession had not already been held inadmissible by the Florida Supreme Court, we would grant certiorari, because the pretrial refusal to admit this confession would be a departure from the essential requirements of the law for which the state would have no adequate remedy by review. State v. Pettis, 520 So. 2d 250 (Fla. 1988).

Owen State, 20 Fla. L. Weekly D963 (Fla. 4th DCA April 19, 1995). Given the district's court's uncertainty regarding the application of Davis in Florida in light of Traylor v. State, 596 So. 2d (Fla. 1992), the court certified the following question:

> Do the principles announced in Davis apply to the admissibility of confessions in Florida, in light of Traylor?

Owen, 20 Fla. L. Weekly at D964. For the following reasons the state submits that the certified question should be answered in the affirmative.

A. Whether or not United States v. Davis should apply in Florida does not involve a consideration of Traylor v. State.

Before the district court, Owen relied on Haliburton v. State, 514 So. 2d 1088 (Fla. 1987) (hereinafter Haliburton II), and Traylor v. State, 596 So. 2d 957 (Fla. 1992), to support his contention that Davis should not be applied in his case or in

Florida law in general. In Haliburton v. State, 476 So. 2d 194 (Fla. 1985), (hereinafter Haliburton I), this Court ruled that the confession was involuntary as it was not the result of a knowing and intelligent waiver. On remand from the United States Supreme Court, this Court again found the confession to be involuntary, based on state law. Haliburton II.[2] In Traylor, after analyzing the voluntariness of Traylor's confession, this Court affirmed its admissibility. There is a fundamental distinction between Owen's case and Haliburton/ Traylor. In Haliburton II and Traylor, this Court analyzed the voluntariness of the confession under the state constitution. In Owen, on the other hand, this Court found Owen's confession voluntary but found the confession inadmissible because of a technical violation of Miranda:

> It is clear that from these tapes that the sessions were initiated by Owen, who was repeatedly advised of his rights to counsel and to remain silent. Moreover, he acknowledged on the tapes that he was completely familiar with his Miranda rights and knew them as well as the police officers. It is also clear that the sessions, which encompassed six days, were not individually lengthy and that Owen was given refreshments, food, and breaks during the sessions. The tapes show that the confession was entirely voluntary under the fifth amendment and that no improper coercion was employed.

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[2] This Court was clearly troubled by the officer's initial refusal to obey then Judge Barkett's telephone order. Both Haliburton I & II cite to Jamason v. State, 455 So. 2d 380 (Fla. 1984)(willful refusal by police to obey telephonic court order constitutes criminal contempt).

> Owen next argues that even if the confession was voluntary under the fifth amendment, it was nevertheless obtained in violation of the procedural rules of Miranda. On this point, we agree.

Owen, 560 So. 2d at 210. (emphasis added; citations omitted).

Miranda of course established a federal procedural rule based on federal law. Miranda warnings themselves are not constitutionally mandated but are prophylactic measures to ensure against compulsory incrimination. Thus a violation of Miranda is not a constitutional violation. Brown v. State, 565 So. 2d 304, 306 (Fla. 1990) (citing Duckworth v. Eagan, 492 U.S.195, 109 S.Ct.2875, 106 L. Ed. 2d 166 (1989), and Michigan v. Tucker, 417 U.S. 433, 444, 94 S.Ct. 2357,41 L. Ed. 2d 182 (1974) (Miranda warnings designed to deter police coercion and are not protected by the Constitution). Consequently, any analysis of the admissibility of Owen's confession should not entail a discussion of either state or federal constitutional law. Since Traylor and Haliburton II concern only the violation of a constitutional right against self incrimination, neither of those cases should be included in any analysis regarding the continuing validity of this Court's holding in Owen, in light of Davis.

This Court has recognized and applied that same distinction. In Haliburton I the state relied upon State v. Craig, 237 So. 2d 737 (Fla. 1970), which had come before this Court for review on conflict certiorari from the Fourth District Court of Appeal. In Craig, the district court ruled the defendant's confession inadmissible because the preinterrogation warnings did not inform the defendant that he had the right to have an attorney present during the interrogation. Craig v. State, 216 So. 2d 19, 20 (Fla.

4th DCA 1968). The district court also concluded that the defendant's statements during the interrogation were sufficient to invoke his right to an attorney. Id. The facts also indicate that the defendant's family had secured for him the services of an attorney. Craig, 237 So. 2d at 739. Regardless, this Court found that the district court's suppression of the confession was in error. In reversing Haliburton's conviction, however, this Court distinguished Craig:

> The state argues that we should find appellant's waiver valid under our decision in State v. Craig, (citation omitted from the original). We are unpersuaded, however, as the issues before us in Craig were the adequacy of the preinterrogation warnings to inform the defendant of his right to consult with an attorney and have the attorney with him during interrogation and the manner in which the defendant expressed his desire to waive counsel.

Haliburton I 476 So. 2d at 194 (emphasis added).

The issue in the instant case is akin to the issue in Craig, i.e., the manner in which a defendant invokes his right to remain silent. As recognized by this Court in the instant case, as well as in Craig, the issue of voluntariness is separate from the issue regarding the propriety of Miranda warnings and the sufficiency of any subsequent invocation or waiver of a right to remain silent. Owen, 560 So. 2d at 210.

As previously noted, Haliburton II and Traylor are premised on constitutional law, whereas Owen is premised on a federal rule of procedure. To further illustrate this point one need only to review the cases relied upon by this Court in ruling Owen's confession inadmissible. This Court relied primarily upon

Long v. State, 517 So. 2d 664 (Fla. 1987), cert. denied, 486 U.S. 1017 (1988), and cases cited therein. In those referenced cases,[3] this Court determined, relying solely on federal authority, that equivocal responses required limited questioning designed to clarify the statements. Thus, in analyzing the admissibility of Owen's confession, this Court relied upon previous interpretations of a federal rule, namely Edwards. Because of its previous interpretation of Edwards, this Court felt compelled to apply Long to find Owen's confession inadmissible even though it believed Owen's confession was voluntary.

In Long, this Court determined that Edwards mandated the cessation of all questioning after an equivocal statement is made by a defendant. Any further communication must be limited to clarifying the meaning of the equivocal response:

> The record is clear, however, that the investigating officer did not attempt to clarify the equivocal request for counsel, but continued to interrogate Long to obtain the eventual confession. **We are bound by the United States Supreme Court decisions in Miranda, Edwards, and Rhode Island v. Innis, 446 U.S. 291 (1990), which we conclude mandate suppression of Long's confession. Without this equivocal request for counsel we would find this confession voluntary and admissible.** Miranda and Edwards, however, establish a bright line test that controls this case and requires suppression of the confession.

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[3] Cannady v. State, 427 So. 2d 723, 728 (Fla. 1983); Valle v. State, 474 So. 2d 796 (Fla. 1985), vacated on other grounds, 476 U.S. 1102, 106 S.Ct. 1943, 90 L. Ed. 2d 353 (1986); Waterhouse v. State, 429 So. 2d 301, 305 (Fla. 1983).

Long, 517 So. 2d at 667 (emphasis added). See also Martin v. Wainwright, 770 F. 2d 918, 923 (11th Cir. 1985)(voluntary confession held inadmissible based on defendant's equivocal response, "can't we wait until tomorrow"). Now that Davis has settled the conflict involving the interpretation of Edwards, this Court should adopt the Davis analysis.

The district court expressed concern about application of Davis because of the emphasis in Traylor on the primacy doctrine. Traylor, however, did not establish the concept of primacy of the state constitution; it merely reaffirmed it. In fact in Haliburton II, the United States Supreme Court remanded for reconsideration in light of Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135, 89 L. Ed. 2d 410 (1984). This Court decided to affirm its holding based on the state's constitution. However, this Court's refusal to apply federal law on the question of voluntariness in Haliburton II was consistent with precedent long before Traylor and long before Owen. See, e.g., Simon v. State, 5 Fla. 285, 296 (1853); Nickles v. State, 90 Fla. 659, 667, 106 So. 479, 483 (1925). Whether new or old, it does not matter, the primacy doctrine is inapplicable to the instant case. The issue in Haliburton I and II and Traylor are distinguishable from Owen.[4] Because Haliburton II and Traylor are premised on constitutional law, as opposed to a federal rule of procedure,

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[4] The issue of voluntariness as expressed by this Court in Haliburton I and II are not the concern in the instant case. Compare, Walls v. State, 580 So. 2d 131, 133 (Fla. 1991)(subterfuge and deception by government agents violated Haliburton and Art. I, Section 9 of Florida Constitution).

they do not apply to the admissibility of the confession in the instant case.

B. United States v. Davis should apply in Florida and in the instant case.

As noted above, this Court felt compelled in Long to hold that equivocal responses required that any further questioning be limited to a clarification of the response. See also Thompson v. State, 548 So. 2d 193, 203 (Fla. 1989)(when a defendant makes an equivocal request Miranda and Edwards require that police continue questioning for the sole purpose of clarifying the request and nothing more). On June 24, 1994, during the pendency of Owen's retrial, the United States Supreme Court rendered its decision in Davis. The Court determined that an equivocal request in reference to Miranda warnings does not render a confession inadmissible:

> [W]e decline to adopt a rule requiring officers to ask clarifying questions. If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.
>
> To recapitulate: We held in Miranda that a suspect is entitled to the assistance of counsel during custodial interrogation even though the Constitution does not provide for such assistance. We held in Edwards that if a suspect invokes the right to counsel at anytime, the police must immediately cease questioning him until an attorney is present. But we are unwilling to create a third layer of prophylaxis to prevent police questioning when a suspect might want a lawyer. Unless the suspect actually requests an attorney, questioning may continue.

Davis, 129 L. Ed. 2d at 373. The Court noted that lower courts have developed conflicting standards for determining consequences

of equivocal requests. Smith v. Illinois, 469 U.S. 91, 95 n.3, 83 L. Ed. 2d 488, 105 S.Ct. 490 (1984). In light of Davis, those conflicts no longer exist. Davis, 129 L. Ed. 2d at 369.

A review and comparison of Florida and federal law generated in the area of confession law demonstrates that the policy considerations articulated in the caselaw are identical. This Court has recognized the tension and the competing interests between the value of confessions in fighting crime and the concern that such confessions will be obtained through coercion. Traylor, 596 So. 2d at 964. Those identical concerns exist in the federal arena as well. Moran, 475 U.S. at 426.

To protect against coercion, the United States Supreme Court crafted the following requirements:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.

Miranda, 384 U.S. at 444-445. The United States Supreme Court decision in Edwards was designed to give force to the Miranda warnings. Minnick v. Mississippi, 498 U.S. 146, 112 L. Ed. 2d 489, 111 S.Ct. 486 (1990). Once an accused as invoked his right to counsel, questioning must cease until counsel has been made available. Reinterrogation is forbidden unless it is initiated

by the accused. Edwards, 451 U.S. at 484. The rule of Edwards has been described by the Court as follows:

> The rule ensures that any statement made in a subsequent interrogation is not the result of coercive pressures. Edwards conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness, and implements the protections of Miranda in practical and straightforward terms.
>
> The merit of the Edwards decision lies in the clarity of its command and the certainty in its application. We have confirmed that the Edwards rule provides 'clear and unequivocal' guidelines to the law enforcement profession.

Minnick, 498 U.S. at 151.

This Court has chosen to adopt the identical rules without any modification:

> Based on the foregoing analysis of our Florida law and the experience under Miranda and its progeny, we hold that to ensure the voluntariness of confessions, the Self-Incrimination Clause of Article I, Section 9, Florida Constitution, requires that prior to custodial interrogation in Florida suspects must be told that they have a right to remain silent, that anything they say will be used against them in court, that they have a right to a lawyer's help, and that if they cannot pay for a lawyer one will be appointed to help them.
>
> Under Section 9, if the suspect indicates in any manner that he or she does not want to be interrogated, interrogation must not begin or, if it has 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. Once a suspect has requested the help of a lawyer, no state agent can reinitiate interrogation on any offense throughout the period of custody

> unless the lawyer is present, although the suspect is free to volunteer a statement to police on his or her own initiative at any time on any subject in the absence of counsel.

Traylor, 596 So. 2d at 966. Consistent with the United States Supreme Court's desire for clarity, this Court has described the purpose of the above stated safeguards as necessary to maintain a bright-line standard for police interrogation. Id, at 966.

As noted above, this Court determined that Miranda and Edwards require questioning of a suspect to stop once an equivocal response is made. Long. The United States Supreme Court has now made it clear, however, that such an expansion of Edwards is not required:

> 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. See Arizona v. Roberson, supra, at 688, 100 L. Ed. 2d 704, 108 S.Ct. 2093(Kennedy, J.,dissenting)(the "rule of Edwards is our rule, not a constitutional command; and it is our obligation to justify its expansion"). The rationale underlying Edwards is that the police must respect a suspect's wishes regarding his right to have an attorney present during custodial interrogation. But when the officers conducting the questioning reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning "would transform the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity," Michigan v. Mosely, 423 U.S. 96, 102, 46 L. Ed. 2d 313, 96 S.Ct. 321 (1975), because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present.

Davis, 129 L. Ed. 2d at 372.

Further expansion of Edwards resulting in yet more restrictions on law enforcement would do little to enhance the safeguards of Miranda and Edwards or maintain the bright-line guidelines for police. Miranda was designed to ensure that an accused was completely apprised of his rights under the constitution, in order that he may either exercise them or waive them. Miranda was designed to give an accused the power to exercise control over the course of an interrogation. Moran. Edwards was formulated to guarantee that once a decision is made to invoke those rights, that invocation remains in effect unless or until the accused decides otherwise. The rules are straightforward. There is nothing constitutionally offensive in simply requiring a defendant to affirmatively and clearly invoke those rights. This Court adheres to the principle noted in McNeil v. Wisconsin, __ U.S. __, 111 S.Ct. 2204, 115 L. Ed. 2d 158 (1991) that freely given confessions are an unqualified good. Traylor, 596 So. 2d at 965. To further expand Miranda and Edwards would unduly hamper the gathering of such information. Davis, 129 L. Ed. 2d at 372.

An example of the high cost exacted by such a rule is illustrated in this Court's decision in Long. The expansion of Miranda and Edwards in that case resulted in the suppression of a voluntary and otherwise admissible confession. Id. at 667. A ruling this Court grudgingly dispensed. In other words, the state was sanctioned (via exclusion of probative and valuable evidence) amid the absence of any impermissible coercion or wrongdoing by police. Continued application of such a costly and ineffective practice would thwart criminal investigations, offer

little in the way of any added due process protection to our citizens and severely undermine society's confidence in the justice system.

Miranda and Edwards are federal judicially created rules. Subsequent decisions from the United States Supreme Court which limit those rules, along with the rationale behind any limitation, are logically entitled to be applied by this Court. In light of the fact that Florida and federal courts have been guided by identical policy considerations, this Court should adopt the rationale and rule of Davis. In other words, this Court should apply its pre-Edwards analysis in Craig.[5]

The application of Davis to Florida confession law would be consistent with this Court's and other Florida courts long history of adopting other federal limitations on Miranda.[6]

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[5] In Craig v. State, 216 So. 2d 19 (Fla. 4th DCA 1968), the district court suppressed a suspect's confession because of the equivocal responses given during interrogation. During the giving of Miranda warnings, the defendant stated that "in a way" he would like to have an attorney, but concluded that he did not "see how it can help me." The district court held that the suspect should have been given the opportunity to consult with an lawyer or a clear and unequivocal waiver should have been obtained. Craig, 216 So. 2d at 20. The state appealed and this Court rejected the logic employed by the district court. This Court stated that the defendant's comment that an attorney could not help him did not require the police to convince him otherwise. A waiver of Miranda does not require recitation of any magical words. Clear and unambiguous conduct indicating a willingness to answer questions by a person who has been sufficiently advised is sufficient. Craig, 237 So. 2d at 741.

[6] The Fifth District Court of Appeals has recently rejected the argument that in light of Traylor v. State, 596 So. 2d 957 (Fla. 1992), the definition of custody articulated in Berkmer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L. Ed. 2d 317 (1984) and historically relied upon in Florida, is no longer applicable. The district court concluded that Florida has not chosen to extend the definition of custody more broadly than the federal courts. State v. Burns, 20 Fla. L. Weekly D807, 808 (Fla. 5th DCA March 31, 1995).

Christmas v. State, 632 So. 2d 1368, 1370-1371 (Fla. 1994)(based on Illinois v. Perkins, 496 U.S. 292, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990), Miranda warnings are not required in custodial situations when defendant initiates conversation with police); Brown, supra(based on Duckworth v. Eagan, 492 U.S. 195, 106 L.Ed. 2d 166, 109 S. Ct. 2875 (1989), right to cut off questioning is implicit in Miranda warnings; consequently, there is no requirement that such a statement be specifically communicated); Bonifay v. State, 626 So. 2d 1310, 1312 (Fla. 1993)(based on Colorado v. Connely, 479 U.S. 157, 107 S.Ct. 515, 93 L. Ed. 2d 473 (1986), police allaying fears of defendant about safety of family is not psychological coercion); Herring v. Dugger, 528 So. 2d 1176, 1178 (Fla. 1988)(based on Colorado v. Spring, 479 U.S. 564, 107 S.Ct. 851, 93 L. Ed. 2d 954 (1987), valid Miranda warnings do not require that suspect be aware of all possible subjects of questioning); Henry v. State, 613 So. 2d 429 (Fla. 1992)(based on Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L. Ed. 2d 222 (1985), inadmissibility of statements made without the benefit of Miranda warnings does not preclude admission of subsequent statements that are made pursuant to such warnings); State v. Manning, 506 So. 2d 1094, 1096 (Fla. 3rd DCA 1987)(based on New York v. Quarles, 467 U.S. 649, 104 S.Ct. 2626, 81 L. Ed. 2d 550 (1984), necessity of Miranda warnings rests with determination of whether suspect is constructively under arrest or in custody); Henry v. State, 574 So. 2d 66, 69-70 (Fla. 1991)(based on Michigan v. Mosely, 423 U.S. 96, 96 S.Ct. 321, 46 L. Ed. 2d 313 (1975), suspect's assertion of his right to remain silent does not create any per se bar to subsequent

interrogation); Caso v. State, 524 So. 2d 422 (Fla. 1988)(based on Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L. Ed. 2d 182 (1974), exclusionary rule of Wong Sun not applicable to testimony of a witness whose identity was discovered through the unwarned statement of defendant); Parker v. State, 611 So. 2d 1224, 1227 (Fla. 1992)(based on Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L. Ed. 2d 1 (1971), defendant's otherwise inadmissible statements are admissible during cross-examination of a defendant for impeachment purposes); Washington v. State, 20 Fla. L. Weekly S197 (Fla. April 27, 1995)(based on Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L. Ed. 2d 908 (1966), taking of blood samples does not violate Article I, Section 9, of Florida Constitution); Rodriguez v. State, 619 So. 2d 1031, 1032 (Fla. 3rd DCA 1993)(based on Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct.2124, 65 L. Ed.2d 86 (1980), use of pre-arrest silence to impeach a defendant's credibility does not violate the Constitution); Allerd v. State, 622 So. 2d 984, 987 n. 10 (Fla. 1993)(based on Pennsylvania v. Muniz, 496 U.S. 582, 110 S. Ct. 2638, 110 L. Ed.2d 528 (1990), routine booking questions do not violate the constitutional protection against self-incrimination); Thompson v. State, 595 So. 2d 16, 17 (Fla. 1992)(based on California v. Prysock, 453 U.S. 355, 101 S. Ct. 2806, 69 L. Ed. 2d 696 (1981), no requirement of a 'tailsmanic incantation' of Miranda warnings); Gore v. State, 599 So. 2d 978, 981 n. 2 (Fla. 1992)(based on North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L. Ed. 2d 286 (1979), refusal to sign a written waiver is not dispositive to a finding of a valid waiver); Arbelaez v. State, 626 So. 2d 169, 175 (Fla. 1993)(based

on Roberts v. United States, 445 U.S. 552, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980), Miranda does not apply 'outside the context of the inherently coercive custodial interrogations for which it was designed'); Arbelaez, supra, (based on California v. Beheler, 463 U.S. 1121, 103 S.Ct. 3517, 77 L. Ed. 2d 1275 (1983), in determining whether a suspect is in custody for Miranda purposes, the inquiry is simply whether there is a formal arrest or restraint on freedom).

Moreover numerous other states have adopted Davis. e.g., State v. Panetti, 891 S.W. 2d 281, 284 (Tex. App. 1994)(United States v. Davis removed federal foundation for rule that ambiguous request for counsel bars further questioning except for clarifying the statement; irrespective of primacy doctrine, no reason to mandate rule as a matter of state law and create greater rights for criminal defendants); State v. Long, 526 N.W. 2d 826, 830 (Wis. App. 1994); People v. Crittenden, 885 P. 2d 887, 912-913 (Cal. 1994); State v. Arizona, 883 P. 2d 999, 1006-1107 (Arz. 1994); Higgins v. State, 879 S.W. 2d 424, 427 (Ark. 1994); State v. Morris, 880 P. 2d 1244, 1252 (Kan. 1994); State v. Parker, 886 S.W. 908, 918 (Mo.banc 1994); State v. Farley, 452 E. 2d 50, 58 (W.Va. 1994); State v. Bacon, 658 A. 2d 54 (Ver. 1994). But see State v. Hoey, 881 P.2d 504 (Hawaii 1994).

C. The doctrine of law of the case should not bar application of Davis to the instant case.

In reviewing the state's petition for certiorari, the Fourth District held that the exceptional circumstances for reconsideration are present in the instant case. Owen, 20 Fla. L

Weekly at D964. The state asserts that strict adherence to the erroneous ruling would result in "manifest injustice". Brunner Enterprises v. Dept. of Revenue, 452 So. 2d 550 (Fla. 1984). In Brunner this Court determined that a foreign corporation could be taxed in Florida for the sale of out-of-state stock. Two years later, the United States Supreme Court rendered a decision which was directly contrary to the state court's decision. Id, at 552. Had the united States Supreme Court decision been decided prior to the first holding in Brunner the case would have been decided differently. Given the contrary holding, modification of the law of the case was warranted.

The procedural posture of Brunner is identical to the instant case. Had Davis been decided prior to Owen's direct appeal, the trial court's ruling admitting the confession would have been upheld. The opportunity to change the law of the case is present with no prejudice to Owen. The defendant is in no different circumstance then he was during pendency of the direct appeal. The retrial has not yet taken place. There is nothing fundamentally fair about forcing the state to incur the expense and time for a new trial that became necessary because of an erroneous ruling. In the instant case, the continued exclusion of Owen's voluntary confession would result in the miscarriage of justice. Critical inculpatory admissions that were freely made by Owen would be lost. Strict adherence to the doctrine of law of the case would punish the state for the Court's incorrect legal interpretation.

Illuminating on this point is the analysis by the United States Supreme Court in Lockhart v. Fretwell, 506 U.S. ___, 122

L. Ed. 2d 180, 113 S. Ct. __ (1993). In trying to establish a claim of ineffective assistance of counsel, a capital defendant accused his trial counsel of deficient performance for his failure to pursue an issue that was viable and would have been successful at trial. Subsequent to the trial, however, the law regarding that issue changed. Consequently, the new law would not have entitled the defendant to relief if it had been in effect at the time of trial. In reversing a federal district court's granting of relief, the United States Supreme Court stated that the defendant is not entitled to a windfall to which the law does not provide.

Likewise, in the instant case there is nothing in fundamental fairness that entitles Owen to continue to escape the consequences of his own voluntary statements. Preclusion of critical inculpatory evidence based on an erroneous legal ruling would be a manifest injustice and would result in a total miscarriage of justice. The state should not be punished in the absence of any wrongdoing. The dissenting opinion by Justice Grimes and concurrence by then-Chief Justice Ehrlich was the correct legal interpretation of the law. Owen, 560 So. 2d at 213-216. The people of Florida are entitled to that interpretation. There is absolutely no benefit in upholding a ruling that was decided solely and wrongly under federal law. The continued adherence to a federal rule that does not even exist does nothing to protect or uphold any state or federal constitutional right. The doctrine of law of the case should not be used to perpetuate this costly error. Therefore this Court should apply Davis and reinstate Owen's confession and conviction. See Preston v. State, 564 So. 2d 120, 123 (Fla. 1990).

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that this Honorable Court answer the certified question in the affirmitive. The state also requests that this Court apply United States v. Davis, supra, to the instant case, reinstate Owen's confession, conviction and sentence.

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 Carey Haughwout, Esquire, 324 Datura Street, Suite 250, West Palm Beach, Fl. 33401, this 3rd day of July, 1995.

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