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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

CASE NO. 87,484

BRIAN WALTER KIPP,
Respondent.

DCA No.94-00091

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The Petitioner inappropriately included a statement of facts in its jurisdictional brief. The sole issue for your determination is whether this Supreme Court has jurisdiction to discretionarily review the instant decision of the second district court of appeal.

Facts regarding the interrogation process are irrelevant to your Jurisdictional determination. This point is raised because the Petitioner's factual references are incomplete and misleading and tend to foster a wrong impression. The state subtly suggests, with the **out** of context recitation of part of the interrogation colloquy, that the appellate court reached the wrong decision regarding whether Kipp actually made an equivocal invocation of his *Miranda* rights. Suffice to say the unabridged version of the interrogation amply reveals there was substantial, competent evidence in the record to support the appellate court's factual findings. But of course that determination is not at **issue.**

The only factual finding necessary for your consideration is the finding, which you must presume to be true, that Kipp made an equivocal invocation of his right to remain silent and detectives disregarded his request to terminate the questioning and continued questioning him. If so, that factual determination was applied consistently with the requirements from *Traylor* v. State.

JURISDICTIONAL STATEMENT

The Respondent agrees with the Petitioner's recitation of the legal basis for discretionary review in this case. This Supreme Court may only exercise discretionary jurisdiction if there is direct and express conflict with a decision of the supreme court or another district court of appeal on the same point of law. Unfortunately for the Petitioner's position, such conflict does not exist.

SUMMARY OF THE ARGUMENT

Petitioner disingenuously alleges conflict between the holding in the instant case and this Court's decision in *Traylor v. State,* 596 So.2d 957 (Fla. 1992). The **source** of the conflict is never described. In fact, the district court opinion explicitly relies and was based on *Traylor*. Rather than conflicting with *Traylor*, the **DCA** opinion rests upon it.

Further, the Petitioner urges conflict between the instant opinion and the fourth district's decision in State *v.* Owen, **654** So.2d 200 (Fla. 4th **DCA**), review granted, 662 So.2d 933 (Fla. 1995). Such a suggestion of conflict is a tad misleading because the *Owen* court alsa affirmed the suppression of statements made after there had been an equivocal invocation of *Miranda*, also in reliance on *Traylor*. Owen and ***Kipp*** are not conflicting, but are consistent.

The Owen court did certify the question whether the principles espoused in the **U.S.** Supreme Court decision in Davis or those from the *Traylor* decision should **apply** to equivocal invocations of the right to remain silent. The certification of that question, however, did not create conflict with the Kipp opinion because the certification question did not create any controlling precedent.

What the Petitioner really wants this Court to do is limit the Traylor holding. But that may not be done in this instance by conflict jurisdiction.

ARGUMENT

THE DECISION OF THE SECOND DISTRICT IN THIS CASE DOES NOT EXPRESSLY **AND** DIRECTLY CONFLICT WITH THE DECISION OF THIS COURT IN ***TRAYLOR*** V. STATE, ***596*** So.2d 957 (Fla. 1992), BUT IN FACT WAS EXPLICITLY BASED ON ***TRAYLOR;*** MOREOVER, THERE IS NOT CONFLICT WITH ***STATE*** v. OWEN, 654 So.2d 200 (Fla. 4TH DCA), review granted, 662 So.2d **933** (Fla. 1995) BECAUSE OWEN DID NOT PROMULGATE **A** BINDING AND CONTRARY POINT OF LAW BUT MERELY CERTIFIED A QUESTION TO THIS COURT. (As restated by the Respondent)

A. Conflict with *Traylor* v. State, 596 So.2d 957 (Fla. 1992).

The Petitioner undiscerningly argues the instant decision of the second district court of appeal expressly and directly conflicts with this Court's decision in Traylor v. State, **596** So.2d 957 (Fla, 1992). The Petitioner never describes any particular portion of the *Kipp* opinion that it feels conflicts with ***Traylor.*** The failure to define the conflict with particularity is enough to **deny** discretionary review.

Moreover, when the *Kipp* decision is analyzed, it is apparent that there is no conflict because the decision was explicitly based on principles set out in Traylor.

Traylor clearly established the proposition that when called upon to decide matters of fundamental rights, Florida's state courts are to **give** primacy to our state Constitution. Bluntly put, state courts are to ignore federal case law decisions until an initial analysis of a claimed constitutional violation has been examined under our state court principles.

Based upon the primacy analysis **and** the experience under *Miranda* and its progeny, the Florida Supreme Court held in

Traylor 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 far a lawyer one will be appointed to help them. This holding recounts **the** federal standard of the commonly called "***Miranda*** warnings" and explicitly adopts them **as** the free standing law in Florida. Henceforth the such warnings could more properly be called "*Traylor* warnings."

Traylor went on to require that:

> 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.

Traylor **v. *State*,** 596 So.2d **957,** 966 (Fla. **1992).**

Under *Traylor,* interrogation must stop if a suspect indicates in any manner that he or she does not want to be interrogated.

If there was **an** equivocal indication that Kipp did not want to be interrogated, under prior and still binding state **court** precedent, all questioning should have been terminated except those that clarified Kipp's wishes. See Owen v. ***State,*** 560 So.2d **207,211** (Fla. **1990), *cert. denied*, 498** *U.S. 855*, **11** S.Ct. **152, 112 L.Ed.2d 118 (1990)** and **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).**

Owen and *Long* are clearly still binding. There was no question prior to the advent of the decision of the United States Supreme Court in Davis *v. United States*, ___U.S. ___, 114 S.Ct.2350, 129 L.Ed.2d 362 (1994). *Davis* dramatically altered the federal rule in regard to the obligation of an interrogating officer confronted with a suspect's equivocal reference to a *Miranda* right. In Davis the court receded from prior federal decisions establishing a rule similar to that espoused in Owen and Long. In *Davis* the majority opinion expressly declined to adopt a rule requiring officers to ask qualifying questions, and stated:

> If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.

Davis v. United States, ___U.S. ___, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994).

Davis' diminution of rights under the federal system is not applicable to a review of a defendant's rights against self-incrimination under the Florida Constitution. That was the fundamental point in *Traylor*.

Explicit recognition of Davis' non-application in Florida is apparent from a review of a recent roller coaster case from the Fifth District Court of Appeal. In an initial opinion, applying principles from *Owen* and *Long*, the 5th DCA reversed a conviction that was based upon the erroneous admission of statements made after the defendant made an equivocal assertion of a Miranda right. Subsequent questions were not limited to clarifying the

defendant's wishes but were designed "to clear matters up." Deck *v. State,* 20 Fla. Law Weekly D36 (Fla. 5th DCA Dec. 22, 1994).

The state successfully moved for rehearing, apparently based on the new **Davis** decision, and a totally revised opinion was rendered. This time the trial court action was affirmed with explicit reliance upon the newly cited decision in Davis. Deck *v. State,* 653 So.2d 435 (Fla. 5th DCA 1995).

Subsequently, the court granted the defendant's request for a rehearing and again substituted a totally revised opinion. The conviction was reversed once again. The court opined that *Traylor* directly addressed the issue of an equivocal assertion of a *Miranda* right, and that opinion was controlling rather than ***Davis.*** Traylor expressly argued that a fundamental right created by the state constitution must be respected even if no similar right is recognized by the federal courts. ***Deck v.*** State, 20 Fla. Law Weekly D747 (Fla. 5th DCA March 24, 1995).

In the instant case, the opinion repeatedly cites to the above principles from *Traylor.* Far from being in conflict with *Traylor,* the result in *Kipp* **was** founded upon that decision.

B. Conflict with ***State v.*** Owen. 654 So.2d 200 (Fla. 4th DCA), review granted, 662 So.2d 933 (Fla. 1995).

Nor does the *Kipp* decision conflict with State *v.* Owen, 654 So.2d 200 (Fla. 4th DCA), review granted, 662 So.2d 933 (Fla. 1995).

In *Owen* v. *State,* 560 So.2d 207 (Fla. 1990) this Court

reversed a conviction because a confession had been obtained after an equivocal invocation of ***Miranda.*** Between the reversal and the retrial the U.S. Supreme Court clarified its interpretation of the scope of the ***Miranda*** protections **in *Davis*** v. *U.S.* **As** noted above, the U.S. Supreme Court no longer requires questioning to stop after an equivocal or ambiguous invocation of *Miranda*. Prior to retrial in Owen, the state moved the trial court to once again allow the confession, pursuant to ***Davis.*** However, the trial court followed this Court's direction from Owen v. State, 560 So.2d 207 (Fla. 1990) and held the confession inadmissible despite ***Davis.***

The state then took certiorari to the Fourth District Court of Appeal. Interestingly, the district court opinion denied certiorari specifically acknowledging that it was not certain whether ***Davis*** **was** the law in Florida, thus affirming the trial court's rejection of ***Davis.***

The upshot of the above is that the specific precedential holding of Owen does not conflict with the decision in *Kipp*.

The Fourth DCA did certify the following question as one of great public importance:

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

Certification of that question did not create conflict. Conflict would have been created had the Fourth District actually ruled that ***Davis*** principles applied to confessions in Florida rather than ***Traylor*** principles. But it didn't.

holding.

Conflict also would have been created if this Court had ruled prior to the *Kipp* decision that Davis applied to confessions in Florida rather than *Traylor* principles. But, as of the date of the Second DCA opinion in *Kipp*, this Court has never held that police can continue interrogating a suspect after the suspect has made an equivocal invocation of his *Miranda* rights. Accordingly, there is no conflict between the *Kipp* decision and any ruling of this Court.

The Second District Court of Appeal chose to apply the rule of law set forth in *Traylor*, enthusiastically applied in Deck and grudgingly followed in Owen. The Second DCA seemed sure of the applicability of *Traylor* and did not chose to certify any questions to clarify its meaning. Accordingly, there is no decisional conflict. And there is no discretionary jurisdiction in this Court based on express and direct conflict.

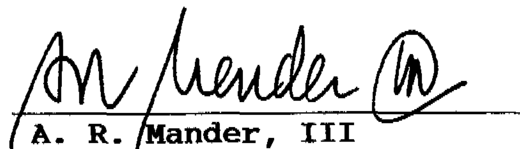
CONCLUSION

The decision in *Kipp* does not conflict with *Traylor*. Quite the contrary, *Kipp* was posited on principles espoused in *Traylor*.

Neither does *Kipp* expressly and directly conflict with the holding in State *v.* Owen, 654 So.2d 200 (Fla. 4th DCA), review granted, 662 So.2d **933** (Fla. 1995). In fact, the holding in Owen is in accord with *Kipp* and *Traylor*. The fact that *Owen* certified a question of great public importance does not create conflict, even if a potential answer creates the possibility of **a** limitation of *Traylor*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a **true** and correct copy of the foregoing Respondent's Jurisdictional Brief has been furnished to the Attorney General's Office, Robert J. Krauss and John M. Klawikofsky, **2002** North Lois Avenue, Suite **700,** Tampa, Florida **33607-2366,** by regular U.S. mail delivery on March 5, 1996



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