IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CECIL SKYLES,

Respondent.

Case No. 87,640

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the defendant at trial and the appellant in the Fourth District Court of Appeal. Petitioner was the prosecution and the appellee.

In the brief, the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts as recited in its initial brief. In support of its additional argument, respondent would rely on these additional facts:

The state's complaining witnesses were Troy and Chris. Chris testified and was cross-examined on Monday, November 21 (T 208-242). The next morning respondent's counsel learned for the first time that on Saturday, November 19, or Sunday, November 20, just one or two days before testifying, Chris told an 11 year old boy he was playing with that the sexual battery claim was a fabrication (T 289-293). Respondent immediately notified the court, asking to recall Chris for cross-examination on this claim (T 289-293). The state objected, arguing that since Chris had on a previous occasion denied the incident and been cross-examined on the denial, the new testimony wherein he stated the entire incident was a fabrication would be cumulative (T 291-292). The trial court denied the motion stating,

> If we do that we'll start, you know, just a continuous things what (sic) people may have told him. The Defense has got to be ready, you need to cross-examine all your potential witnesses and it's too late to recall him.

(T 293), Skyles v. State, 670 So. 2d 1084, 1086 (Fla. 4th DCA 1996).

The district court, in its opinion, agreed that it was error to refuse to permit respondent to recall Chris under these circumstances but found the error harmless apparently based on the state's argument that the testimony would have been cumulative. Skyles, 670 So. 2d at 1086. In finding the error harmless the court related the following factual scenario:

> Sometime after the alleged assault, victim A (Troy) told victim B's (Chris) stepfather that an older boy had sexually assaulted B. B's stepfather asked B about the allegation, but B denied it. More than a year later, A's father read an article about a

> man molesting children at the neighborhood school and discussed it with his children. A few days later A told his father that Skyles had molested him and B. Subsequently, A again told B's stepfather, and after initially denying it, B then admitted to his stepfather that it had happened.
>
> After A's father called the police, an officer interviewed A and B, and they both confirmed that the sexual assaults had occurred. They also claimed that Skyles had threatened to kill them with a pocketknife if they did not cooperate, an allegation which they both later admitted was false.
>
> The boys were examined by a pediatrician, and both told him that the assaults had occurred. The pediatrician found a one-half centimeter scar on B's rectum, which was consistent with the abuse described.
>
> When B testified at trial, defense counsel cross-examined him about his previous denials that the incident had occurred, and about lying about the knife.

This Court has jurisdiction to review the district court's finding on this issue as well as the certified question. State v. Gray, 654 So. 2d 552 (Fla. 1995); Feller v. State, 637 So. 2d 911 (Fla. 1994).

SUMMARY OF ARGUMENT

The state and federal constitution each guarantee suspects the right to remain silent. Part of that right is the right to cut-off questioning even after an initial waiver. Under the Florida Constitution, if a defendant attempts to exercise the right to silence in any manner, questioning must immediately cease. In this case respondent twice tried to end questioning when he said "I'm through man, that's all I'm saying" and later "that's all I have to say." Questioning did not cease as required but was only taken over by a different police officer. Respondent's later admissions should have been suppressed under state and federal law as the district court correctly held. Although the court also certified the question of whether Davis v. United States applies in Florida, that question is irrelevant to the resolution of this case. Davis involved an equivocal request for counsel. Appellant, on the other hand, made an unequivocal invocation of his right to cut off questioning. While the Supreme Court held equivocal requests for counsel are insufficient to require that questioning cease, Mosley v. Michigan recognizes that unequivocal statements cutting off questioning must be scrupulously honored by ceasing the interrogation. There is no inconsistency between these separate rules and the reversal of respondent's conviction should be affirmed. Although the facts of Davis do not apply here, if the court chooses to address the certified question, this Court should adopt the reasoning of the concurring opinion of Justices Souter, Blackmun, Stevens, and Ginsburg in Davis which is not only the better and more easily applied rule, it is also consistent with this Court's holding in Traylor v. State, 596 So. 2d 957 (Fla. 1992) and other Florida cases.

A second error also required reversal of respondent's conviction.

Chris and Troy, neighborhood friends, accused respondent, an older boy who spent the summer in the neighborhood, of sexually assaulting them. The incident was said to have occurred about two years earlier. The day after Chris testified at trial,

respondent's counsel was told by another neighborhood boy that the weekend before Chris testified he told the other boy he and Troy had made up the story of the assault. Respondent immediately asked to be allowed to recall Chris to question him about the inconsistent statement. The court refused to allow the recall. In this case, that refusal was an abuse of discretion which justified reversal of the conviction. The boy was a local witness, the trial had just begun, and the new statement went not only to Chris's credibility but to whether the crime ever occurred at all. There was simply no reason the jury should not have heard this important testimony. Although the district court agreed error had occurred, it refused to find the error reversible. Contrary to the district court's conclusion, the evidence was not merely cumulative nor was the error harmless.

ARGUMENT

POINT I

WHETHER THE PRINCIPLES ANNOUNCED IN DAVIS APPLY TO THE ADMISSIBILITY OF CONFESSIONS IN FLORIDA IN LIGHT OF TRAYLOR IS IRRELEVANT TO THIS CASE. THE DISTRICT COURT'S REVERSAL SHOULD BE AFFIRMED BECAUSE THE POLICE FAILED TO SCRUPULOUSLY HONOR RESPONDENT'S UNEQUIVOCAL INVOCATION OF HIS RIGHT TO CUT-OFF QUESTIONING. (RESTATED).

Article I, section 9 of the Florida Constitution provides:

> No person shall...be compelled in any criminal matter to be a witness against himself.

In a similar vein, the Fifth Amendment to the United States Constitution provides:

> ...nor shall he be compelled in any criminal case to be a witness against himself.

Long before the United States Supreme Court decided Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), this Court recognized the significance of informing a person of his right to silence as part of the proscription against compelled self-incrimination, and thus required that one charged with a crime be informed of his rights prior to giving a confession. Green v. State, 40 Fla. 474, 24 So. 537, 538 (1898); Coffee v. State, 25 Fla. 501, 6 So. 493, 496 (1889). Many years later the Supreme Court reached a similar conclusion in Miranda. To assure that the Fifth Amendment's privilege against self-incrimination would be honored, the court found concrete constitutional guidelines for law enforcement agencies and the court to follow were necessary; the so-called "Miranda" rights were born. 86 S. Ct. at 1611. Once a person has been informed of his right not to speak, to cut off questioning, or to have counsel,

> ...the subsequent procedure is clear. *If the individual indicates in any manner*, at any time prior to or *during questioning, that he wishes to remain silent, the interrogation must cease*. At that point he has shown that he intends to exercise his Fifth Amendment privilege.... Without the right

> to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been invoked.

384 U.S. at 473-474, 86 S. Ct. at 1627-1628 (emphasis added). The Court made clear that part of the purpose of the required warnings is to let the accused know that his interrogators are prepared to honor his right to silence if invoked. 86 S. Ct. at 1625.

In the instant case respondent Skyles, then 14 or 15 years of age, was interrogated at the police station after being read a card describing his rights per Miranda, one of which was his right to stop answering questions at any time. As the district court in its opinion explains, during respondent's interrogation

> He repeatedly denied any wrongdoing, and at one point said *"I'm through man, that's all I'm saying."* The officer interrogated him further,[1] during which Skyles continued to deny the allegations and concluded by stating, *"That's all I have to say* is (sic) 'cause that's all I know."

670 So. 2d at 1084-1085 (emphasis added). Still interrogation did not cease. Instead another officer took over and about 45 minutes later respondent finally made an inculpatory statement. The district court ruled the statement inadmissible, but, due to its confusion about the applicability of Davis v. United States, 512 U.S. ___, 114 S. Ct. 2350 (1994), certified the same question it had previously certified in State v. Owen, 654 So. 2d 200, 202 (Fla. 4th DCA 1995),

> Do the principles announced by the United States Supreme Court in Davis apply to the admissibility of confessions in Florida, in light of Traylor?

670 So. 2d 1085.

Petitioner devotes many pages to a convoluted analysis of state and federal precedent, most of which is questionable at best and has little to do with answering the

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[1] The officer's response to young Skyles's attempt to stop questioning was "Just a minute now. I...was just asking you a simple question." He then asked, don't you want to know what the boys said? (T 336-337).

question posed in this case. But more importantly, what petitioner completely ignores is that whether or not Davis is adopted by this Court, it would not change the result in this case because this case, unlike Davis, does not deal with an equivocal request for counsel.

The court in Miranda recognized two rights within the Fifth Amendment, the right to remain silent and the right to counsel, which it viewed as a means to protect the right of silence. 86 So. 2d at 1624-1625. The cases since Miranda have developed basically in two groups, one involving the right to remain silent without requesting counsel, see e.g. Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321 (1975), and a second line involving issues of counsel, see e.g. Edwards v. Arizona, 451 U. S. 477, 101 S. Ct. 1850 (1981), Minnick v. Mississippi, 498 U.S. 146, 111 S. Ct. 486 (1990). Davis is in that line. In Edwards, one of the cases in the counsel line, the court had prohibited further interrogation of a suspect once he clearly requested counsel. Davis then answered the next question, what if the request was unclear.[2] The district court's confusion over what to do with Davis shows it failed to consider that there are in fact these two lines of cases and that they deal with two slightly different rights. While many of the rules and principles explained are interchangeable between the two, not all are. For instance in Edwards the court held that a subject who requests counsel is not subject to further interrogation without counsel, but pursuant to Mosley a suspect who does not request counsel but invokes his privilege to silence by cutting off questioning can be subject to later interrogation. Because it failed to consider the possible differences in result depending on which right was invoked, the district court misapprehended the context in which the statement in Davis, that officers are not obligated to stop questioning a suspect unless the suspect makes "an unambiguous and unequivocal request for counsel," was

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[2] Davis's initial statement was "Maybe I should talk to a lawyer." The interrogator immediately stopped and assured Davis they would respect his wishes if he wanted a lawyer, but Davis said "No, I'm not asking for a lawyer."

made. See 670 So. 2d at 1085. That statement, put into context, was never intended to be read as the sole method for cutting off questioning.

What should be evident is that the question posed in Davis has nothing to do with the instant case, thus the answer does not matter here. But even if Davis did apply, it would not change the result in this case. Respondent did not make an ambiguous or equivocal[3] request for counsel. There was no question, no "maybe" or "I might." Instead, he stated in no uncertain terms, "Ain't none of us pulled our pants down. *I'm through man, that's all I'm saying.*" Which of those words is unclear? Respondent suggests none of them. At that point respondent had indicated, not just "in any manner" as Miranda says, but by a clear and unequivocal statement, that the interview was over; he had nothing more to say to his accusers. Compare State v. Sawyer, 561 So. 2d 278 (Fla. 2d DCA 1990) ("I'm done talking. I - I'm sorry. I don't remember" was unequivocal statement cutting off questioning and should have been honored by stopping the interrogation); State v. Winniger, 427 So. 2d 1114 (Fla. 3d DCA 1988) (defendant's request to go home was invocation of right to remain silent). The procedure at that point should have been to cease interviewing Mr. Skyles.

Respondent's right to cut off questioning was not however, scrupulously honored. Instead it was wholly ignored. The officer told respondent to "just wait a minute," and continued questioning him. Finally, as the district court acknowledged, respondent said "That's all I have to say is (sic) 'cause that's all I know." Still the interrogation did not cease. It must have been painfully obvious to the teenager at that point, that the statement he had been read informing him he could stop answering questions at any time was simply not true; the officers had no intention of honoring an invocation of his rights.

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[3] Black's Law Dictionary defines equivocal as "having a double or several meanings or senses. Synonymous with ambiguous." Sixth Ed. 1991. See also Long v. State, 517 So. 2d 664, 667 (Fla. 1989) ("when a person expresses both a desire for counsel and a desire to continue the interview without counsel.")

This is the very scenario Miranda sought to avoid.

Not only were federal constitutional standards violated however, but state constitutional standards as well. This Court in Traylor v. State, 596 So. 2d 957 (Fla. 1992), recounted Florida's proud history of honoring the fundamental rights of its citizens suspected of wrongdoing. Part of that tradition is the state constitutional recognition that no one should be compelled to be a witness against himself. Art. I, sec. 9, Fla. Const. "....in order for this constitutional privilege to accomplish its intended purpose it must be broadly construed." 596 So. 2d at 965.

> 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 cease*.

596 So. 2d at 966 (emphasis added). Regardless of any tinkering with the federal standard, this Court has set forth a clear and workable standard which is fair to all sides. The district court properly applied the law in this case and ordered respondent's statement suppressed. That holding should be affirmed.

Although petitioner spends much of its argument explaining how Miranda is really just a mere rule of federal procedure and thus hardly worthy of consideration, in the next breath it urges the court to adopt the latest twist set forth in Davis. As respondent has explained, consideration of Davis should not effect the outcome of this case. Nevertheless, given the certified question and petitioner's brief, respondent feels compelled to urge the court to maintain current Florida law as it relates to equivocal requests, whether for counsel or to invoke silence. See Long v. State, supra, Cannady v. State, 427 So. 2d 723 (Fla. 1983); Owen v. State, 560 So. 2d 207 (Fla. 1990) ("at the least, an equivocal invocation"); Deck v. State, 653 So. 2d 435 (Fla. 5th DCA 1995).

As the Supreme Court explained in Davis, the various jurisdictions have dealt with equivocal statements in one of three ways: 1.) to require the interview cease upon any request, equivocal or unequivocal, 2.) to ignore equivocal statements, and 3.) to require

clarification before further interrogation. Interestingly enough, while adopting the second alternative in Davis, the officers involved there actually employed the third, they clarified Davis's equivocal statement with Davis stating unequivocally that he did not want counsel.

Florida currently follows the third option. See Long v. State, supra, and cases cited above. For all the reasons expressed in Justice Souter's concurring opinion in Davis, Florida should continue to follow that option. First, if Davis were adopted and police could ignore equivocal requests, the problem would not be solved but instead the focus merely shifted to what constitutes equivocal versus unequivocal. Are polite statements equivocal just because they use a please or may I? If the inflection in a person's voice rises at the end of a sentence, does that make the statement equivocal because a typist puts a question mark at the end? Does an unequivocal statement become equivocal because a police officer misunderstands it? The possibilities are nearly endless. See Davis v. United States, 114 S. Ct. at 2363, n. 7, Souter, J. concurring. What seems like a "clear" rule is anything but. Clarification should occur at the stationhouse before a statement is made, not afterwards in a court. Florida's current rule, that any equivocal statement be clarified is by far the simpler standard. Further, it is the standard which most fully comports with the Florida constitutional prohibition on self-incrimination. That it works is demonstrated by Davis itself; the officers clarified Mr. Davis's equivocal statement and received a clear and unequivocal waiver.

In Traylor this Court stated that "A prime purpose ...(for adopting specific rules on silence and counsel)...is to maintain a bright-line standard for police interrogation...." 596 So. 2d at 966. Just as this Court declined to follow the federal precedent of Moran v. Burbine, 475 U.S. 412 (1986), in Haliburton v. State, 514 So. 2d 1088, 1090 (Fla. 1987), so too should the court decline to embark on the twisted path which Davis offers.

ARGUMENT

POINT II

THE TRIAL COURT ERRED IN REFUSING TO ALLOW RESPONDENT TO RECALL A STATE WITNESS FOR FURTHER QUESTIONING WHEN RESPONDENT'S COUNSEL LEARNED THAT TWO DAYS BEFORE THE WITNESS TESTIFIED IN COURT HE TOLD ANOTHER BOY THE ALLEGATIONS AGAINST RESPONDENT WERE MADE UP.

Respondent, a young teenager, was charged with sexually battering two younger boys, Chris and Troy, two years earlier. Chris, age 10, was the state's first witness. After repeated questions and much coaxing by the trial prosecutor Chris testified that about two years earlier respondent "stuck his private part in the back of me." He said he then kicked respondent and ran away. He did not see anything happen to Troy. On cross-examination Chris admitted that at Troy's instigation, they made up a story that respondent has a knife and that he had threatened to kill them. Chris repeated the knife story and lied to police and others, even though he was told it was important to tell the truth. After a number of months, Chris finally told his mother the claim about a knife was a lie.

The trial started on a Monday and recessed after Chris's testimony. The next morning, before the trial began for the day, respondent's counsel was told that during the proceeding weekend Chris had been playing with other children at the neighborhood school where the incident allegedly occurred and he volunteered to another child that the story of a sexual assault was made up. In an off-record conversation, counsel immediately alerted the judge and prosecutor, and moved to recall Chris for further cross-examination. Court was reconvened for the day and the state called its next witness, Troy, who also claimed respondent had assaulted Chris and him. At the next break respondent's counsel, on the record, voiced his previous off-record request to recall

Chris and again laid out the factual allegations (T 289-293). The state objected to a recall claiming that since Chris had on another occasion denied the incident happened, the proposed testimony of the latest denial would be cumulative (T 291-292). The court refused to allow the witness to be recalled stating:

> If we do that we'll start, you know, just a continuous things what (sic) people may have told him. The Defense has got to be ready, you need to cross-examine all your potential witnesses and it's too late to recall him.

(T 293). Though a request to reexamine a witness is addressed to a trial court's discretion, the trial court's ruling in this case was error as the district court correctly found. Skyles v. State, 670 So. 2d at 1086.

Abuse of discretion has been found in both civil and criminal cases when trial court's have refused to allow a party to recall a witness or reopen its case to permit additional evidence to be presented. Akins v. Taylor, 314 So. 2d 13 (Fla. 1st DCA 1975), involved an accident between a vehicle and a tractor-trailer. Through oversight the appellant's attorney neglected to put into evidence interrogatories which would have shown the identification of the tractor-trailer driver and that the rig was operated under a lease with the defendants. Though the trial court had exercised its discretion by denying the motion to reopen to present that evidence, the district court reversed, finding the ruling to be an abuse of discretion. In so ruling the court noted:

> Law suits are no longer a cat and mouse game to such an extent that a party will be denied an opportunity to have a jury determine the justice of his cause on such a minor technicality.

314 So. 2d at 14. In the same spirit, the first district held in Kimmons v. State, 178 So. 2d 608, 615 (Fla. 1st DCA 1965), that it was not error to allow the state to reopen its case against a defendant even after the defense had rested where the state's witness had not been located until a day or two before. Again the court noted that it is the duty of judges "to assure that the trials over which he presides are conducted in accordance with

the precepts of justice and fairness to all parties concerned, in order that truth and justice - the objects of our court system - may be attained." 178 So. 2d at 615. See also Pitts v. State, 185 So. 2d 164 (Fla. 1966) (not error to allow state to reopen case to clarify conflicting testimony between a state witness and the prosecutrix pertaining to identification of defendant in response to a jury question); Dees v. State, 357 So. 2d 491 (Fla. 1st DCA 1978) (no error to allow state to reopen after defendant's motion for judgment of acquittal to prove venue); Louisy v. State, 667 So. 2d 972 (Fla. 4th DCA 1996) (abuse of discretion to refuse to allow defendant to re-open case where counsel had forgotten to ask defendant about an area of inquiry which would have explained reason for victim's vaginal injuries.)

And of course, what is allowed by one side must be allowed by the other as well; a party may always invoke the discretion of the trial court to reopen or recall a witness where it can be done without injustice to the other party. Buckingham v. Buckingham, 492 So. 2d 858, 861 (Fla. 1st DCA 1986) (reversing refusal to reopen to present evidence on attorney's fees and costs); Weary v. State, 644 So. 2d 156 (Fla. 4th DCA 1994) (abuse of discretion and reversible to refuse to reopen for defense witness on a major point where no great inconvenience to parties); Lambert v. State, 626 So. 2d 340 (Fla. 4th DCA 1993) (reversible abuse of discretion to refuse to reopen for evidence on standing).

Because the courts favor a full airing of the merits of any case, a reversible abuse of discretion has been found in various circumstances where trial judges have refused to permit additional evidence. Moran v. State, 274 So. 2d 26 (Fla. 1st DCA 1973), cited by the district court in its opinion, is such a case. Mr. Moran was accused of having sexual relations with his 15 year old daughter. The state presented two witnesses, the 15 year old and a doctor who confirmed the child was "nonvirginal." The defense called the 13 year old sister Cindy. Cindy had previously said that on the morning after the

alleged incident her older sister had told her that while the father had attempted to have sex with her, she had refused and he had been unsuccessful. When Cindy was on the stand testifying she said she was unable to remember what had been said. After a recess and several more defense witnesses, counsel requested to recall Cindy, explaining to the court that Cindy had been frightened and nervous on the stand but that she now said she remembered the conversation with her sister which was exculpatory to the defendant. 274 So. 2d at 28. The trial court refused to allow the recall saying it would be nothing more than a rehash of previous testimony and that the defense should not be allowed to recall a witness after a recess and talking to the witness just because it were unhappy with her testimony. 274 So. 2d at 28-29. This ruling was found to be reversible error.

> The record indicates that there were only two principal witnesses upon whose testimony an adjudication of guilt could stand or fall. The jury was faced with the decision to believe either the appellant or the alleged victim, and their decision would essentially dispose of the issue of guilt. Hence, it was vital that they hear any witness who might shed light upon the credibility of either of the principal witnesses.
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> * * *
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> ...we conclude that the refusal to allow Cindy's testimony to be introduced was an abuse of discretion which was harmful to appellant and was therefore error.

274 So. 2d at 29. Likewise, in Hogle v. Lowe's of Fla. Inc., 591 So. 2d 1095 (Fla. 1st DCA 1992), a new trial was ordered after the judge refused to allow the appellant to recall appellee's sales manager to cross-examine him about his inconsistent deposition statements regarding access to a cutting tool which was left in an aisle and on which the appellant tripped. "This was extremely important testimony, as the appellee's knowledge and control of the tool's location were crucial aspects of the appellee's case." 591 So. 2d at 1096. See also Delgado v. State, 573 So. 2d 83 (Fla. 2d DCA 1990) (abuse of discretion where request is made timely and jury will be deprived of evidence "which might have a significant impact upon the issues to be resolved.")

In the instant case there was no way for respondent to know that Chris made an inconsistent statement admitting the charges were a fabrication just one or two days before he testified until the person who heard the statement told respondent's attorney. Respondent's counsel could hardly be faulted for not being aware of a statement made by a state witness just a day before trial began. But even if he could, Akins, Pitts, Buckingham, Louisy and Hogle all demonstrate that an error by counsel, easily remedied by allowing recall or reopening, is not a sufficient reason to short-circuit the truth seeking process. Here, Chris's recent statement was not about some collateral detail, it obviously went to the heart of the allegations against respondent, i.e. might have a significant impact on the issues to be resolved. Delgado. Respondent's counsel immediately notified the judge and prosecutor, making clear his desire to recall Chris and question him about the statement; his request to recall Chris was timely. See Delgado. At that point no other witnesses had even testified and there was absolutely no reason not to allow Chris, who was a local witness, to be recalled and questioned on the statement. See Weary. The district court agreed and found the ruling to have been error but then found the error harmless.

The state argued the testimony was cumulative because on one previous occasion two years before Chris had denied this incident took place.[4] But that does not make a *different* incident cumulative. During its examination of Chris the state asked,

> Q. (Other than the claim that respondent threw a knife at the boys) Did you make up any other part of what happened?
>
> A. No.
>
> Q. What you just told me a minute ago about what

[4] The district court's opinion states the jury knew that "more than once" Chris denied the assault occurred. Although Chris did indeed deny the assault on more than one occasion, the jury only heard about a single denial (T 229-230, 237).

happened, did you make any of that up?

A. No.

(T 226). By keeping out Chris's inconsistent statement to the contrary, made closest to his testimony, the state set up its closing argument wherein it explained away Chris's initial denial by saying he was embarrassed or afraid he would be in trouble (T 515, 519). Though that explanation would seem entirely reasonable and might well persuade a jury who only heard about an initial denial of the incident, the explanation rings rather hollow in light of Chris's later statement that the whole thing, not just the knife incident, was made up. The whole theory behind the admissibility of inconsistent statements is that they tend to call into question a witness's credibility. Certainly a witness who admits to having lied about one factor, the knife, is rendered further unbelievable when he makes a statement not two days before he testifies that the entire incident is a fabrication.

Further, the excluded evidence was not cumulative because Chris' admission that the charges against respondent were fabricated is the only such admission. For a witness to admit he, (or in this case, Troy,) made the whole thing up is far different from initially denying something occurred, which, as noted, the state explained away as embarrassment or shyness, and is also far different from merely admitting that the claim of a knife was a fabrication, which the state also explained away as the boys being angry at respondent.[5] Far from being cumulative, the recently discovered admission that the alleged crime was a total fiction puts Chris's earlier statements in a completely different light; that admission is exactly the type of evidence which would surely play a substantial part in a jury's deliberations. Finally, the impeachment evidence demonstrates that the

[5] The state's argument further suggested the fact Chris admitted he lied about the knife made him a more credible witness (T 515).

difficulty Chris had in making the accusation at trial was not because it happened and Chris did not want to talk about it, but because it never happened and Chris was just going along with a story made up by his friend Troy. Troy first made the accusation, not to his own father but to Chris's stepfather. In making the original accusation he had only accused respondent of molesting Chris. Chris's stepfather, to whom Chris was close, talked to Chris about the allegation and Chris flatly denied it had ever occurred. The stepfather gave it no more thought because he knew Troy to be unreliable and because the incident as related could not have occurred. Nothing else happened for a year and a half. Then Troy's father read Troy a newspaper report about a man who had molested some children at Wabasso School. A few days later Troy made the claim that he and Chris had been molested by respondent at Wabasso School. Troy then went to Chris's stepfather to brag that respondent was going to jail. Chris again denied the accusation[6] against respondent and it was only after Troy called his friend a liar and insisted that Chris finally went along with the claim. The stepfather felt Chris "admitted" the allegation under duress. Troy then made up the claim that respondent had a knife, even inventing a description for the knife, and got Chris to go along with the claim. Although Chris stuck to the knife story and repeated it for the police, the doctor, and his parents, after several months he finally went to his mother and told her it was not true. Several months later the case went to trial. If only a day or two before trial Chris volunteered that the offense never happened at all, it was vital that the jury hear that testimony. Like the testimony offered in Moran, the proposed testimony here might shed light on the credibility of one of respondent's accusers and on the question of whether the offense ever occurred.

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[6] This second denial was not made clear to the jury; it had been explored in a pretrial hearing.

Contrary to the district court's conclusion, the refusal to allow Chris to be recalled was not harmless. There were basically three areas of evidence in this case: the boys' statements, respondent's statement, and the physical evidence, namely the ½ centimeter scar on Chris's rectum. Each of the areas was challenged. Two friends, one with a motive to lie, reported a crime two years after it allegedly occurred. In repeating the allegation to the police and doctor, they added details about a knife later proven to be false. One of the two had a small scar, the age of which could not be determined, which was consistent with the claim but not inconsistent with other causes. No other corroboration existed. One or two days before he testified, one boy said the two made the whole thing up. After repeatedly denying the offense, respondent "confessed." He testified he made his statement only after being told he could not go home until he admitted he committed the offense, and his two attempts to terminate his interrogation were in fact ignored. Respondent repudiated his "confession" under oath at trial. Thus, the case came down to respondent's word against that of the two boys plus the inconclusive scar. The state's closing argument to the jury was focused on convincing the jury to believe the two boys.

Although the district court cited State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), in finding the error harmless, the decision's emphasis on evidence admitted, rather than the effect of evidence excluded, demonstrates precisely the kind of flawed argument warned against in DiGuilio, which cautions that the function of an appellate court on review is not simply to examine the permissible evidence, exclude the impermissible evidence, and determine that the evidence of guilt is overwhelming.

> ...harmless error analysis *must not become a device whereby the appellate court substitutes itself for the jury,* examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence. In a pertinent passage, Chief Justice Traynor points out:

> Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result. (citation omitted).

491 So. 2d at 1136 (emphasis added). This caveat, even overwhelming evidence of guilt does not negate the fact that the error may have played a substantial part in the jury's deliberations, dates back at least to Drake v. State, 441 So. 2d 1079 (Fla. 1983), when this Court admonished that if there is *any* reasonable possibility that the error *may have contributed* to the defendant's conviction, it may not be held harmless beyond a reasonable doubt -- even if there is overwhelming evidence of guilt. The Second District Court of Appeal has phrased the test in perhaps less metaphysical terms by suggesting that error is not harmless beyond a reasonable doubt if the appellate court cannot say that an acquittal was not reasonably within the realm of *possibility*. Singletary v. State, 483 So. 2d 8 (Fla. 2d DCA 1985). Indeed, in DiGuilio the district court had already found the error harmless, but this Court disagreed, stressing again the rigorous nature of the test. 491 So. 2d at 1137. "...the state, as beneficiary of the error, (must) prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." 491 So. 2d at 1138. See also Sullivan v. Louisiana, 508 U.S. ___, 113 S. Ct. 2078, 2081-2082 (1993), wherein Justice Scalia writes:

> Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. (Citation omitted). Harmless error review looks, we have said, to the basis on which "the jury *actually rested* its verdict." (Citation omitted). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered

> in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered --no matter how inescapable the findings to support that verdict might be--would violate the jury trial guarantee.

Zerquera v. State, 549 So. 2d 189 (Fla. 1989), is an example of the correct application of the harmless error test in a case where evidence is wrongly excluded. Zerquera was convicted of first degree murder based on his taped statement admitting that he and a co-defendant robbed the victim, and upon the co-defendant's testimony admitting the crime but naming Zerquera as the triggerman. Zerquera's defense at trial was that he did not know the co-defendant planned to rob the victim; the co-defendant shot the victim. Bullets were found in the co-defendant's suitcase but appellant was prevented from cross-examining the co-defendant or the investigating officer about this fact, which tended to support the defense, by the trial court's erroneous rulings sustaining objections based on hearsay and beyond the scope of direct examination. In reversing the conviction, this Court specifically rejected the state's harmless error argument, despite Zerquera's original statement which in effect admitted a felony murder. See also Ramirez v. State, 542 So. 2d 352, 356 (Fla. 1989), (reversing a murder conviction despite defendant's many inconsistent statements, his access to scene of crime, his bloody thumbprint at scene, etc. because of insufficient predicate for an expert's testimony regarding murder weapon: "The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test.... The focus is on the effect of the error on the trier-of-fact.")

The evidence of guilt in the present case was far from overwhelming and certainly not as strong as the evidence in either Zerquera or Ramirez. With or without his statement, respondent should be granted a new trial.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, respondent respectfully requests this Court to affirm the decision of the Fourth District regarding respondent's statement and remand for a new trial.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to William Spillias, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 27 day of June, 1996.

Cherry Grant
CHERRY GRANT
Counsel for Respondent

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 87,640
	)	
CECIL SKYLES,	)	
	)	
Respondent.	)	
_____	)	

APPENDIX

PER CURIAM.

Affirmed. *See Daugharty v. Daugharty*, 456 So.2d 1271 (Fla. 1st DCA 1984), *rev. denied*, 464 So.2d 554 (Fla.1985).

Cecil SKYLES, Appellant/Cross-Appellee,

v.

STATE of Florida, Appellee/Cross-Appellant.

No. 95-0249.

District Court of Appeal of Florida, Fourth District.

March 20, 1996.

Rehearing Denied April 19, 1996.

Minor defendant was convicted in the Nineteenth Judicial Circuit Court, Indian River County, Charles E. Smith, J., of two counts of sexual battery on person under 12, and he appealed. The District Court of Appeal, Klein, J., held that: (1) defendant's confession should not have been admitted, and (2) defense counsel should have been allowed to recall one of victims on day after victim's testimony, though court's refusal to allow recall would be harmless if defendant's confession were determined to be admissible.

Reversed and remanded for new trial, and questions certified.

1. Criminal Law ⇐527

Confession by minor defendant regarding molestation of two boys when they were seven should not have been admitted, particularly in light of defendant's statements, during questioning, that, "I'm through man, that's all I'm saying," and that, "That's all I have to say is (sic) 'cause that's all I know"; after those statements were made, tape recorder was turned off for period of time, after which, back on tape, defendant confessed to having anally assaulted boys.

2. Criminal Law ⇐1170.5(1)

Witnesses ⇐332

In prosecution of minor defendant on two counts of sexual battery on person under 12, defense counsel should have been allowed to recall one of victims on day after victim's testimony, on ground that defense had just learned that victim had recently told playmate that sexual battery claim was fabrication, but court's refusal to allow recall would be harmless if defendant's confession were determined to be admissible; jury already knew that victim had, more than once, denied that assault occurred, and that victim had admitted fabricating claim that defendant had threatened to kill victims with pocketknife if they did not cooperate.

Cross-appeal from the Circuit Court of the Nineteenth Judicial Circuit, Indian River County; Charles E. Smith, Judge.

Richard L. Jorandby, Public Defender and Cherry Grant, Assistant Public Defender, West Palm Beach, for appellant/cross-appellee.

Robert A. Butterworth, Attorney General, Tallahassee, and William A. Spillias, Assistant Attorney General, West Palm Beach, for appellee/cross-appellant.

KLEIN, Judge.

Cecil Skyles appeals his two convictions for sexual battery on a person under 12, arguing that the court erred in admitting his confession and in refusing to allow him to recall one of the victims for additional cross-examination. We reverse.

[1] Skyles, who was 14, was accused of molesting two boys who were 7 at the time. After Skyles became a suspect, he agreed to come to the police station with his mother, and, after receiving his *Miranda* rights, was questioned. He repeatedly denied any wrongdoing, and at one point said "I'm through man, that's all I'm saying." The officer interrogated him further, during which Skyles continued to deny the allega-

ıck on tape, defendant confess-
ıally assaulted boys.

aw ⇐1170.5(1)
⇒332
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udicial Circuit, Indian River
les E. Smith, Judge.

Jorandby, Public Defender and
, Assistant Public Defender,
ach, for appellant/cross-appel-

Butterworth, Attorney General,
nd William A. Spillias, Assis-
General, West Palm Beach, for
appellant.

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tions and concluded by stating "That's all I have to say is (sic) 'cause that's all I know."

The tape recorder was then turned off for a period of time after which, back on the tape, Skyles confessed on the tape to having anally assaulted both of the boys after they had pulled their pants down.

In *Owen v. State*, 560 So.2d 207, 211 (Fla. 1990), the Florida Supreme Court concluded that a confession was erroneously admitted because the defendant said things like "I don't want to talk about it" in response to questions about the crime, stating:

> The responses were, at the least, an equivocal invocation of the *Miranda* right to terminate questioning, which could only be clarified. It was error for the police to urge appellant to continue his statement.

After *Owen* the United States Supreme Court clarified *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and held that officers are not obligated to stop questioning a suspect unless the suspect makes "an unambiguous or unequivocal request for counsel." *Davis v. U.S.*, — U.S. —, —, 114 S.Ct. 2350, 2356, 129 L.Ed.2d 362 (1994). *Davis* was decided before the defendant in *Owen* was retried, and the state sought certiorari in this court, arguing that under *Davis* Owen's confession would now be admissible. Although we were bound by the supreme court's decision in *Owen* and thus denied certiorari, we certified 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*? [1]

State v. Owen, 654 So.2d 200, 202 (Fla. 4th DCA), *rev. granted*, 662 So.2d 933 (1995).

We conclude that under *Owen I* this confession should not have been admitted, and therefore reverse for a new trial, but certify the same question of great public importance as we did in *Owen II*. We reject the state's argument that *Owen I* is inapplicable because Skyles was not in custody. *See Martin v. State*, 557 So.2d 622 (Fla. 4th DCA 1990), and cases cited therein (the fact that there has not been a formal arrest does not necessarily mean suspect is not in custody).

[2] Because the Florida Supreme Court is not bound by *Owen I*, and may conclude that the confession was admissible, obviating a new trial on that issue, we also address whether the trial court erred in refusing to allow one of the victims to be recalled for further cross-examination. This requires consideration of the evidence.

Sometime after the alleged assault, victim *A* told victim *B*'s stepfather that an older boy had sexually assaulted *B*. *B*'s stepfather asked *B* about the allegation, but *B* denied it. More than a year later, *A*'s father read an article about a man molesting children at the neighborhood school and discussed it with his children. A few days later *A* told his father that Skyles had molested him and *B*. Subsequently, *A* again told *B*'s stepfather, and after initially denying it, *B* then admitted to his stepfather that it had happened.

After *A*'s father called the police, an officer interviewed *A* and *B*, and they both confirmed that the sexual assaults had occurred. They also claimed that Skyles had threatened to kill them with a pocketknife if they did not cooperate, an allegation which they both later admitted was false.

The boys were examined by a pediatrician, and both told him that the assaults had occurred. The pediatrician found a one-half centimeter scar on *B*'s rectum, which was consistent with the abuse described.

When *B* testified at trial, defense counsel cross-examined him about his previous denials that the incident had occurred, and about lying about the knife. The day after *B*'s testimony was concluded, defense counsel asked the court to recall *B*, because the defense had just learned that *B* had recently told a playmate that the sexual battery claim

1. *Traylor v. State*, 596 So.2d 957, 961 (Fla.1992), in which the Florida Supreme Court recognized that:

> Under our federalist system of government, states may place more rigorous restraints on government intrusion than the federal charter imposes; they may not, however, place more restrictions on the fundamental rights of their citizens than the federal Constitution permits.

was a fabrication. The state objected, arguing that *B*'s denial that the incident occurred was nothing new, and that recalling him would be cumulative. The court refused to allow the recall of *B*, stating:

> If we do that we'll start, you know, just a continuous things what (sic) people may have told him. The Defense has got to be ready, you need to cross-examine all your potential witnesses and it's too late to recall him.

Skyles took the stand and testified that the assaults did not occur and that he had confessed only so that he could go home. He was convicted on both counts.

The trial court should have permitted the defendant to recall the victim under these circumstances. A similar situation was presented in *Moran v. State*, 274 So.2d 26 (Fla. 1st DCA 1973), in regard to the testimony of the 13 year old sister of the alleged victim of incest. Defense counsel asked the court to allow him to recall her, because she told him after her original testimony that she had been frightened and thus temporarily forgot the substance of a critical conversation with her sister which could have exculpated the defendant. The trial court refused, and the first district reversed, finding an abuse of discretion, because it was "vital that they [the jury] hear any witness who might shed light upon the credibility of either of the principal witnesses." *Id.* at 29.

The state argues that the ruling was harmless, pointing out that the jury already knew that *B* had, more than once, denied that the assault occurred, and that *B* admitted fabricating the part about the knife.

The most incriminating evidence, of course, is Skyles' confession. If the supreme court recedes from *Owen I* and adopts *Davis*, which would make the confession admissible, we would find that not recalling *B* was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986). We need not decide whether the ruling would be harmless if the supreme court adheres to *Owen I*, since that result would require a new trial without the confession, and the defendant would then have the opportunity to fully cross-examine the witness.

We have examined the other issue and find it to be without merit. We therefore reverse and remand for a new trial, certifying the question we certified in *Owen II*.

GLICKSTEIN and DELL, JJ., concur.

David C. CLAWSON, Appellant,

v.

STATE of Florida, Appellee.

No. 95–00225.

District Court of Appeal of Florida, Second District.

March 22, 1996.

Defendant was convicted in the Circuit Court, Pinellas County, Bob Barker, J., of engaging in sexual activity with child over 12 but less than 18 and for handling and fondling child under 16. Defendant appealed judgment and sentences. The District Court of Appeal, Patterson, Acting C.J., held that since state did not prove additional physical trauma for incidents which occurred prior to statutory amendment providing that victim injury must be scored regardless of whether state presented evidence of physical injury, victim injury points should have been scored only for one incident of penetration which occurred after statutory amendment.

Affirmed in part, reversed in part, and remanded.

1. Criminal Law ⇐1236, 1246

Statutory amendment, which effectively overruled prior case law, providing that when sexual offense includes penetration or sexual contact, victim injury must be scored regardless of whether state presented evidence of physical injury cannot be applied retroactively, and thus since state did not prove addi-

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appendix has been furnished by courier to William A. Spillias, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 21 day of June, 1996.

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