IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CECIL SKYLES,

Respondent.

Case No. 87,640

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

# PETITIONER'S REPLY BRIEF ON THE MERITS

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## PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the appellee in the Fourth District Court of Appeal, and will be referred to herein as "Petitioner" or "the State." Respondent, Cecil Skyles, was the appellant in the Fourth District Court of Appeal, and will be referred to herein as "Respondent."

## STATEMENT OF THE CASE AND FACTS

The State relies upon the Statement of the Case and Facts set forth in its initial brief on the merits, except for the following additions:

In the argument/discussion on Respondent's motion to recall state witness Christopher Walker, the prosecutor agreed that the child to whom the subject statement was allegedly made should be called rather than the state witness being recalled (T. 290). However, Appellant never moved to proffer the testimony of this "unnamed" child, but instead sought only to recall state witness Christopher Walker (T. 290-291). Defense counsel extensively cross-examined Christopher Walker and elicited from Walker that he in fact told his mother's boyfriend that the subject crimes never occurred and that he had lied about the presence of the knife (T. 227-236, 239-241).

## SUMMARY OF THE ARGUMENT

This Court should answer the certified question in the affirmative. United States v. Davis, 512 U.S. ____, 114 S.Ct. 2550, 129 L.Ed.2d 362 (1994), should be applied in the instant case and in Florida generally. This Court's opinion in Owen I (and thus the Fourth District's opinion in the instant case, which relied solely upon Owen I) 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 in Owen I (and thus the Fourth District's interpretation of said rule in the instant case) was erroneous. Consequently this Court should apply United States Supreme Court's interpretation/limitation of its own rules.

Furthermore, this Court should decline to consider Respondent's issue 2, as the Fourth District certified conflict only as to the issue of the admissibility of Respondent's confession. However, if this Court disagress with the State's position, the State submits that issue 2 was not preserved for appellate review. Moreover, the trial court did not abuse its discretion in denying Respondent's motion to recall a state witness for further questioning. Also, the Fourth District correctly applied the harmless error analysis and properly found that any error would be harmless if this Court reverses the Fourth District's holding as to the admissibility of Respondent's confession.

## ARGUMENT

### ISSUE I

**WHETHER 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.**

In arguing that Davis[1] does not apply to the instant case, Respondent fails to understand established and controlling reasoning enunciated by this Court and by the federal courts. The holding of Davis clearly centers on what is required of police officers in determining whether a defendant has asserted any right under Miranda.[2] The question of whether the equivocal response relates to the right to remain silent or to the right to counsel is not germane to the discussion. As explained in Coleman v. Singletary, 30 F. 3d 1420, 1424 (11th Cir. 1994):

> Because we are bound to follow the Supreme Court's holding in *Davis*, our decisions creating a duty to clarify a suspect's intent upon an equivocal invocation of counsel are no longer good law. Furthermore, we have already recognized that the same rule should apply to a suspect's ambiguous or equivocal references to the right to cut off questioning as to the right to counsel.

See also Martin v. Wainwright, 770 F. 2d 918, 924 (11th Cir. 1985) (same rule should apply to equivocal invocation of right to silence as to right to counsel), modified on other grounds, 781 F. 2d 185(11th Cir. 1985), cert.denied, 479 U.S. 909, 107 S.Ct. 307, 93 L.Ed.2d 281 (1986). This Court has also applied the same rule to ambiguous or equivocal invocations of the right to remain silent and the right to counsel. In overturning the defendant's confession in Owen v. State, 560 So. 2d 207

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[1]United States v. Davis, 512 U.S. ____, 114 S.Ct. 2550, 129 L.Ed.2d 362 (1994).

[2]Miranda v. Arizona, 384 U.S. 436, 16 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

(Fla. 1990), this Court relied upon Martin, 770 F. 2d at 918; Miranda v. Arizona, 384 U.S. 436, 16 S.Ct. 1602, 16 L.Ed.2d 694 (1966); Long v. State, 517 So. 2d 664, 666 (1987), cert. denied, 486 U.S. 1017, 108 S.Ct. 1754, 100 L.Ed.2d 216 (1988), and the cases cited therein. All of those cases, except for Martin, involved an equivocal request for counsel rather than an equivocal request to cut off questioning. Accordingly, Respondent's illusory distinction does not preclude application of Davis to the instant case.

The State further submits that Respondent's misplaced assertion that his statements in the instant case amounted to an unequivocal invocation of his right to remain silent is incredible and must fail. Respondent's statements in the instant case are ambiguous and equivocal under the facts and circumstances of the instant case, as Respondent never directly or unequivocally invoked his right to remain silent, and are no less ambiguous or equivocal than the defendant's statements in Owen, 560 So. 2d at 207, 211,[3] where this Court explained as follows:

> 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.

Respondent's reliance upon Traylor v. State, 596 So. 2d 957 (Fla. 1992), is also misplaced. The major emphasis in Traylor is on the primacy of state law for purposes of determining the voluntariness of a confession:

> The basic contours of Florida confession law were defined by this Court long ago under our common law. We recognize the important role that confessions play in the crime-solving process and the great benefit they provide; however, because of the tremendous weight accorded confessions by our courts and the significant potential for

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[3]In response to questions about the crime, Owen said things like "I don't want to talk about it."

> compulsion----both psychological and physical----in obtaining such statements, a main focus of Florida confession law has always been on guarding against one thing----coercion. We defined the abiding standard for determining the admissibility of a confession nearly a century and half ago:
>
> > To render a confession voluntary and admissible as evidence, the mind of the accused should at the time be free to act, uninfluenced by fear or hope. To exclude it as testimony, it is not necessary any direct promises or threats be made to the accused. It is sufficient, if the attending circumstances, or declarations of those present, be calculated to delude the prisoner as to his true position, and exert an improper and undue influence over his mind.
>
> Simon v. State, 5 Fla. 285, 296 (1853). The test is one of voluntariness, or free will, which is determined by an examination of the totality of the circumstances surrounding the confession.

(Footnote omitted). Traylor, 596 So. 2d at 964. Such is not the issue before the Court in the instant case. The issue in the instant case is whether this Court will continue to apply an interpretation of a federal procedural rule now that the United States Supreme Court has determined that interpretation to be incorrect. The state constitution is not implicated in any way, nor does Traylor address this issue. The rule in Davis is simply a limitation on the scope of Miranda. As noted in the State's initial brief, this Court has continued to adopt such limitations. In State v. Craig, 237 So. 2d 737, 738-740 (Fla. 1970), this Court rejected the Fourth District's determination that equivocal responses by a defendant require the cessation of questioning. Davis reaffirms that position.

## ISSUE II

**THIS COURT SHOULD DECLINE TO CONSIDER THIS ISSUE; NEVERTHELESS, THIS ISSUE WAS NOT PRESERVED FOR APPELLATE REVIEW, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING RESPONDENT'S MOTION TO RECALL A STATE WITNESS FOR FURTHER QUESTIONING, AND THE FOURTH DISTRICT CORRECTLY APPLIED THE HARMLESS ERROR ANALYSIS AND PROPERLY FOUND THAT ANY ERROR WOULD BE HARMLESS IF THIS COURT REVERSES THE FOURTH DISTRICT'S HOLDING AS TO THE ADMISSIBILITY OF RESPONDENT'S CONFESSION.**

The State initially submits that this Court should decline to consider the instant issue. In Savoie v. State, 422 So. 2d 308, 310 (Fla. 1982), this Court stated that it may, in its discretion, consider other issues "properly raised and argued before this Court" (emphasis added). A review of the Fourth District's opinion in the instant case clearly shows that the District Court only certified as a question of great public importance a question involving the admissibility of Appellant's confession. The State sought this Court's jurisdiction only as to issue 1, and Respondent never cross-appealed. The Fourth District's opinion clearly shows that the court carefully addressed the harmless error issue, the resolution of which is not ancillary to the resolution of issue 1, and its holding on that issue must be considered final, as it is a court of last resort. See Whipple v. State, 431 So. 2d 1011 (Fla. 2d DCA 1983).

However, if this Court disagrees with the State's position, the State asserts that, despite the Fourth District's finding to the contrary, this issue was not preserved for appellate review based upon Respondent's failure to proffer the testimony of the child to whom the state witness allegedly made the subject statement. In the argument/discussion on Respondent's motion to recall state witness Christopher Walker, the prosecutor agreed that the child to whom the subject statement was

allegedly made should be called rather than the state witness being recalled (See T. 290). The record, however, proceeds to show that Appellant never moved to proffer the testimony of this "unnamed" child, but instead sought only to recall state witness Christopher Walker (See T. 290-291). Therefore, because Appellant failed to move to proffer the testimony of said "unnamed" child, this issue was not preserved for appellate review. See Eagle v. Eagle, 632 So. 2d 122 (Fla. 1st DCA 1994); Tinson v. State, 594 So. 2d 334 (Fla. 1st DCA 1992); Holmes v. Redland Construction Co., 557 So. 2d 911 (Fla. 3d DCA 1990); Peterson v. State, 505 So. 2d 16 (Fla. 3d DCA 1987); Silveira-Hernandez v. State, 495 So. 2d 914 (Fla. 3d DCA 1986); Ketrow v. State, 414 So. 2d 298 (Fla. 2d DCA 1982); Llanos v. State, 401 SO. 2d 848 (Fla. 4th DCA 1981).

The re-examination of any witness is within the discretion of the trial court. Jacobs v. State, 396 So. 2d 713, 717 (Fla. 1981). The State submits that the trial court did not abuse its discretion in denying Appellant's request to recall state witness Christopher Walker. First, the State notes that there was no evidence that any witness subsequent to Christopher Walker gave an account which differed significantly from Walker's testimony on any crucial point;[4] thus, it is clear that the trial court did not abuse its discretion. See United States v. Masat, 948 F. 2d 923 (5th Cir. 1991). Second, the record clearly reflects that defense counsel extensively cross-examined Christopher Walker, as was noted by the trial court, and also shows that defense counsel actually elicited from Walker that he in fact told his mother's boyfriend that the subject crimes never occurred and that he had lied about the presence of the knife (See T. 227-236, 239-241). Thus, the attempted recall of

[4]Such is the case because, as noted above, Respondent failed to call as a witness, and even failed to attempt to call as a witness, the "unnamed" child to whom Christopher Walker allegedly made the subject statement.

Walker, and the question sought to be posed by defense counsel, were merely cumulative.[5]

The State further notes that Respondent could have asked Walker on cross-examination, but apparently chose not to, whether he had denied the subject crimes to anyone else, considering the fact that he had already elicited from Walker that he had lied about the presence of the knife and had initially told his mother's boyfriend that the subject crimes did not occur. Defense counsel had thus already attempted to establish that Walker had "partially fabricated" the incident; defense counsel could have attempted to show "total fabrication" during cross-examination, but he chose not to. Respondent was thus sought to recall Walker in an attempt to show "total fabrication" despite having the opportunity to do so on cross-examination. Furthermore, the State reasserts that Respondent never named or offered the "unnamed" child, nor offered anything about this child to show that he or she actually existed. The State submits that neither the trial court, nor any court, should "assist" attorneys by giving them "second cracks" at witnesses whom they have already extensively cross-examined, but to whom they may have "missed" asking certain questions.

Furthermore, the State again emphasizes the fact that Respondent failed to call as a witness, and proffer the testimony of, the "unnamed" child, which the State submits was the only proper procedure. Otherwise, the trial court (and all future trial courts under the Fourth District's holding) would be forced to recall a witness, who had already been extensively cross-examined, based purely on speculation and conjecture, which was the situation facing the trial court in the instant case. Moreover, despite Respondent's spirited argument to the contrary, the Fourth District correctly

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[5]The cases cited and relied upon by Respondent are distinguishable on their facts from the instant case. Many involve the reopening of a party's case, rather than the recall of a witness, and none involve the cumulative nature of the subject evidence or the failure to proffer the subject evidence.

applied the harmless error analysis and properly found that any error on the part of the trial court would be harmless if this Court reverses the Fourth District's holding as to the admissibility of respondent's confession. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); §§ 59.041 and 924.33, Fla.Stat. (1993).[6]

## CONCLUSION

**WHEREFORE**, based on the foregoing arguments and authorities cited herein, the State respectfully requests that this Honorable Court answer the certified question in the affirmative, vacate the Fourth District's decision reversing Respondent's conviction and remanding for a new trial, and affirm Respondent's conviction.

Respectfully submitted,

**ROBERT BUTTERWORTH**
**ATTORNEY GENERAL**
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[6]Respondent appears to ignore the fact that a harmless error analysis is to be applied on a case-by-case basis. The cases cited by Respondent on page 20 of his answer brief are inapplicable to the instant case. In those cases, this Court found that, under the specific facts and circumstances of those cases, the subject errors could not be considered harmless. In Zerquera v. State, 549 So. 2d 189 (Fla. 1989), this Court reasoned as such because the defendant and co-defendant were pointing the finger at each other as to who fired the gun that killed the victim during an armed robbery, and the improperly excluded evidence pointed to co-defendant. In Ramirez v. State, 542 So. 2d 352 (Fla. 1989), this Court reasoned as such because an expert witness had positively identified during his testimony that a knife found in a car connected to the defendant was the murder weapon; such testimony was erroneously admitted because it lacked scientific reliability. In the instant case, the subject testimony was merely cumulative, and clearly harmless in light of Respondent's confession.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Reply Brief on the Merits" has been furnished by courier to: **CHERRY GRANT**, Assistant Public Defender, Counsel for Respondent, at Criminal Justice Building, 421 3rd Street, 6th Floor, West Palm Beach, Florida 33401, this 17th day of July 1996.

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