IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

vs.

CASE NO. 90,493

JOHN WEBER,
Respondent.

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ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

# INITIAL BRIEF OF PETITIONER

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES

**FEDERAL CASES**



**STATE CASES**

## PRELIMINARY STATEMENT

State of Florida, was the prosecution in the trial court and will be referred to herein as "petitioner" or "state." John Weber was the defendant in the trial court and appellant in the fourth district court of appeal, and will be referred to herein as "Weber" or "respondent."

In this brief the letter "T" is used to denote transcript of the proceeding.

## STATEMENT OF THE CASE AND FACTS

John Weber was convicted of one count of lewd assault and eleven counts of sexual battery. The fourth district court of appeal reversed Weber's convictions, holding that Weber's equivocal invocation of his right to counsel "requires law enforcement to clarify the assertion before the continuation of any interrogation." Weber v. State, 22 Fla. L. Weekly D915, D916 (Fla. 4th DCA April 9, 1997). Petitioner adopts the facts summarized in the fourth district court's opinion as follows.

> The victim is the son of Weber's live-in girlfriend. He alleged that Weber had engaged in repetitive acts of sexual misconduct with him over a one year period of time. After initially denying the allegations, Weber traveled to the police station where he took a polygraph examination and made a statement to the police.

The fourth district found that it is undisputed that Weber never made an unequivocal request for the appointment of a lawyer. However, the fourth district found that the facts surrounding Weber's invocation of his right to counsel are disputed, and said the following:

> Weber testified that Sgt. Smith informed him of his *Miranda*[1] rights prior to the

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[1]Miranda v. Arizona, 384 U.S., 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694 (1966).

polygraph examination. After the exam, Sgt. Smith informed Weber he had failed the examination and placed him under arrest. According to Weber, Smith screamed at him until he cried. Smith then suggested a deal, which included counseling for Weber. Smith told him that he thought that they should stop discussing the issue so that Weber could get an attorney.

Weber responded that he did not have an attorney and could not afford one. Smith then told him that the court would appoint one for him. According to Weber, he took that to mean he would not get a lawyer until he appeared in court. He didn't think he was entitled to a lawyer during questioning.

Sgt. Smith admitted that Weber may have asked about a lawyer, and that he responded that "one would be furnished for him." He remembered specifically that Weber did comment that he could not afford an attorney. Smith then testified that Weber never actually asked for a lawyer or refused to talk to the police without speaking to an attorney. Smith recalled Weber asking about a deal and that Smith indicated he should get an attorney for this purpose.

Officer Ponce testified that after Weber left Smith's examination room, they went straight into an interview room where Weber confessed on tape to molesting the child victim. Ponce did not give *Miranda* warnings again before obtaining the confession, but merely inquired if he remembered them. Weber never once indicated that he wished to stop talking and Ponce never promised Weber any leniency if he admitted his guilt. Ponce did not recall any conversation about Weber asking about a public defender.

The fourth district court acknowledged that this issue has been decided by the United States Supreme Court. The fourth

district however certified a question of great public importance because at the time the Weber opinion was issued at the fourth district, Owen was still pending before this Court regarding this issue. The fourth district found Weber's request for counsel equivocal invocation of his right to counsel, and certified the question of "whether *Davis*[2] applies to the admissibility of confessions in Florida in light of *Traylor v. State*, 596 So. 2d 957 (Fla. 1992)."[3]

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[2]United States v. Davis, 512 U.S. 452 (1994).

[3]The fourth district court certified the same question, which was answered by this Court in the affirmative in State v. Owen, 22 Fla. L. Weekly S246 (Fla. May 8, 1997).

## SUMMARY OF ARGUMENT

The certified question by the fourth district court of appeal has been answered in the affirmative by this Court's opinion in State v. Owen, 22 Fla. L. Weekly S246 (Fla. May 8, 1997). This Court has held in Owen that the principles announced by the United States Supreme Court in United States v. Davis, 512 U.S. 452 (1994) apply to the admissibility of confessions in Florida in light of Traylor.

## ARGUMENT

WHETHER DAVIS APPLIES TO THE ADMISSIBILITY OF CONFESSIONS IN FLORIDA, IN LIGHT OF TRAYLOR; THIS COURT HAS ANSWERED THIS CERTIFIED QUESTION IN THE AFFIRMATIVE.

The fourth district court of appeal acknowledged that this issue had been decided by the United States Supreme Court in Davis in which the Court held that in order to invoke the right to counsel, the defendant must make an unequivocal request to invoke that right. The fourth district, however, found that Weber's questions constituted an *equivocal* invocation of his right to counsel, and held that Weber's assertion required law enforcement to clarify the assertion before the continuation of any interrogation. For support of its holding the fourth district court in Weber cited to Slawson v. State, 619 So. 2d 255 (Fla. 1993)(held that the defendant's question "What about an attorney?" was an equivocal request for counsel for which the police were permitted to initiate further communications for the sole purpose of clarifying the equivocal request) and Deck v. State, 653 So. 2d 435 (Fla. 5th DCA 1995).

In Deck the fifth district court of appeal relied on the following language in Traylor:

> 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 begun, must immediately stop.* (Emphasis in the Deck opinion).

653 So. 2d at 463 (Citing to Traylor v. State, 596 So. 2d at 966).

The fourth district in Weber, which was issued on April 9, 1997, certified the question to this Court, because it relied on the above language of Traylor. A month later, on May 8, 1997, this Court issued its opinion in Owen, in which this Court explained its interpretation of the above language of Traylor as follows:

> In *Traylor*, we reaffirmed the federalist principles which give primacy to our state constitution and pointed out that the federal constitution represents the floor for basic freedoms while our constitution represents the ceiling. *Id.* at 962. Though our analysis in *Traylor* was grounded in the Florida Constitution, our conclusions were no different than those set forth in prior holdings of the United States Supreme Court. The words "indicates in any manner" added nothing to federal law, as they were identical to the words used in *Miranda* itself. *Miranda[ v. Arizona,]*, 384 U.S. [436] at 473, 86 S. Ct. [1602] at 1627[, 16 L. Ed. 2d 694 (1966)]. Moreover, we did not construe these equivocal request words in *Traylor*, 596 So. 2d at 971. The words "in any manner" simply mean that there are no magic words that a suspect must use in order to invoke his or her rights.
>
> Therefore, *Traylor* **does not** control

> our decision in this case. It does, however, remind us that we have the authority to reaffirm *Owen* regardless of federal law. Upon consideration, we choose not to do so. We find the reasoning of *Davis* persuasive.

22 Fla. L. Weekly at S247 [e.s.]. This Court in Owen further stated that:

> To require the police to clarify whether an equivocal statement is an assertion of one's *Miranda* rights places too great an impediment upon society's interest in thwarting crime.

22 Fla. L. Weekly at S247. Thus, in Owen this Court held that "police in Florida **need not** ask clarifying questions **if** a **defendant** who has received proper *Miranda* warnings **makes** only an **equivocal or ambiguous request** to terminate an interrogation after having validly waived his or her *Miranda* rights. [e.s.]"[4]

In the instant case, the fourth district held that Weber's request for counsel constituted an equivocal invocation of his right to counsel.[5] Thus, because the question certified by the

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[4]The reasoning of *Davis* applies when a defendant makes an equivocal assertion of any right under *Miranda*. 22 Fla. L. Weekly at S247.

[5]The record shows that Weber mentioned that he could not afford an attorney, and Smith told him that one would be appointed for him if he so desired (not later on), but Weber never took him up on it, and never mentioned it again (T 180-187). According to Smith, there was no mention of a time frame with regard to providing counsel for Weber (T 180-187). Petitioner also notes that when

fourth district in this case has been answered in the affirmative by this Court in State v. Owen, 22 Fla. L. Weekly S246 (Fla. May 8, 1997), the certified question in Weber should be answered in the affirmative.

## CONCLUSION

Based on the foregoing argument and authorities, the State respectfully requests that this Honorable Court answer the certified question in the affirmative based on State v. Owen, 22 Fla. L. Weekly S246 (Fla. May 8, 1997), and apply United States v. Davis, supra, to the instant case, reinstate Weber's confession, conviction and sentence.

Respectfully submitted,

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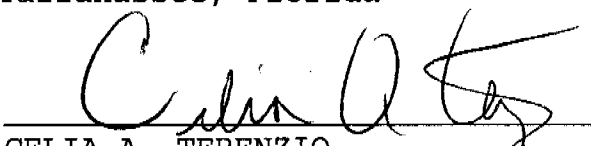

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arguing his case to the fourth district Weber relied primarily on *Deck* and *Traylor*, asserting that the police was required to clarify Weber's comment (that he could not afford a lawyer) before proceeding. In light of Owen this is obviously an incorrect interpretation of Traylor.

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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 Charles W. Musgrove, Esquire, Congress Park, Suite 1D, West, West Palm Beach, Florida 33406, this 4th day of June, 1997.

CELIA A. TERENZIO
Senior Assistant Attorney

ETTIE FEISTMANN
Assistant Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the appendix has been furnished by U.S. Mail to Charles W. Musgrove, Esquire, Congress Park, Suite 1D, West, West Palm Beach, Florida 33406, this 4th day of June, 1997.

ETTIE FEISTMANN
Assistant Attorney General

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an opinion, in which KOGAN, C.J. and ANSTEAD, J., concur.)

[1]Section 924.34, Florida Statutes (1995), is identical to section 924.34, Florida Statutes (1989).

[2]These two sections set out the general instances in which the state has a right to appeal.

[3]Sections 924.07 and 924.071 are substantially the same in the current statutes. Section 39.14 no longer exists, but chapter 39 currently contains at least two sections, section 39.069 and section 39.413, which cover the same material.

[4]This section provided:

Determination of degree of offense.—If the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged; if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or any lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense.

[5]This section provided:

Conviction of attempt; conviction of included offense.—Upon an indictment or information for any offense the jurors may convict the defendant of an attempt to commit such offense, if such attempt is an offense, or convict him of any offense which is necessarily included in the offense charged. The court shall charge the jury in this regard.

[6]This Court clarified the trial judge's responsibilities for determining whether an instruction was required under category 4 by stating:

In this category, the trial judge must examine the information to determine whether it alleges all of the elements of a lesser offense, albeit such lesser offense is *not* an *essential* ingredient of the major offense alleged. If the accusation is present, then the judge must determine from the evidence whether it supports the allegation of the lesser included offense. If the allegata and probata are present then there should be a charge on the lesser offense.

*Id.* at 383.

[7]This rule, along with rule 3.490, was amended in 1981 to reduce the number of categories of lesser included offenses from four to two. *See In re Use of Standard Jury Instructions in Criminal Cases*, 431 So. 2d 594 (Fla. 1981); *In re Florida Rules of Criminal Procedure*, 403 So.2d 979 (Fla. 1981). Under this new classification, category 1 offenses were defined as offenses necessarily included in the offense charged, and category 2 offenses were defined as offenses which may or may not be included in the offense charged, depending on the accusatory pleading and the evidence. These rules were amended to stop the practice of requiring instructions on attempts and on all lesser degrees of an offense even when there was no evidence to support the instructions.

[8]Prior to the amendment, the statute read:

In a case where the offense is divided into degrees or necessarily includes lesser offenses, and the appellate court is of the opinion that the evidence does not prove the degree or offense of which the defendant is found guilty, but does establish his guilt of some lesser degree or offense necessarily included therein, then the appellate court shall reverse the judgment of the trial court with directions to the trial court to enter judgment for such lesser degree or offense necessarily included in the charge and pass sentence accordingly, unless some other matter or thing appearing in the record makes it advisable that a new trial be had.

§ 924.34, Fla. Stat. (1969).

(HARDING, J., concurring in result only.) Although I agree that the adjudications in the instant case should not have been affirmed, I respectfully disagree with the majority's interpretation of section 924.34, Florida Statutes (1995). I believe the language used in that section is clear. Accordingly, I would hold that section 924.34 applies *only* to offenses necessarily included in the offense charged.

I believe the majority's reliance on Judge Cope's reasoning in the District Court of Appeal's *G.C.* opinion is misplaced. *G.C.* was primarily concerned with the issue of whether Florida's omnibus theft statute required a finding of specific intent; section 924.34 was a minor issue in our disposition of that case. Because our ruling in *Gould* thoroughly analyzed the policy underlying section 924.34, as well as the ramifications of extending it to include permissive lesser-included offenses, I believe *Gould* is the better case for us to follow here.

I would therefore follow *Gould*, but recede from *G.C.* to the extent it holds that section 924.34 applies to permissive lesser offenses. I do, however, agree with the majority's decision that the adjudications of delinquency in the instant case must be vacated. (KOGAN, C.J. and ANSTEAD, J., concur.)

* * *

**Criminal law—Confession—Inculpatory statements made by defendant after he has waived *Miranda* rights and then made equivocal request for counsel or to terminate interrogation are admissible—Police in Florida need not ask clarifying questions if a defendant who has received proper *Miranda* warnings makes only an equivocal or ambiguous request to terminate an interrogation after having validly waived his or her *Miranda* rights—Law of the case—Where Florida Supreme Court had previously ruled that statements of defendant were erroneously admitted at trial and had reversed murder conviction, intervening decision of United States Supreme Court qualifies as an exceptional situation which permits statements to be admitted in new trial**

STATE OF FLORIDA, Petitioner, v. DUANE OWEN, Respondent. Supreme Court of Florida. Case No. 85,781. May 8, 1997. Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance. Fourth District - Case No. 94-2885 (Palm Beach County). Counsel: Robert A. Butterworth, Attorney General and Celia A. Terenzio, Assistant Attorney General, West Palm Beach, for Petitioner. Carey Haughwout of Tierney & Haughwout, West Palm Beach, for Respondent. James T. Miller of Corse, Bell & Miller, P.A., Co-Chairman, Jacksonville; and Robert A. Harper, Co-Chairman, Tallahassee, for Florida Association of Criminal Defense Lawyers, Amicus Curiae. Andrew H. Kayton, Legal Director, Miami, for The American Civil Liberties Union Foundation of Florida, Inc., Amicus Curiae.

(GRIMES, J.) We have for review a decision ruling upon the following question certified to be of great public importance:

> DO THE PRINCIPLES ANNOUNCED BY THE UNITED STATES SUPREME COURT IN [*DAVIS v. UNITED STATES*, 512 U.S. 452 (1994)] APPLY TO THE ADMISSIBILITY OF CONFESSIONS IN FLORIDA, IN LIGHT OF [*TRAYLOR v. STATE*, 596 So. 2d 957 (Fla. 1992)]?

*State v. Owen*, 654 So. 2d 200, 202 (Fla. 4th DCA 1995). We have jurisdiction. Art. V, § 3(b)(4), Fla. Const.

Duane Owen was convicted of first-degree murder and sentenced to death for the 1984 stabbing death of a fourteen-year-old babysitter in Delray Beach.[1] The essence of the State's case against Owen consisted of inculpatory statements made by Owen while he was in police custody and under interrogation. On direct appeal, we reversed Owen's convictions and remanded for retrial, holding that although Owen's confession had been voluntary and free of improper coercion under the Fifth Amendment,[2] the statements nevertheless had been obtained in violation of Owen's rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). *Owen v. State*, 560 So. 2d 207, 209-11 (Fla. 1990).[3]

Our decision in *Owen* turned on two responses that Owen had given to police questions about what we characterized as relatively insignificant details of the crime.[4] We determined those responses to be, "at the least, an equivocal invocation of the *Miranda* right to terminate questioning." *Owen*, 560 So. 2d at 211. Based upon our interpretation of federal law at that time, we held that upon a suspect's equivocal invocation of the right to terminate questioning, police are required to stop all further questioning except that which is designed to clarify the suspect's wishes. *Id.* Rather than limiting their questions to clarify what Owen meant, the police continued to question him about the details of the murder. At that point, Owen began to give the inculpatory answers that led to his conviction. We ruled the statements inadmissible and reversed because we were unable to find that the error in admitting them was harmless beyond a reasonable doubt. *Id.*

Subsequent to our decision in *Owen* but before Owen's retrial, the United States Supreme Court announced in *Davis v. United States*, 512 U.S. 452 (1994), that neither *Miranda* nor its progeny require police officers to stop interrogation when a suspect in custody, who has made a knowing and voluntary waiver of his or her *Miranda* rights, thereafter makes an equivocal or ambiguous request for counsel. Thus, under *Davis* police are under no obligation to clarify a suspect's equivocal or ambiguous request and may continue the interrogation until the suspect makes a clear assertion of the right to counsel.

Prior to retrial the State moved the trial court to reconsider the admissibility of Owen's confession in light of *Davis*, but the trial court held the confession inadmissible. The State next filed a petition for a writ of certiorari in the district court of appeal. The district court observed:

> If we were certain that *Davis* was the law in Florida, and

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 law for which the state would have no adequate remedy by review.

*Owen*, 654 So. 2d at 201. Because the suppression of Owen's confession was the law of the case, the court denied the petition but certified the foregoing question.

At the outset, we recognize that *Davis* involved an ambiguous request for counsel whereas Owen's case turns on his purported decision to terminate interrogation. However, the reasoning of *Davis* applies when a defendant makes an equivocal assertion of any right under *Miranda*. This is well illustrated by the case of *Coleman v. Singletary*, 30 F.3d 1420 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1801 (1995), in which the court considered the question of whether the defendant's response to a police inquiry constituted an invocation of his right to remain silent. In upholding the admissibility of the confession because the defendant's response had been equivocal, the court reasoned:

> 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. *Martin v. Wainwright*, 770 F.2d 918, 924 (11th Cir. 1985) ("We see no reason to apply a different rule to equivocal invocations of the right to cut off questioning."), *modified on other grounds*, 781 F.2d 185 (11th Cir.), *cert. denied*, 479 U.S. 909, 107 S. Ct. 307, 93 L. Ed. 2d 281 (1986). The Supreme Court's concern in *Davis* was to craft "a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information." __ U.S. at __, 114 S. Ct. at 2352. The Court rejected a rule requiring that police cease questioning a suspect after an ambiguous or equivocal invocation of his *Miranda* rights out of a fear that the "clarity and ease of application" of the bright line rule "would be lost." *Id.* Because this concern applies with equal force to the invocation of the right to remain silent, and because we have previously held that the same rule should apply in both contexts, we hold that the *Davis* rule applies to invocations of the right to remain silent. A suspect must articulate his desire to cut off questioning with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent. If the statement is ambiguous or equivocal, then the police have no duty to clarify the suspect's intent, and they may proceed with the interrogation.

*Id.* at 1424.[5] We agree that *Davis* applies as much to requests to terminate interrogation as it does to requests for counsel.[6] *Davis* now makes it clear that, contrary to our belief at the time, federal law did not require us to rule Owen's confession inadmissible.

Moreover, there is no question that our holdings in *Owen* and our prior cases on the same subject[7] were predicated upon our understanding of federal law that even an equivocal invocation of *Miranda* rights required the police to either terminate the interrogation or clarify the suspect's wishes. In fact, before the United States Supreme Court's decisions in *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975), and *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), this Court had implied, if not held, that an ambiguous request for a lawyer would not require police to clarify the suspect's wishes. *State v. Craig*, 237 So. 2d 737, 739-40 (Fla. 1970) (concluding that interrogator was not required to convince defendant of need for counsel after defendant stated, "Well, I would like to have one [lawyer] in a way, but I don't see how it can help me" and finding defendant had validly waived right to counsel). Thus, *Davis* has undercut the premise upon which our decision in *Owen* was based.

Owen cites *Traylor v. State*, 596 So. 2d 957 (Fla. 1992) in support of the argument that article I, section 9 provides an independent basis for requiring police to clarify a suspect's equivocal request to terminate questioning. He relies specifically upon our statement in *Traylor* that "[u]nder 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." *Id.* at 966 (emphasis added). In so doing, he reads a meaning into these words that we never attributed to them.

In *Traylor*, we reaffirmed the federalist principles which give primacy to our state constitution and pointed out that the federal constitution represents the floor for basic freedoms while our constitution represents the ceiling. *Id.* at 962. Though our analysis in *Traylor* was grounded in the Florida Constitution, our conclusions were no different than those set forth in prior holdings of the United States Supreme Court. The words "indicates in any manner" added nothing to federal law, as they were identical to the words used in *Miranda* itself. *Miranda*, 384 U.S. at 473, 86 S. Ct. at 1627. Moreover, we did not construe these words in *Traylor* or discuss the appropriate police response to an equivocal request because the defendant in *Traylor* made no request whatsoever that he wished to invoke his *Miranda* rights. *Traylor*, 596 So. 2d at 971. The words "in any manner" simply mean that there are no magic words that a suspect must use in order to invoke his or her rights.

Therefore, *Traylor* does not control our decision in this case. It does, however, remind us that we have the authority to reaffirm *Owen* regardless of federal law. Upon consideration, we choose not to do so. We find the reasoning of *Davis* persuasive:

> Although the courts ensure compliance with the *Miranda* requirements through the exclusionary rule, it is police officers who must actually decide whether or not they can question a suspect. The *Edwards* rule—questioning must cease if the suspect asks for a lawyer—provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information. But if we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney, this clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he hasn't said so, with the threat of suppression if they guess wrong. We therefore hold that, after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.

*Davis*, 512 U.S. at 461. This same principle applies to the exercise of the right to terminate interrogation. *Coleman*. To require the police to clarify whether an equivocal statement is an assertion of one's *Miranda* rights places too great an impediment upon society's interest in thwarting crime. As noted in *Traylor*: "We adhere to the principle that the state's authority to obtain freely given confessions is not an evil, but an unqualified good." 596 So. 2d at 965. Thus, we hold that police in Florida need not ask clarifying questions if a defendant who has received proper *Miranda* warnings makes only an equivocal or ambiguous request to terminate an interrogation after having validly waived his or her *Miranda* rights.

Our decision today is in harmony with those of other states which have also held in the wake of *Davis* that police are no longer required to clarify equivocal requests for the rights accorded by *Miranda*. *E.g.*, *People v. Crittenden*, 885 P.2d 887, 912-13 (Cal. 1994), *cert. denied*, 116 S. Ct. 144, 133 L. Ed. 2d 90 (1995); *State v. Morris*, 880 P.2d 1244, 1253 (Kan. 1994); *State v. Williams*, 535 N.W.2d 277, 285 (Minn. 1995); *State v. Panetti*, 891 S.W.2d 281, 284 (Tex. Ct. App. 1994) (noting that *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. Ct. App. 1994), *review dismissed*, 531 N.W.2d 330 (Wis. 1995). *But see State v. Hoey*, 881 P.2d 504, 523 (Haw. 1994).

Having determined that Florida's Constitution does not place greater restrictions on law enforcement than those mandated under federal law when a suspect makes an equivocal statement regarding the right to remain silent, we now face the question o

how to treat Owen's confession. Generally, under the doctrine of the law of the case, "all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts." *Brunner Enters., Inc. v. Department of Revenue*, 452 So. 2d 550, 552 (Fla. 1984). However, the doctrine is not an absolute mandate, but rather a self-imposed restraint that courts abide by to promote finality and efficiency in the judicial process and prevent relitigation of the same issue in a case. *See Strazulla v. Hendrick*, 177 So. 2d 1, 3 (Fla. 1965) (explaining underlying policy). This Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case. *Preston v. State*, 444 So. 2d 939 (Fla. 1984).

An intervening decision by a higher court is one of the exceptional situations that this Court will consider when entertaining a request to modify the law of the case. *Brunner*, 452 So. 2d at 552; *Strazulla*, 177 So. 2d at 4. Thus, the Supreme Court's decision in *Davis* qualifies as an exceptional situation. Moreover, we find that reliance upon our prior decision in Owen's direct appeal would result in manifest injustice to the people of this state because it would perpetuate a rule which we have now determined to be an undue restriction of legitimate law enforcement activity.

Because Owen's responses were equivocal,[8] the State would have this Court reinstate Owen's convictions on the ground that a retrial is unnecessary in light of our decision. We are unwilling to go that far. Our prior decision which reversed Owen's convictions and remanded for a new trial is a final decision that is no longer subject to rehearing. With respect to this issue, Owen stands in the same position as any other defendant who has been charged with murder but who has not yet been tried. Just as it would be in the case of any other defendant, the admissibility of Owen's confession in his new trial will be subject to the *Davis* rationale that we adopt in this opinion. However, Owen's prior convictions cannot be retroactively reinstated.

We answer the certified question in the affirmative. We quash the decision below and remand with directions to grant the petition for certiorari. We recede from *Owen*, *Long*, *Valle*, *Waterhouse*, and *Cannady* to the extent that they are inconsistent with this opinion.

It is so ordered. (OVERTON, HARDING and WELLS, JJ., concur. SHAW, J., concurs specially with an opinion. KOGAN, C.J., dissents with an opinion. ANSTEAD, J., recused.)

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(SHAW, J., concurring specially.) The majority opinion endorses the rationale of *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), and holds that under Florida law once a suspect initially waives his or her rights under *Miranda* the suspect must thereafter "clearly" invoke the right to cut off questioning:

> Thus, we hold that police in Florida need not ask clarifying questions if a defendant who has received proper *Miranda* warnings makes only an equivocal or ambiguous request to terminate an interrogation after having validly waived his or her *Miranda* rights.

Majority op. at 5. Neither *Davis* nor the majority opinion, however, explains what "clearly" means.

I concur in the majority opinion, as far as it goes, but write specially to express my view as to what constitutes a "clear" invocation of the right to cut off questioning in Florida.

This Court explained in *Traylor v. State*, 596 So. 2d 957 (Fla. 1992), that although the federal constitution secures a common degree of protection for the citizens of all fifty states, the United States Supreme Court has been parsimonious in construing the extent of this protection for good reason:

> [F]ederal precedent applies equally throughout fifty diverse and independent states; a ruling that may be suitable in one may be inappropriate in others. And [also], the federal union embraces a multitude of localities; the Court oftentimes is simply unfamiliar with local problems, conditions and traditions.

*Id.* at 961.

State high courts, on the other hand, do not suffer these concerns and may construe their state constitutions freely to address local conditions:

> [N]o court is more sensitive or responsive to the needs of the diverse localities within a state, or the state as a whole, than that state's own high court. In any given state, the federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling.

*Id.* at 962. This division of labor between the United States Supreme Court and the state high courts is the essence of our federalist system.

In Florida, a prime reason for requiring that officers inform a citizen of his or her right to remain silent and cut off questioning under article I, section 9, Florida Constitution, is "to ensure the voluntariness of confessions." *Id.* at 965-66. This purpose is substantially achieved when a suspect is initially advised of this right and given the opportunity to remain silent—the reading of the right alone goes far in dispelling the inherently coercive atmosphere of custodial interrogation. The present issue, I emphasize, does not concern or compromise in any way this initial right.

For those suspects who feel comfortable enough to waive their rights and proceed with questioning, it is not unreasonable to require that they thereafter express any desire to cut off the interview clearly. It would substantially impede the interview process, would do virtually nothing to advance the policy underlying the pre-interrogation warnings, and would in fact undermine the legitimacy of those warnings to require that each interview grind to a halt whenever an otherwise willing interviewee uses any language that might hint at a desire to stop. I agree with the majority that the "clearly invoke" standard articulated in *Davis* is appropriate for Florida, but I would explain what "clearly" means for the benefit of Florida's courts.

To comport with federalist principles, the Florida standard must take into account this state's unique geographic and demographic makeup. Florida is located near the heart of the Caribbean region—in close proximity to the various Caribbean islands, and both Central and South America—and our state population reflects this. Florida is home to large numbers of immigrants from Cuba, Haiti, Panama, Guatemala, Brazil, Argentina, Chile, and many other countries. Additionally, Florida's climate and soil render it ideal for seasonal farming, and migrant workers often are present in substantial numbers. Given this rich diversity, it is unrealistic to expect each Floridian to invoke his or her constitutional rights with equal precision. Such an expectation might make sense in a homogeneous region of the country like the Midwest but is untenable here. Many Floridians have little formal schooling, speak broken—or no—English, or have emigrated from societies where the rules governing citizen/police encounters are vastly different from ours.

Accordingly, to ensure compliance with the Florida Constitution, and as required in other *Miranda* contexts, courts should use a "reasonable person" standard when determining whether a suspect "clearly" invoked his or her right to cut off questioning. *Cf. Traylor*, 596 So. 2d at 966 nn.16-17 (a person is in "custody" if "a reasonable person placed in the same position" would think so; "interrogation" takes place when "a reasonable person" would think so). *Accord Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984); *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). In my view, a suspect "clearly" invokes the right to cut off questioning when a reasonable person would conclude that the suspect has evinced a desire to stop the interview. All the circumstances surrounding the statement—including the suspect's schooling, command of English, and ethnic background—should be considered.

A final caution from *Davis*: "Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney." *Davis*, 512 U.S. at 461.

In the present case, this Court already has determined that "[Owen's] responses were, *at the least*, an equivocal invocation

of the *Miranda* right to terminate questioning." *Owen v. State*, 560 So. 2d 207, 211 (Fla. 1990) (emphasis added). To my mind, this means that on the spectrum ranging from "no" invocation to "equivocal" invocation to "clear" invocation the comments fall on or between "equivocal" and "clear." I agree that under these circumstances this case must be remanded for reconsideration under the *Davis* standard.

In sum, I agree that the "clearly invoke" standard is appropriate for use in Florida but feel that without further elucidation this standard is in danger of being used as a "one glove fits all" criterion. Use of the term "clearly" in such a fashion would disserve Florida's courts, for to require a migrant worker with a limited education and strong regional dialect to "clearly" invoke his or her constitutional rights with the same precision and forcefulness as a urologist or a nationally-recognized trial lawyer is simply unrealistic.

I concur in the majority opinion as explained herein.

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(KOGAN, C.J., dissenting.) I disagree with the majority's holding that "police in Florida need not ask clarifying questions if a defendant who has received proper *Miranda* warnings makes only an equivocal or ambiguous request to terminate an interrogation after having validly waived his or her *Miranda* rights." Majority op. at 5. The majority's decision is consistent with the United States Supreme Court's five-to-four decision in *Davis v. United States*, 514 U.S. 452 (1994), which adopts what is commonly referred to as the "threshold standard of clarity" approach.[9] In following *Davis*, however, the majority rejects the "clarification" approach which the majority of courts, including this Court in *Owen v. State*, 560 So. 2d 207 (Fla.), *cert. denied*, 498 U.S. 855 (1990), applied prior to the *Davis* decision. *See also State v. Leyva*, 906 P.2d 894, 897-98 (Utah Ct. App. 1995), *cert. granted*, 916 P.2d 909 (Utah 1996), and cases cited therein.

I find, in accord with Justice Souter's concurring opinion in *Davis*,[10] that the "clarification" approach offers a better means of dealing with equivocal or ambiguous requests to terminate interrogation. Consistent with Justice Souter, I would hold that when a suspect makes an equivocal or ambiguous invocation of his or her *Miranda* rights,[11] all questioning must cease except for those questions designed to clarify the suspect's equivocal statements. Moreover, I believe that pursuant to article I, section 9 of the Florida Constitution, we are not bound by the decision in *Davis* but are free to give the broader protection offered by the "clarification" approach.

In my opinion, the "clarification" approach offers the best balance between effective law enforcement and the rights of the accused. With regard to ensuring effective law enforcement, this approach provides law enforcement officers with workable guidelines. While the majority finds, in accord with *Davis*, that the "threshold standard of clarity" approach provides law enforcement officers with a bright line rule that can be easily applied in the real world, I find the "clarification" approach actually provides more workable guidelines for officers.

The "threshold standard of clarity" approach requires the interrogating officer to make a determination as to whether a suspect has "clearly" invoked his or her *Miranda* rights. As Justice Shaw's concurring opinion confirms, this is not an easy task in light of this state's unique demographic and geographic makeup. Other factors such as a suspect's physical condition, level of intimidation, level of fear, or lack of linguistic ability also make the task of identifying a clear invocation of *Miranda* rights a difficult one. Ultimately, the "threshold standard of clarity" approach requires individual officers to make a judgement as to whether a suspect has unequivocally invoked his or her *Miranda* rights.

Rather than requiring the officer to guess whether a suspect has invoked his or her *Miranda* rights, the "clarification" approach puts this judgment call into the hands of the party that is most competent to make it—the individual suspect. *See Davis*, 114 S. Ct. at 2363 (Souter, J., concurring in the judgment). The officer need only decide if the suspect's statements are susceptible to being interpreted as an invocation of the suspect's *Miranda* rights and thereafter ask questions to clarify the suspect's intent. Additionally, if we continue to use the "clarification" approach in cases like the instant one, officers could employ the same rather than different approaches to a suspect's initial equivocal invocation of his or her *Miranda* rights and an equivocal invocation that follows a waiver of those rights.[12] Moreover, applying a single approach is consistent with *Miranda*'s promise of a "continuous" opportunity to exercise one's *Miranda* rights. *See Davis*, 114 S. Ct. at 2361 (Souter, J., concurring in the judgment).

In addition to providing the necessary guidance to law enforcement officers, I find that the "clarification" approach has adequately served and will continue to serve society's interest in thwarting crime. In response to the majority's contention to the contrary I quote from Justice Souter's concurring opinion in *Davis*:

> [T]he margin of difference between the clarification approach advocated here and the one the Court adopts is defined by the class of cases in which a suspect, if asked, would make it plain that he meant to request counsel (at which point questioning would cease). While these lost confessions do extract a real price from society, it is one that *Miranda* itself determined should be borne.

*Davis*, 512 U.S. at 474 (Souter, J., concurring in the judgment). According to Souter, the "clarification" approach merely prevents the use of confessions that a suspect did not intend to give and therefore does not act as a hindrance to legitimate police investigation.

On the opposite side of the scale created by equivocal invocations of *Miranda* rights lie the rights of the accused. In my opinion, the "threshold standard of clarity" approach does not adequately account for these rights and consequently tips the scale in favor of law enforcement interests. The majority in *Davis* recognized that situations may arise in which a suspect may not articulate his or her desire to remain silent or to have an attorney present because of fear, intimidation, lack of linguistic skill, language barriers, or a variety of other reasons. 512 U.S. at 460. The Court, however, found that confessions obtained under such circumstances were an acceptable risk in light of the protections already afforded these suspects by the *Miranda* warnings. *Davis*, 512 U.S. at 460.

I find fault with the *Davis* majority's analysis for two reasons. First, I believe that the *Davis* majority downplays the significance of this problem. As Justice Souter in his concurring opinion points out:

> [C]riminal suspects who may (in *Miranda*'s words) be "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures" would seem an odd group to single out for the Court's demand of heightened linguistic care. A substantial percentage of them lack anything like a confident command of the English language, many are "woefully ignorant," and many more will be sufficiently intimidated by the interrogation process or overwhelmed by the uncertainty of their predicament that the ability to speak assertively will abandon them.

*Davis*, 512 U.S. at 469-70 (Souter, J., concurring in the judgment) (citations omitted). Justice Souter continues:

> Social science confirms what common sense would suggest, that individuals who feel intimidated or powerless are more likely to speak in equivocal or nonstandard terms when no ambiguity or equivocation is meant. Suspects in police interrogation are strong candidates for these effects.

*Id.* at 470 n.4 (Souter, J. concurring in the judgment)(citations omitted). Thus, *Davis* and the majority in the instant case place a hurdle in front of those individuals who are the most likely to have difficulty surmounting that hurdle and successfully invoking their rights. The "clarification" approach, on the other hand, removes that hurdle and through the use of clarifying questions ensures compliance with a suspect's actual desires.

Rather than apply the "clarification" approach, however, the *Davis* majority holds that the disadvantages a suspect suffers under the "threshold standard of clarity" approach are adequately addressed by the reading of one's *Miranda* rights. Again, I

must disagree. As Justice Souter points out, ***Mimnda*** warnings alone will not suffice to protect a suspect's Fifth Amendment rights in every situation.

> When a suspect understands his (expressed) wishes to have been ignored (and by hypothesis, he has said something that an objective listener could "reasonably" although not necessarily, take to be a request), in contravention of the "rights" just read to him by his interrogator, he may well see further objection as futile and confession (true or not) as the only way to end his interrogation.

***Davis,*** 512 U.S. at 472-73 (Souter, J., concurring in the judgment). Only the "clarification" approach will adequately protect the rights of all suspects, including the suspect described by Justice Souter, while at the same time serve society's interest in maintaining an effective system of law enforcement.

The majority concedes, and I agree, that our Constitution gives us the authority to reaffirm *Owen*, and thereby continue applying the "clarification" approach, regardless of federal law. Majority op. at 4. ***See also State v. Hoey***, 881 P.2d 504 (Haw. 1994). The majority, however, declines do so in part because it finds that our prior application ***of*** the "clarification" approach was based on our understanding that federal law required a police officer to terminate interrogation or clarify a suspect's wishes when a suspect equivocally invoked his or her ***Mimnda*** rights. In support of its finding, the majority states:

> In fact, before the United States Supreme Court's decisions in ***Michigan v. Mosley, 423*** U.S. 96 (1975), and ***Edwards v. Arizona,*** 451 U.S. 477 (1981), this Court bad implied, if not held, that an ambiguous request for a lawyer would-not require police to clarify the ***suspect's*** wishes. ***State*** v. ***Craig,*** 237 So. 2d 737 (Fla. 1970)(concluding that interrogator was not required to convince defendant of need for counsel after defendant stated, "Well, I would like to have one [lawyer] in a way, but I don't see how it can help me" and finding defendant had validly waived right to counsel).

Majority op. at 4. ***Mosley*** and ***Edwards,*** however, do not address ambiguous requests for a lawyer. As Justice Souter points out in his concurring opinion in ***Davis,*** the United States Supreme Court declined to directly address this issue prior to ***Davis.*** 512 U.S. at 467 n.3. Consequently, any change that might have occurred in the Florida law on this issue subsequent to ***Craig was*** not solely the result of decisions from the United States Supreme Court. It is my belief that article I, section 9 of our state constitution played a significant part in resolving this issue.

Because I find that the "clarification" approach provides the best balance between the rights of the accused and society's interest in effective law enforcement, and because I find that article I, section 9 of Florida's Constitution provides a basis for the continued use of the "clarification" approach, I would answer the certified question in the negative. I note however that *Traylor* does not expressly require this result. As the majority indicates, however, ***Tmylor*** does remind us that we have the authority to reaffirm ***Owen*** regardless of federal law. Majority op. at 4. I would exercise that authority and approve the district court's decision denying certiorari.

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'Owen also was convicted of burglary and sexual battery.

'Videotapes of the interrogations revealed that Owen had initiated the sessions, was repeatedly advised of his rights to counsel and to remain silent, and acknowledged that he was familiar with his *Mimndu* rights and knew them as well as the police officers. None of the six questioning sessions was individually lengthy, and Owen was given food, refreshments, and breaks during the sessions. Owen *v. State*, 560 So. 2d 207,210 (Fla. 1990).

'The facts of the murder are set forth more fully in Owen, 560 So. 2d at 209 (Fla. 1990).

'At one point, one of the officers asked whether Owen had targeted the house or whether he had just been going through the neighborhood. Owen responded, "I'd rather not talk about it." Then later the officer asked Owen about where he had put a bicycle, to which Owen responded, "I don't want to talk about it."

[5]Recently, the Eleventh Circuit Court of Appeals has held "that a suspect's refusal to answer certain question5 is not tantamount to the invocation, either equivocal or unequivocal, of the constitutional right to remain silent and that questioning may continue until the suspect aniculates in some manner that he wishes the questioning to cease." *United States v. Mikell*, 102 F.3d 470, 477 (11th Cir. 1996). *cert. denied, No.* 96-8254 *(U.S.* Apr. 14, 1997). This holding is precisely applicable to the instant case because the basis upon which Owen's statements were previously suppressed was because he had refused to answer two questions.

[6]If anything. requests for counsel have been accorded greater judicial deference than requests to terminate interrogation. As the Minnesota Supreme Court explained in *State v. Williams. 535* N.W.2d 277, 285 (Minn. 1995):

> Because the Supreme Court has held that the Constitution does not require police officers to confine their questioning to clarifying questions when an accused ambiguously or equivocally attempts to invoke his right to counsel, *Davis v. United States,* __ *U.S.* __, __, *114 S. Ct. 2350, 2356,* 129 L. Ed. 2d 362 (1994). it follows by even greater logic that the Constitution does not require such a clarifying approach when an accused ambiguously or equivocally attempts to invoke his [or her] right to remain silent. *See Michigan v. Mosley,* 423 U.S. 96, 104 n. 10, 96 S. Ct. 32 1, 326 n. 10, 46 L. Ed. 2d 313 (1975) (distinguishing between the procedural safeguards triggered by a request to remain silent and the greater procedural safeguards triggered by a request for an attorney).

[7]*See, e.g., Long v. State,* 517 So. 2d 664, 667 (Fla. 1987); *Valle v. State,* 474 So. 2d 796.799 (Fla. 1985). *vacated on other grounds,* 476 U.S. 1102, 106 S. Ct. 1943.90 L. Ed. 2d 353 (1986); *Waterho use v. State,* 429 So. 2d 301, 305 (Fla.), *cert. denied, 464* U.S. 977. 104 S. Ct. 415, 78 L. Ed. 2d 352 (1983); *Cannady v.* State, 427 So. 2d 723, 728-29 (Fla. 1983).

*We reject Owen's argument that because we termed his comments to be "at least equivocal" in our earlier opinion we shou ld now construe his comments as unequivocal.

[9]The "threshold standard of clarity" approach is one of three appmac :hes that federal courts, prior to *Davis,* and state courts have applied to a suspect'4 ambiguous *or* equivocal invocation of *Mimnda* rights. *See,* e.g., *Smith v. Illinois,* 469 U.S. 91. 95-96 & n.3 (1984); Stare v. *Leyva,* 906 P.2d 894, 897-98 (Utah Ct. App. 1995), *cert. granted,* 916 P.2d 909 (Utah 1996); *State v. Hoey,* 881 P.2d 504, 521-22 (Haw. 1994). The second approach, which I refer to hem as the "clarification" approach. requires that interrogation cease upon an equivocal invocation of a *Miranda* right, but allows the interrogator to ask the suspect narrow questions designed to clarify the suspect's equivocal statement. See, *e.g., Smith,469* U.S. at 96 n.3; *Leyva,* 906 P.2d at 897-98; *Hoey,* 886 P.2d at 522. The third approach requires that all questioning cease when the suspect equivocally refers to his or her *Mimnda* rights. See, e.g., *Smith, 469* U.S. at 96 n.3: *Leyva,* 906 P.2d at 897; *Hoey,* 886 P.2d at 521.

"Justices Blackmun, Stevens, and Ginsberg joined in Justice Souter's opinion concurring in the judgment.

[11]The phrase "*Miranda* rights" as used here refers to both the right to counsel and the right to cut off questioning.

[12]In *Davis,* the defendant's equivocal reference to his *Miranda* rights followed a waiver of *those* rights. *Davis, 512* U.S. at 455. The Court's reasoning does not alter the procedures officers must follow when a suspect makes an equivocal invocation of his or her *Miranda* rights without first validly waiving them. In this later situation, the "clarification" approach may still be used.

* * *

**Torts-Medical malpractice-Negligent infliction of emotional distress-Stillbirth of child-Action by parents for negligent stillbirth is recognized in Florida-Impact rule is inapplicable to this narrow class of cases--Damages recoverable in** action for **negligent stillbirth limited to *mental* pain and anguish and medical expenses incurred incident to pregnancy**

JAMES R. TANNER, Petitioner, vs. ELLIE M. HARTOG, etc., et al., Respondents. Supreme Court of Florida. Case No. 88,544. May 8. 1997. Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance. 2nd District - Case No. 95-00949 (Polk County). Counsel: Kennan George Dandar of Dandar & Dandar, P.A., Tampa, for Petitioner. Thomas M. Hoeler and Jerry L. Newman of Shear. Newman, Hahn & Rosenkranz, P.A.. Tampa; and Kevin C. Knowlton and Stephen R. Senn of Peterson & Myers, P.A., Lakeland, for Respondents. Lee D. Gunn N of Gunn, Ogden & Sullivan, P.A., Tampa, for Florida Defense Lawyers Association, Amicus Curiae.

(GRIMES, J.) We review Tanner *v. Hartog, 678 So.* 2d 13 17 (Fla. 2d DCA 1996),[1] in which the court certified a question as one of great public importance. We have jurisdiction under article V, section 3(b)(4) of the Florida Constitution.

The genesis of this case occurred when Phyllis Tanner experienced a stillbirth during her forty-first week of pregnancy. She and her husband, James, brought suit against Drs. Hartog and Duboy and Lakeland Regional Medical Center, alleging that their negligence caused the stillbirth. In a prior opinion [2] the district court of appeal affirmed that portion of the trial judge's order finding that the complaint failed to state a cause of action for the wrongful death of the fetus. However, the court reversed the portion of the judge's order which had dismissed Phyllis's claim for personal injury. Thereafter, through the filing of amended

and sick leave benefits paid as wages cannot be considered as credits when the employee is not performing services-regardless of whether the employee remained employed.

Claimant concedes in his brief that records in evidence indicate an employment end date of December 1993, the month of his heart attack. However, the record also contains information consistent with claimant's position, including his doctor's letter from January 1995, which states that claimant is "currently employed at the South Florida Reception Center of the Dept. of Corrections." Simply because claimant did not perform services after December 1993 does not mean that his employment automatically ceased. In fact, the appeals referee found that "[o]n July 18 and 19. the claimant attended classes designed to prepare the claimant for recertification as a correctional officer. These are classes operated by the employer. The claimant was notified of the classes through the employer."

Because the essential factual determination as to the date of claimant's termination was not made, we cannot affirm the decision of the appeals referee. We remand this case to the reference for a determination of when claimant's employment with the DOC terminated. If the referee finds that employment continued after December 1993, then the referee should award wage credits for that period of time. If this calculation provides the claimant with sufficient wage credits to be eligible for unemployment, then claimant should be awarded unemployment compensation consistent with an amended calculation. If the referee finds that employment terminated in December 1993, then the previous denial of benefits must be upheld. Claimant would then receive *no* unemployment compensation benefits and would be compelled to refund the amount claimed by the UAC.

REVERSED AND REMANDED. (GUNTHER, C.J., concurs. STONE, J., dissents with opinion.)

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'The "base period" is the one-year period consisting of the first four of the last five complete calendar quarters immediately preceding the filing of the claim. See § 443.036(5), (6), Fla. Stat. (1995). In this case, claimant's base period consisted of the last quarter of 1993 and the first three quarters of 1994.

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(STONE, J., dissenting.) I would affirm the UAC's decision that Appellant is not entitled to benefits as he was not paid for insured work for the minimum twenty weeks of the base period. The record is clear that no wages were paid Appellant and he performed no effort, labor, or service for the employer since mid-December, 1993. As a result, and as unfair as it may appear to be, Appellant is excluded from coverage by law, as are others who perform insufficient insured work during their computed base period.

The record reflects that Appellant was not on paid sick leave, but that his only income from the employer during the time in question was his own accumulated fund of back vacation pay and sick leave, which he was entitled to receive in any event, as a lump sum benefit.

I discern no error in the UAC's conclusion that he was not being paid wages during the relevant time for on-the-job effort, but was simply drawing on his own principal in weekly increments. Patently, the work Appellant performed that resulted in his right to the sums drawn was performed prior to December 14, 1993. Therefore, he is entitled to no wag.: credit for those sums.

I also note that great weight should be given to the agency's interpretation of the statute. ***See Public Employees Relations Comm'n v. Dade County Police Benevolent A. s'n, 467 So. 2d*** 987 (Fla. 1985); ***State ex rel. Biscayne Kennel Club v. Board of Bus. Regulation, 276 So.*** 2d 823 (Fla. 1973).

* * *

**Criminal law—Evidence—Confession—Defendant's questions concerning counsel constituted** equivocal invocation of right to counsel which required clarification before officer could continue interrogation—Question certified whether ruling by United States **Supreme Court that request for counsel must be unequivocal applies to admissibility of confessions in Florida in light of contrary holding by Florida Supreme Court**

JOHN WEBER, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 95-0677. Opinion filed April 9. 1997. Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Mary E. Lupo. Judge; L.T. Case No. 93-11599 CFA02. Counsel: Charles W. Musgrove, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Anne Carrion, Assistant Attorney General. West Palm Beach, for appellee.

(MAY, MELANIE G., Associate Judge.,) Four attacks are made on appeal against the conviction of the defendant John Weber on one count Of lewd assault and eleven counts of sexual battery. Only one Of the Claims warrants a reversal. We affirm on the first three grounds. The issue of concern is the trial court's denial of the defendant's motion to suppress. On this issue, the defendant raises a smorgasbord of reasons to reverse, one of which we agree requires reversal under the existing law in this jurisdiction.

The victim is the son of the defendant's live-in girlfriend. He alleged that the defendant had engaged in repetitive acts of sexual misconduct with him over a one year period of time. After initially denying the allegations, Webcr travelled to the police station where he took a polygraph examination and made a statement to the police.

Weber claims in this appeal that during his encounter at the police station he inquired regarding counsel. but he was neither afforded counsel nor properly advised of his right to counsel. It is undisputed that Weber never made an unequivocal request for the appointment of a lawyer. However, the facts surrounding the defendant's invocation of his right to counsel are disputed.

Weber testified that Sgt. Smith informed him of his *Miranda* rights prior to the polygraph examination. After the exam. Sgt. Smith informed Weber he had failed the examination and placed him under arrest. According to Weber, Smith screamed at him until he cried. Smith then suggested a deal, which included counseling for Weber. Smith told him that he thought that they should stop discussing the issue so that Weber could get an attorney.

Weber responded that he did not have an attorney and could not afford one. Smith then told him that the court would appoint one for him. According to Weber, he took that to mean he would not get a lawyer until he appeared in court. He didn't think he was entitled to a lawyer during questioning.

Sgt. Smith admitted that Weber may have asked about a lawyer, and that he responded that "one would be furnished for him," He remembered specifically that Weber did comment that he could not afford an attorney. Smith then testified that Weber never actually asked for a lawyer or refused to talk to the police without speaking to an attorney. Smith recalled Weber asking about a deal and that Smith indicated he should get an attorney for this purpose.

Officer Ponce testified that after Weber left Smith's examination room, they went straight into an interview room where Webcr confessed on tape to molesting the child victim. Ponce did not give *Miranda* warnings again before obtaining the confession, but merely inquired if he remembered them. Weber never once indicated that he wished to stop talking and Ponce never promised Weber any leniency if hc admitted his guilt. Ponce did not recall any conversation about Wcber asking about a public defender.

The U.S. Supreme Court has held that to invoke the right to counsel, the defendant must make an unequivocal request to invoke that right. ***Davis v. United States***, 512 U.S. 452 (1994). The Florida Supreme Court, however, has not reached this conclusion. And, this Court has repeatedly adhered to the Florida Supreme Court's current position that even an equivocal request for counsel sufficiently asserts this constitutional right. See. e.g., *Almeida* ***v. Stale, 687 So.*** 2d 37 (Fla. 4th DCA 1997); *Skyles* ***v. State, 670 So.*** 2d ***1084*** (Fla. 4th DCA), ***rev. granted, 679 So.*** 2d 774 (Fla. 1996); and *State* v. ***Owen,*** 654 So. 2d 200 (Fla. 4th DCA), ***rev. granted***, 662 So. 2d 933 (Fla. 1995).

Wc do not find Wcbcr's questions to be an ***unequivocal*** re-

quest for counsel, but do find that they constitute *an equivocal* invocation of his right to counsel. This assertion requires law enforcement to clarify the assertion before the continuation of any interrogation. Because that did not occur, the statement should have been suppressed. *Slawson v. State,* 619 So. 2d 255 (Fla. 1993). *cert.* denied, 512 U.S. 1246 (1994); and *Deck v. Stare,* 653 So, 2d 435 (Fla. 5th DCA 1995).

We certify the question of whether. Davis applies, to, the admissibility of confessions in Florida in light *of Traylor v. State,* 596 So. 2d 957 (Fla. 1992). Until an answer is forthcoming, we reverse on this issue.

Reversed and remanded for further proceedings; question certified. (DELL and PARIENTE. JJ., concur.)

* * *

**Unemployment compensation-Voluntary termination of employment-Unemployment Appeals Commission impermissibly reweighed evidence in reversing referee's finding that claimsnt was entitled to unemployment benefits--Referee's finding that additional telephone duties were substantial change in claimant's contract of employment supported by competent, substantial evidence**

**SANDRA L. ANDINO. Appellant, v. LANTANA PARTNERS. LTD. and FLORIDA UNEMPLOYMENT APPEALS COMMISSION. Appellees. 2nd District. Case No. 96-01420. Opinion filed April 11, 1997. Appeal from the Unemployment Appeals Commission. Counsel: Thomas G. Difiore, Tampa, for Appellant. William T. Moore. Tallahassee. for Appellee Unemployment Appeals Commission.**

(FRANK, Judge.) Sandra L, Andino worked at Hill Haven Rehabilitation Center, a nursing home operated by Lantana Partners, Ltd,, for a short period. She was hired to perform admissions work with responsibilities including typing, filing, and answering the telephone during her 5:00 p.m. to 9:00 p.m. shift. Upon the commencement of her employment, another person assisted in answering the phones. At a later time, however, that person was terminated leaving Ms. Andino to answer all of the telephone calls. Because Ms. Andino found herself incapable of performing the additional duties, she quit. Lantana challenged her application for unemployment benefits. and after a hearing the referee ruled that it had materially breached its contract with Ms. Andino by making a significant unilateral change in her job requirements. Ms, Andino was awarded benefits, Lantana appealed to the Unemployment Appeals Commission. That body reversed the referee and held that Ms. Andino was not entitled to benefits. In ourjudgment, the UAC impermissibly reweighed the evidence before it; we reverse and remand for the reinstatement of Ms. Andino's benefits.

The determination of whether an employee has left employment voluntarily for cause attributable to the employer is a question of fact. *Carey McAnally & Co., Inc. v. Woodring. 629 So.* 2d 301 (Fla. 2d DCA 1993). The referee, after considering all of the evidence and judging the credibility of the witnesses who were heard and observed during the hearing, found that the additional telephone duties were a substantial change in Ms. Andino's contract of employment. Ms. Andino's complaints that the extra work prevented her *from* doing the job *for* which she was hired were unavailing. Because this was an oral contract situation, the referee was in a superior position to judge whether the added duties were significant. The UAC overstepped its bounds in failing to uphold the referee's decision, which was supported by competent, substantial evidence. *See Stahl v. Florida Unemployment Appeals Comm'n,* 502 So. 2d 78 (Fla. 3d DCA 1987).

Reversed and remanded. (DANAHY, A.C.J., and NORTHCUTT, J., Concur.)

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**Criminal law--Search and seizure—Inevitable discovery rule-Error to grant motion *to* suppress cannabis found on defendant during improper search where, at time of search, defendant had been validly stopped and an investigation which resulted in DUI arrest was being conducted-State established that evidence would have been inevitably discovered by valid means**

**STATE OF FLORIDA. Appellant. v. TIMOTHY A. DUGGINS, Appellee. 2nd District. Case No. 95-03013. Opinion tiled April Il. 1997. Appeal from the Circuit Court for Hillsborough County; Robert Simms, Judge. Counsel: Robert A. Butterworth, Attorney General. Tallahassee, and Patricia E. Davenport, Assistant Attorney General, Tampa, for Appellant. James Marion Moorman, Public Defender, and Frank D. L. Winstead, Assistant Public Defender, Bartow, for Appellee.**

(SCHOONOVER, Judge.) The State of Florida challenges a trial court order granting the appellee's, Timothy A. Duggins, motion to suppress certain evidence seized from him. We reverse.

According to the record presented to us, the appellee was originally stopped early in the morning on a lightly traveled side street by a Hillsborough County Deputy Sheriff because he was "swerving in and out of the southbound lane of Orient Road." When he exited his automobile, the appellee stumbled, and when the deputy approached him, he noticed a strong odor of alcohol on the appellee's breath. Because the deputy did not conduct field sobriety tests, a DUI investigator was called to the scene.

While waiting for the investigator, the deputy started a pat-down search of the appellee, but the appellee grabbed the deputy's hand and told him to stop. The appellee was then arrested for obstructing an officer without violence, and a search incident to the arrest resulted in the seizure of thirty-one grams of cannabis. After the DUJ investigation was completed. the appellee was also charged with driving while under the influence.

The appellee was charged with possession of cannabis-in violation of section 893.13(6)(a), Florida Statutes (1993). and with obstructing an officer without violence in violation of section 843.02, Florida Statutes (1993). The trial court granted the appellee's motion to suppress the evidence obtained as a result of the pat-down search, and the state filed a timely notice of appeal.

In this appeal, the state does not contend that the deputy's initial search of the appellee was proper, but claims that the evidence should not have been suppressed because of the inevitable discovery rule. The appellee, on the other hand, does not contend that the traffic stop was improper, but disputes the applicability of the inevitable discovery rule. We agree with the state's contention. The appellee was properly stopped, and subsequently arrested, for DUI. The state established that the evidence would have been discovered as a result of a valid search conducted pursuant to the appellee's arrest for DUI.

The inevitable discovery rule is an exception to the fruit of the poisonous tree doctrine. Under this exception, evidence obtained as the result of unconstitutional police procedures may still be admissible if it is shown that the evidence would ultimately have been discovered by *legal* means. *Nix v. Williams, 467* U.S. 43 1, 438, 104 S. Ct. 2501, 2511, 81 L. Ed. 2d 377,387 (1984). See *also Maulden* v. *State,* 617 So. 2d 298 (Fla. 1993). Speculation must not play a part in the application of this rule, and it, of course, is not sufficient to show that some possible further investigation would have revealed the evidence. *Ruffin v. State,* 651 So. 2d 206 (Fla. 2d DCA 1995). See *also Bowen v. State, 685 So.* 2d 942 (Fla. 5th DCA 1996) (speculation may not play a part in the inevitable discovery rule, the focus must be *on* demonstrated fact, capable of verification),

In this case, the record establishes that the appellee was validly stopped by a deputy sheriff and that an investigation which resulted in a DUI arrest was being conducted at the time of the improper search and seizure. It is not necessary to speculate as to whether the state would have instituted an investigation; it was going on at that time. The state, accordingly, established that the evidence would have been inevitably discovered by valid means and the trial court erred by suppressing that evidence. See *Maulden,* 617 So. 2d at 301. We, therefore, reverse and remand for proceedings consistent herewith.

Reversed and remanded. (DANAHY, A.C.J., and FULMER, J., Concur.)

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