IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

vs.

CLEO D. LECROY and
JON LECROY,

Respondents.
______________________________/

CASE NO: 64,744

FILED
SID J. WHITE
MAR 1 1984
CLERK, SUPREME COURT
By ______ Chief Deputy Clerk

RESPONDENT, CLEO LECROY'S, BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution, and Respondents, Cleo LeCroy and Jon LeCroy, were the defendants in the trial court below, the Circuit Court of the Fifteenth Judicial Circuit of Florida in and for Palm Beach County. The parties will be referred to as they appear before this Honorable Court, and as the "State" and "Cleo" and "Jon" when appropriate. All emphasis has been added by Respondent, Cleo D. LeCroy, unless otherwise indicated.

The symbol "R" will denote the record on appeal.

STATEMENT OF THE CASE

Respondent, CLEO D. LECROY, accepts as accurate and incorporates the Statement of the Case provided in Petitioner's Brief on the Merits.

STATEMENT OF THE FACTS

In early January, 1981, John and Gail Hardeman failed to return home after a hunting trip to the Brown's Farm reserve in Palm Beach County, Florida. A search was instituted to find the missing couple. (R 503, 504, 903) Respondents, CLEO D. LECROY and his older brother JON LECROY, along with their parents were asked to join in the search because they had hunted in the same location. (R 504, 505) (Hereinafter, Respondents will be referred to by their names only.) CLEO D. LECROY is a juvenile. (R 516) Several days into the search, JON LECROY, along with law enforcement persons in the search party, discovered the bodies of the missing couple. (R 510, 613)

Both CLEO and JON LECROY and their parents voluntarily accompanied Palm Beach County Sheriff's officers to the substation for questioning. (R 969) At the station CLEO LECROY gave a taped statement to the police after being advised and waving his Miranda rights and his rights as a juvenile to consult his parents. (R 969) In this first statement CLEO LECROY admitted meeting the Hardemans while hunting in the woods. He stated that he shot John Hardeman accidently. Then, after seeing John Hardeman lying on the ground, he panicked and shot Gail Hardeman. During questioning he answered both affirmatively and negatively the question whether he shot Gail Hardeman because he did not want

her to be a witness. (R 541-76) The following exchange reveals the juvenile CLEO LECROY's state of mind when he gave the statement:

Detective Welty:	You believe in God? Are you very religious?
The Witness [CLEO LECROY]:	Not really.
Detective Welty:	Your 10 commandments, thou shalt not kill?
The Witness:	I know that, the right to be armed and everything. I know some of them.
Detective Welty:	The right to bear arms is in the 10 commandments?
The Witness:	Well, I am shook up right now... Well, right now I am nervous. I can't even think straight right now.

(R 576-77)

After giving the above statement CLEO LECROY was formally arrested.

Later in the same afternoon CLEO LECROY gave a second taped statement to the police. Before this statement CLEO LECROY was again read the standard Miranda rights. (R 624-27) Before questioning, however, the interrogating officer admonished CLEO LECROY that his statement was primarily being taken for the following reason:

> This statement is taken primarily in order to refresh your memory at the time you may be called upon to testify, if and when this matter goes to court.
> (R 661)

In his second statement CLEO LECROY again admitted shooting both John and Gail Hardeman and again stated that the shooting was done either in self defense or by accident. He also described what he did with his guns and those taken from the Hardemans. (R 624-645)

After the second taped statement CLEO LECROY was transported to Miami to recover the alleged murder weapons he referred to in his second statement. Various statements were also made by CLEO LECROY to the police while in route to Miami. (R 970).

EXPLANATORY NOTE

There are two (2) Respondents involved in this appeal by the State. The State has raised a total of eight (8) issues. Point VIII, concerning the granting of a motion to dismiss Count V of the indictment, applies to both Respondents. Points I-III concern the granting of motions to suppress filed by Respondent, CLEO LECROY. Points IV-VII concern the granting of similar type motions filed by Respondent JON LECROY.

This is the brief of Respondent CLEO LECROY. It will be limited to those issues which concern him. The points on appeal will be discussed in this brief in the order in which they were raised by Petitioner.

OBJECTION TO ADDITION OF ANCILLARY ISSUES

The opinion of the Fourth District Court of Appeals certified, as a matter of great public importance, only one (1) issue. The question certified specifically deals with the admissability of an out of court statement made by Respondent, Cleo LeCroy, on the ground that the statement was obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966). That issue is dealt with in Point I of Petitioner's brief. Petitioner's brief, however, raises eight (8) independant points on appeal. None of the ancillary issues are in any way relevant to the issues raised by the certified question. Point VIII, dealing with the courts granting of a motion to dismiss a count of the indictment, raises issues completely distinct from the statement mentioned in the certified question. Respondent objects to this court hearing or deciding these ancillary issues.

Trushin v. State, 425 So. 2d 1126 (Fla. 1983) controls the present case. In Trushin the defendant was convicted under a statute which makes it a misdemeanor to corruptly influence another's vote. In the district court of appeal he attacked the constitutionality of the statute and raised other grounds, including the admission of an out of court statement. The district court affirmed the conviction on all grounds, but certified to this court the issues dealing with the constitutionality of the statute. This Court granted review

of the certified question. On appeal to this Court the defendant raised the issues relevant to the certified question, the other issues disposed of by the district court's opinion and two (2) entirely new issues.

This Court summarily declined to review the two (2) issues first raised in the defendants' brief. More relevant to this case, however, is that this court also declined to review the other ancillary issues decided by the district court. It was held that this court should not review ancillary issues unless they effect the outcome of the petition after review of the certified question.

> [W]e recognize the function of district courts as courts of final jurisdication and will refrain from using that authority [to entertain ancillary issues] unless those issues affect the outcome of the petiton after review of the certified case.
>
> 425 So. 2d at 1130.

In the present case the district court's opinion specifically dealt with one (1) issue concerning the admissability of an out of court statement made by Respondent, CLEO LeCROY. The issue was also the subject of the certified question which gave this Court jurisdiction to hear this case. None of the ancillary issues sufficiently affect the outcome of this case after review of the certified question to render them ripe for review by this Court.

POINTS INVOLVED

POINT I

WHERE THE POLICE ADVISED RESPONDENT THAT HIS TAPED STATEMENT WAS BEING TAKEN "PRIMARILY IN ORDER TO REFRESH YOUR MEMORY AT THE TIME YOU MAY BE CALLED UPON TO TESTIFY, IF AND WHEN THIS MATTER GOES TO COURT" THE TRIAL COURT WAS CORRECT IN SUPPRESSING THE STATEMENT.

POINT II

THE TRIAL COURT WAS CORRECT IN SUPPRESING STATEMENTS MADE BY RESPONDENT, CLEO D. LECROY, TO THE POLICE IN ROUTE TO MIAMI WHERE THE STATEMENTS WERE THE FRUIT OF THE EARLIER ILLEGALLY OBTAINED STATEMENT.

POINT III

WHERE VARIOUS WEAPONS WERE OBTAINED BY THE POLICE THROUGH USE OF AN ILLEGALLY OBTAINED STATEMENT, THE TRIAL COURT WAS CORRECT IN SUPPRESSING THE WEAPONS AS FRUIT OF THE STATEMENT.

POINT IV

THE TRIAL COURT WAS CORRECT IN DISMISSING COUNT V OF THE INDICTMENT.

POINT I

WHERE THE POLICE ADVISED RESPONDENT THAT HIS TAPED STATEMENT WAS BEING "TAKEN PRIMARILY IN ORDER TO REFRESH YOUR MEMORY AT THE TIME YOU MAY BE CALLED UPON TO TESTIFY, IF AND WHEN THIS MATTER GOES TO COURT" THE TRIAL COURT WAS CORRECT IN SUPPRESSING THE STATEMENT.

A.

Respondent, CLEO LECROY, and his family were civilian volunteers aiding the police in the investigation of two (2) missing hunters. (R 504) Respondent's brother, JON LECROY, eventually lead the police investigators to the bodies of the hunters. Respondents, CLEO and JON LECROY, then became suspects. The entire LeCroy family agreed to accompany the police to the local substation for questioning. (R 969) At the substation CLEO LECROY gave a taped statement to an Officer Welty indicating that he shot the missing couple by accident, and in a panic. (R 529-44) There was no violation of CLEO LECROY's rights with respect to this statement.

Later that afternoon a different policeman, Officer Browning, took a second taped statement from Respondent. Browning read Respondent the traditional Miranda rights. See, *Miranda v. Arizona*, 384 U.S. 436 (1966). Before questioning, however, Browning's *final* admonition to Respondent was as follows:

> *This statment is taken primarily in order to refresh your memory at the time you may be called upon to testify, if and when this matter goes to court.* (R

970) [Emphasis supplied by the trial court in its order suppressing statement.]

The trial court, the Honorable Carl Harper, expressed a factual finding that the above admonition "prejudicially diluted" Respondent's intelligent understanding of the other Miranda warnings. Further, Judge Harper found that the admonition was calculated to delude Respondent as to his true position and/or exert improper influence over him. Accordingly, Judge Harper suppressed the second taped statement. (R 970). The Fourth District Court of Appeals affirmed Judge Harper's order. It is Respondent's position that Judge Harper and the Fourth District Court were correct in their finding, order and affirmance.

B.

The Fifth Amendment to the United States Constitution provides that no person shall be compelled in any criminal case to be a witness against himself. The Sixth Amendment guarantees that an accused shall have a right to counsel. To implement these guarantees the United States Supreme Court has held that prior to questioning a person in custody must be given the complete Miranda warnings which are designed to convey the existence and scope of his Fifth and Sixth Amendment rights. Miranda v. Arizona, 384 U.S. 436 (1966). Failure of the interrogating officers to give the entire Miranda warnings destroys the otherwise voluntary nature of any statements and requires their suppression.

Gilpen v. United States, 415 F. 2d 638 (5th Cir. 1969); _Fields v. State_, 402 So. 2d 46 (Fla 1st DCA 1981). In addition, the failure to advise an accused of the complete Miranda warnings precludes a finding that the accused waived his rights, in that a person cannot intelligently waive rights of which he is not aware. _United States v. Stewart_, 576 F. 2d 50 (5th Cir. 1978); _Agius v. United States_, 413 F. 2d 915 (5th Cir. 1969). Although there are no rigid "talismatic incantations" required to satisfy Miranda, See _California v. Priysock_, 453 U.S. 355 (1981), a set of warnings must clearly advise the following:

- You have a right to remain silent.
- _Anything you say can and will be used against you in a court of law_.
- You have a right to consult an attorney before questioning and have an attorney present at questioning.
- If you cannot afford an attorney, one will be appointed prior to questioning.

(Emphasis supplied.)

The present case deals with an interrogating officer's admonition that Respondent's statement was primarily being taken to refresh his memory should he choose to testify at trial. This directly contradicts the warning that anything an accused says can and will be used against him in a court of law. The importance of this warning was aptly stated by the United States Supreme Court in the Miranda decision itself.

> The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of foregoing it. It is only through an awareness of these

> consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system - that he is not in the presence of persons acting solely in his interest.

Miranda v. Arizona, 384 U.S. at 469.

There are few cases, if any, that specifically analize this issue. This Court can find guidance, however, from the majority of Miranda cases which deal with the warning concerning the right to counsel.

Cribbs v. State, 378 So. 2d 316 (Fla. 1st DCA 1980) presented a factual situation very similar to the present case. In Cribbs the defendant, picked up for questioning, was read the standard Miranda warnings. After the defendant stated he wanted to speak with an attorney a telephone call was made for him to the local public defender's office. While the telephone call was pending an officer told the defendant that the public defender could not represent him unless appointed by the court. The defendant then orally confessed. Later, after again being read a complete set of Miranda warnings, the defendant executed a written waiver form and again confessed.

The First District Court of Appeals reversed the Cribbs conviction holding that all of the confessions should have been suppressed. The court found that the officer's admonition, subsequent to the proper Miranda warnings, to the effect that the defendant could not talk to a public defender until the attorney had been appointed by the court "vitiated the Miranda

warnings previously given Cribbs". 378 So. 2d at 318. Additionally, the court relied on the fact that the fatal admonition was a misstatement of Florida law which does provide that an accused who requests to see an attorney upon arrest shall immediately be placed in communication with the local public defender's office.

> Not only was the statement . . . misleading and confusing regarding his right to counsel prior to questioning, it was a misstatement of applicable Florida law.
> 378 So. 2d at 318.

In _United States v. Stewart_, 576 F. 2d 50 (5th Cir. 1978) the defendant moved to have his post arrest statement suppressed. Despite the interrogating officer's failure to advise the defendant that he had a right to have an attorney present during the interrogation and that counsel would be appointed for him if he was unable to afford one, the trial court ruled that the warnings required by Miranda were sufficiently given and that the defendant knowingly and intelligently waived his privilege against self-incrimination. The United States Court of Appeals for the Fifth Circuit, however, found the warnings given to be deficient. In addition, the trial court's finding that the defendant waived his rights was held erroneous inasmuch as he could not have waived rights he was not adequately informed about. ACCORD. _Sanchez v. Beto_, 467 F. 2d 513 (5th Cir. 1972) (numerous warnings of constitutional rights in accordance with state statute held inadequate because the police failed to advise that the defendant had a right to have counsel present during questioning);

Fendley v. United States, 384 F. 2d 923 (5th Cir. 1967) (defendant informed of right to appointed counsel, but not advised of right to appointed counsel during questioning); *Montoya v. United States*, 392 F. 2d 731 (5th Cir. 1968) (failure to advise of right to have counsel provided before making any statement); *Chambers v. United States*, 391 F. 2d 455 (5th Cir. 1968) (failure to advise of right to presence of retained or appointed counsel during questioning); *Hackney v. United States*, 407 F. 2d 586 (5th Cir. 1969) (effects of earlier invalid interrogation after inadequate Miranda warnings not dissipated by subsequent full warning.)

Florida courts have been very careful in scrutinizing Miranda cases where the accused, as here, is a juvenile. In *Fields v. State*, 402 So. 2d 46 (Fla. 1st DCA 1981) a juvenile defendant of reduced mental ability was advised of his rights, per Miranda, three (3) times during a two (2) hour period proceeding his statement. After each reading the defendant stated that he understood the rights. Upon being asked if he wanted a lawyer, however, he responded "I can't afford to get one". 401 So. 2d at 47. The First District Court of Appeal reversed the conviction. First, the court recognized that while a juvenile can waive his rights, the State bears a "heavy burden" in establishing that the waiver is valid. 402 So. 2d at 47. Then the court held that the response of the defendant, that he could not afford a lawyer, showed that he did not intelligently comprehend the meaning of the right to have counsel appointed

without personal cost. ACCORD, *Tennell v. State*, 348 So. 2d 937 (Fla. 2d DCA 1977) wherein the convictions of a juvenile tried as an adult were reversed because the "state has not borne its heavy burden in establishing that the [Miranda rights] waiver was intelligently made". 348 So. 2d at 938; *Arnold v. State*, 265 So. 2d 64 (Fla. 3rd DCA 1972).

The instant case presents a situation which compels the suppression of Respondent's second recorded statement. Here, Officer Browning actually advised Respondent the opposite of a true Miranda warning. Browning advised Respondent that his statement was primarily being taken to refresh his memory should the case go to trial and he chose to testify. Nothing could have been further from the truth, nor further from the true Miranda warning concerning the use of an acccused's statement. This is not the situation presented in Priysock, supra, where Miranda warnings, although not in perfect language, were recited. Here, Officer Browning's admonition completely subverted the true meaning of Miranda.

As in Cribbs, Officer Browning's admonition vitiated the prior warnings given Respondent. First, the inconsistent admonitions are as confusing and misleading as those in Cribbs. Second, as in Cribbs, the erroneous warning is contrary to Florida law which holds that an accused's statements will be used against him. This appeal is proof enough of the utter falsity of Browning's admonition.

As was the case in Fields, supra, and Tennell, supra, the facts of the present case show that this juvenile Respondent did not have the ability to understand the conflicting admonitions. A good example of Respondants confusion was his exchange with Officer Welty in the first taped statement concerning the right to bear arms as part of the ten commandments.

Detective Welty:	You believe in God? Are you very religious?
The Witness [CLEO LECROY]:	Not really.
Detective Welty:	Your 10 commandments, thou shalt not kill?
The Witness:	I know that, the right to be armed and everything. I know some of them.
Detective Welty:	The right to bear arms is in the 10 commandments?
The Witness:	Well, I am shook up right now... Well, right now I am nervous. I can't even think straight right now.

(R 576-77)

Any juvenile who is so confused as the believe the right to bear arms is in the ten commandments would have difficulty understanding legal "Miranda" rights if stated clearly. When it is considered that Officer Browning gave conflicting advice as to the use of the statements, confusion is very likely. Consider further that the incorrect admonition was the last admonition stated to Respondent prior to his statement and confusion is inevitable. In the least, it cannot be stated that the trial court abused

its discretion by finding that the State failed to bear its "heavy burden" of showing that Respondent intelligently waived his rights.

C.

Petitioner argued the preceding Miranda issue through a discussion of traditional voluntariness law. See Petitioner's Brief, Point I and _Knowles v. State_, 407 So. 2d 259 (Fla. 4th DCA 1981). This Court must keep in mind, however, that the question whether a statement is voluntary in the traditional sense is irrelevant to the initial Miranda issue. In other words, the issues are separate and distinct.

The landmark case of _Harris v. New York_, 401 U.S. 222 (1971) examines the distinction between a statement inadmissible under Miranda and one that is involuntary in the traditional sense. In Harris the defendant gave the police a pre-trial statement admitting that he sold heroin. The defendant made no claim that the statement was coerced or otherwise involuntary in the traditional sense. It was conceded by the State, however, that the statement was inadmissible under Miranda because the defendant was not advised of his right to appointed counsel. The State did not use the statement in its case in chief. After the defendant testified at trial contrary to the statement, however, the State presented the pre-trial statement for impeachment purposes. The United States Supreme Court, per Chief

Justice Burger, upheld the conviction and sentence. In doing so it found that although voluntary statements in violation of Miranda could not be used in the prosecutor's case in chief, the statements could be used for impeachment purposes.

> It does not follow from Miranda that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course, that the trustworthiness of the evidence satisfies legal standards.
>
> 410 U.S. at 224.

Similarly, in Nowlin v. State, 346 So. 2d 1020 (Fla. 1977) a defendant made incriminating statements to the police about his involvement in a robbery without being advised of his Miranda rights. The statement was, therefore, not used in the State's case in chief. After the defendant testified contrary to the staement, however, the statement was admitted into evidence for impeachment purposes. This court approved the procedure, but only for situations where the statement met traditional voluntariness standards.

> Therefore, whenever the State, in order to impeach a defendant's credibility, chooses to present evidence of a defendant's incriminating statements which are inconsistent with trial testimony of the defendant and which are inadmissible in the case in chief because of the custodial offiers failure to give Miranda warnings, the statements must be shown to be voluntary before they may be admitted.
>
> 364 So. 2d at 1024.

In the present case, Judge Harper correctly ruled that the police violated Respondent's right under Miranda, supra. See, POINT I. B. The violation requires suppression of Respondent's second taped statement without regard to whether the statement

met traditional voluntariness standards. Only if Respondent takes the witness stand at trial and testifies contrary to the taped statement will the traditional voluntariness issue arise.

D.

Assuming, arguendo, that Respondent's second taped statement is admissible under Miranda v. Arizona, supra, the statement still is subject to suppression prior to trial under traditional voluntariness standards. The interrogating officer's admonition that Respondent's statement was being taken primarily to refresh Respondent's memory should he choose to testify at trial was a promise calculated to delude Respondent of his true position and exert improper influence over him. Foreman v. State, 400 So. 2d 1047 (Fla. 1st DCA 1981).

The law in the United States was made clear as early as 1897 that a statement from an accused cannot lawfully be obtained by any direct or implied promise, however slight.

> A confession can never be received in evidence where a prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner. . .
>
> Bram v. United States 168 U.S. 532, 543 (1897)

See also, Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963).

Numerous cases in Florida have followed Bram in holding

that a statement that is the product of any promise or is calculated to delude the accused is involuntary. Henthorne v. State, 409 So. 2d 1081 (Fla. 2d DCA 1982). Fillinger v. State, 349 So. 2d 714 (Fla. 2d DCA 1977). Further, upon review appellate courts should not disturb the decision of the trial court on the admission of a statement if there is any evidence to support it. State v. Favaloro, 424 So. 2d 47 (Fla. 3rd DCA 1983); Interest of G.G.P. 382 So. 2d 128 (Fla. 5th DCA 1980).

Filllinger v. State, 349 So. 2d 714 (Fla. 2d DCA 1977) is a good example of cases on this issue. In Fillinger the defendant, an invalid confined to a wheelcahir, was arrested and, after being advised of her rights, confessed to a petty larceny charge. The arresting officer continued to question her, however, about an unsolved grand larceny case. At first the defendant denied involvement. After the officer stated that he had enough information to charge the defendant in the grand larceny case but that he would take her cooperation into consideration in seeking to establish the amount of her bond, the defendant confessed to the grand larceny charge also. On appeal the conviction for grand larceny was reversed and the statement suppressed. It was held that the state failed to carry its burden of proving that the statement was freely and voluntarily made where the evidence indicated that the statement was induced by the promise of a low bond. ACCORD. Brewer v. State, 386 So. 2d 232 (Fla. 1980) wherein this Court vacated a death sentence

and reversed a conviction for first degree murder holding that a police officer's suggestion that he had the power to effect leniency and keep the defendant from the electric chair rendered the defendant's statement involuntary; *Bradley v. State*, 356 So. 2d 849 (Fla. 4th DCA 1978) wherein the Court held a defendant's statement involuntary because the interrogating officer stated that he could get the defendant a "deal" for a lighter sentence if he confessed; *Henthorne v. State*, 409 So. 2d 1081 (Fla. 2d DCA 1982) wherein a confession was held involuntary where the defendant was promised that if he described the identity of his coperpetrator he would not be charged with two (2) other offenses, even though the defendant conferred with his attorney before making the decision to confess. *Brockelbank v. State*, 407 So. 2d 368 (Fla. 2d DCA 1981). Promised release from confinement; In Interest of G.G.P. 382 So. 2d 128 (Fla. DCA 1980) Promised immunity; *Fulland v. State*, 352 So. 2d 1271 (Fla. 1st DCA 1977) Theft confession suppressed because the officer promised the defendant "if I get the lawn mower back there won't be a problem"; *Cribbs v. State*, supra.

In the present case the trial court found that Respondent's second recorded statement was induced by the promise that the statement was primarily being taken to refresh Respondent's recollection should he choose to testify at trial. Judge Harper also found the statement involuntary because the admonition was calculated to delude Respondent of his true position

and exert improper influence over him. (R 970) The Fourth District Court of Appeal affirmed the suppression order. An accused who has the benefit of a recorded statement to refresh his memory if he chooses to testify at trial is certainly in a better position than one whose statement is being used by the prosecution to convict him. This Court should not disturb Judge Harper's or the Fourth District's decisions. The clarity of the interrogating officers admonition shows that the trial court's ruling is fully supported by the evidence.

E.

Petitioner seeks support in Knowles v. State, 407 So. 2d 259 (Fla. 4th DCA 1981). Knowles, however, does not support Petitoner's erroneous position. First, the Knowles opinion is a per curiam affirmance (P.C.A.). Second, the Miranda v. Arizona, supra, issue was never raised or discussed. Third, the specially concurring opinion in Knowles is totally consistent with the Fourth District's affirmance in the present case. The improper admonition being discussed in the present case was also discussed in the short specially concurring opinion in Knowles. The trial court, in Knowles, found that the statement in issue was voluntary notwithstanding the improper admonition. We do not know the other facts surrounding the voluntariness of the statement because they were never discussed in the opinion. The

concurring opinion merely held that the trial court's finding of fact had to be affirmed. The opinion recognized, however, that in future cases, the trial court's decision could well be the opposite.

> However, in other instances such conduct on the part of the police may well be the factor that tips the scales against a finding of voluntariness.
> *Knowles*, at 260 (Judge Anstead concurring specially.)

The present case is the situation prophesied by Judge Anstead in *Knowles*, supra. In the present case the trial court, after hearing lengthy testimony at the hearing on the motion to suppress statements, found that the improper admonition in issue was the factor that tipped the scales against a finding of voluntariness. As in *Knowles*; the Fourth District correctly declined to reweigh and overrule the trial court's finding. The Fourth District's affirmances in the present case and in *Knowles* are therefore, consistent with each other and a correct application of Florida law. *State v. Favaloro*, 424 So. 2d 47 (Fla. 3rd DCA 1983).

POINT II

THE TRIAL COURT WAS CORRECT IN SUPPRESSING STATEMENTS MADE BY RESPONDENT, CLEO D. LECROY, TO THE POLICE IN ROUTE TO MIAMI WHERE THE STATEMENTS WERE THE FRUIT OF THE EARLIER ILLEGALLY OBTAINED STATEMENT.

Respondent objects to this Court's review of Point II. See, Objection to Addition of Ancillary Issues. Assuming, *arguendo*, this issue is properly before this Court for review, it is Respondent's position that this Court should affirm the opinion of the district court.

The trial court suppressed various statements Respondent, CLEO LECROY, made to police during an auto trip to Miami which followed his second recorded statement. (R 969-70) These statements were made a short time after CLEO gave the second taped statement. The sole basis for the suppression of the "auto" statements was that they were "fruits" of the illegally obtained taped statement. See *Wong Sun v. United States*, 371 U.S. 471 (1963).

Respondent agrees with Petitoner that the fate of these "auto" statements lies with that of the underlying taped statement which is the subject of Point I of this brief.

POINT III

WHERE VARIOUS WEAPONS WERE OBTAINED BY THE POLICE THROUGH USE OF AN ILLEGALLY OBTAINED STATEMENT. THE TRIAL COURT WAS CORRECT IN SUPPRESSING THE WEAPONS AS FRUIT OF THE STATEMENT.

Respondent objects to this Court's review of Point III. See, Objection to Addition of Ancillary Issues. Assuming, *arguendo*, that this issue is properly before the Court, it is Respondent's position that this Court should affirm the opinion of the district court.

A.

The trial court suppressed three (3) weapons, a rifle allegedly belonging to the victims, and two (2) weapons belonging to the LeCroys. The court found that the weapons were fruits of the illegal statement taken from CLEO LECROY. (R 584-85) The Fourth District Court affirmed this suppression.

Respondent, CLEO LECROY, agrees with Petitioner that under the trial court's order the suppression of the weapons is dependent upon suppression of the underlying taped statement. The sole ground for the suppression was that the weapons were the fruits of the illegally obtained statement. *Wong Sun v. United States*, 371 U.S. 471 (1963).

B.

Respondent disagrees with Petitioner's suggestion that the suppression of the weapons should be reversed even if the suppression of the underlying statement is affirmed because JON LECROY was an "independent source" of the weapons. First, his argument must be limited to the two (2) weapons taken from the LeCroys home. Jon LeCroy knew nothing of the third person who had the alleged victims' gun.

Second, and more important, the independent source argument must fail because the trial court made the factual finding that the LeCroy weapons were in fact the fruits of CLEO LECROY's statement. (R 971) Findings of fact by the trial court must be taken as true by an appellate court unless wholly unsupported by the record because the trial court is in the best position to weigh coflicting evidence and observe the witnesses. Nor can the possibility that JON LECROY might have led the police to the weapons purge the illegality that occurred. State v. Ramos, 405 So. 2d 1001 (Fla. 3rd DCA 1981).

Evidence supporting the trial court's finding that the weapons were the fruits of CLEO LECROY's statement and not JON LECROY's statements is contained in the very next paragraph of the court's order. There, the trial court raised the distinction between the two (2) Respondent's statements and refused to suppress

for CLEO LECROY a fourth (4th) weapon. The court found this fourth weapon was obtained through the use of statements given by JON LECROY. (R 971). Contrast this with the three (3) weapons that were suppressed which were expressly found to be "fruits of the poisonous tree". (R 971)

C.

Respondent, CLEO LECROY, also disagrees with Petitioner's assertion that this Respondent has no standing to object to the seizure of the alleged victims' gun from the Eliot residence. Petitioner's assertion shows a total misunderstanding of the law regarding standing.

An accused has standing to object to the seizure of evidence if it was a violation of the accused's rights which lead to the disputed evidence. Conversely, an accused cannot object to a violation of another's rights even if evidence seized as a result of that violation is used against the accused. United States v. Salvucci, 448 U.S. 83 (1980); See also Kayes v. State, 409 So. 2d 1075 (Fla. 2d DCA 1981) where the court reversed the suppression of evidence as to one defendant but affirmed as to a co-defendant because the co-defendant lacked standing to object to the seizure. The controlling question, therefore, is whose rights were violated? If a statement was illegally obtained, all fruits of the statement must be no matter

where the fruits may be located. *Wong Sun v. United States*, supra. Here the illegality complained of occurred during the taking of CLEO LECROY's statement. See Point I. Clearly, CLEO LECROY has standing to object to the admission of his own statement. The alleged victims' gun, found at the Eliot house, was the fruit of CLEO LECROY's statement. It was the statement alone which led the police to the gun. See Order suppressing statements.

Petitioner confuses this case with the situation where an illegality in the seizure at the Eliot residence led to the victims' gun, i.e., an insufficient search warrant, violation of the knock and announce laws or torturing Eliot into disclosing the location of the gun. That clearly is not the case herein.

POINT IV

THE TRIAL COURT WAS CORRECT IN DISMISSING COUNT V OF THE INDICTMENT.

Respondent objects to this Court's review of Point IV. See, Objection to Admission of Ancillary Issues. Assuming, *arguendo*, that this issue is properly before this Court it is Respondent's position that this Court should affirm the opinion of the district court.

Count V of the indictment purports to charge both respondents with concealing evidence from a criminal investigation in violation of Section 918.13 (i)(a), Florida Statutes. Specifically, the indictment charges both Respondents:

> . . . did knowingly and unlawfully, knowing that a criminal investigation by a duly constituted law enforcement agency was pending and/or in progress, conceal a 30.06 rifle and a .38 caliber revolver with the purpose to impair their availability in said investigation. . . (R 759)

The trial court dismissed Count V on two (2) separate grounds.

A.

IT IS A VIOLATION OF DUE PROCESS AND THE SELF INCRIMINATION CLAUSE TO CHARGE RESPONDENTS WITH UNLAWFULLY CONCEALING EVIDENCE FROM A LAW ENFORCEMENT INVESTIGATION WHERE THE EVIDENCE CONCEALED WAS THE FRUIT OF A ROBBERY ALREADY CHARGED IN THE INDICTMENT

Count V of the indictment charged respondents with unlawfully concealing from a law enforcement investigation a certain rifle and revolver. As found by the courts below, the rifle and revolver in issue were the items allegedly stolen in the robbery counts of the indictment. They were not the instruments used in the robbery or mere evidence relevant to the robbery.

> . . . [I]t is clear that the two firearms described in count five are the fruits of the robberies allegedly committed by both defendants in counts three and four of the indictment. In other words, the State seeks not only to prosecute the defendants for stealing the firearms in the first instant, but also for concealing the same firearms from the investigating officers so as to make the firearms unavailable as evidence against them at trial.
>
> (R 964)

The trial court properly dismissed Count V and the Fourth District properly affirmed that dismissal because, as applied to the facts of this case, the statute violates respondents' rights to due process and against self incrimination as protected by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Florida Constitution.

The United States Supreme Court decision in _Leary v. United States_, 395 U.S. 6 (1969) controls the present case. In that case marijuana was found in Timothy Leary's automobile and on his teenage daughter's person when they stopped at a customs inspection point upon driving back to the United States from Mexico. Leary was indicted and subsequently convicted of both transporting illegal marijuana into the United States and not paying the tax on imported marijuana imposed by the Marijuana Tax Act. Of interest to this case was the prosecution under the tax act.

Leary argues that the tax act prosecution was illegal because registration and the payment of the marijuana tax would tend to establish his guilt under state laws which prohibited the possession of marijuana. The United States Supreme Court agreed, holding that the assertion of the privilege against self incrimination provided a complete defense to prosecution under the tax act.

> Since compliance with the transfer tax provision would have required Petitioner unmistakably to identify himself . . . [as a possessor of marijuana] we can only decide that when read according to their terms these provisions create a real and appreciable hazard of incrimination.
> 395 U.S. at 18.

Accord, _Marchetti v. United States_, 390 U.S. 39 (1968) where the United States Supreme Court held that a plea of the Fifth Amendment privilege provided a complete defense to a prosecution for failure to register and pay the occupational tax on wagers since wagering was a crime in almost every state; _Grosso v. United_

States, 390 U.S. 62 (1968) where the court similarly held that a claim under the Fifth Amendment was a defense to prosecution for not paying a tax on the proceeds from wagering; *Haynes v. United States*, 390 U.S. 85 (1968) wherein the court held that the Fifth Amendment privilege barred prosecution for possession of an unregistered illegal weapon dispite the fact that in certain instances registration would not be incriminating.

In the present Respondent was faced with the same Hobson's choice held unconstitutional in Leary and the above cited cases. The firearms in issue were the fruit of the robberies under investigation, not an instrumentality or evidence of the robbery. The robberies were charged in the indictment. To say that Respondent should not have concealed the weapons means that they should not have committed the robbery or should have turned the weapons over to the officers investigating the robbery. This would not only result in the weapons being used against Respondents, but also in evidence that Respondents were the ones who possessed them. Surely, this is as incriminating as Leary registering and paying taxes on proscribed marijuana or Grosso paying a tax and identifying himself as the possessor of proceeds of illegal gambling.

As found by the court below, the state's argument that compliance with the concealing evidence statute would not provide evidnece of a testimonial or communicative nature is simply not correct. As the trial court noted:

"Every theft involves the taking of property and to that extent a concealing of the property."
(R 965)

B.

WHERE COUNT V OF THE INDICTMENT, PURPORTING TO CHARGE THE OFFENSE OF CONCEALING EVIDENCE FROM A CRIMINAL INVESTIGATION BY A DULY CONSTITUTED LAW ENFORCEMENT AGENCY, FAILED TO REFER TO ANY SPECIFIC INVESTIGATION OR SPECIFIC LAW ENFORCEMENT AGENCY, THE TRIAL COURT WAS CORRECT IN FINDING IT FATALLY VAGUE.

Respondents were charged in Count V with knowingly concealing evidence from a criminal investigation by a duly constituted law enforcement agency. The indictment failed to refer to any specific criminal investigation or specific law enforcement agency. Accordingly, Count V was found to be fatally vague and subject to dismissal (R 965).

It is settled Florida law that a charging document is legally sufficient only if it expresses all of the elements of the offense charged in such a way that the accused is neither misled nor embarassed in the preparation of his defense or exposed to double jeopardy. State v. Dilworth 397 So. 2d 292 (Fla. 1981). While in some cases an offense may be adequately charged by reciting a statute, mere recitation is not sufficient if the statutory language is so generic that it fails to inform the accused specifically what criminal act he allegedly committed.

Dilworth, supra; *State ex rel. Swanboro v. Mayo*, 155 Fla. 330, 19 So. 2d 883 (1944).

State v. Covington, 392 So. 2d 1321 (Fla. 1981) is instructive on this issue. In Covington the defendants were charged, among other grounds, with two (2) counts of having violated the anti-fraud provision of the Florida Sale of Securities Law. The information in issue tracked the language of the applicable law, but supplied no more factual allegations. The defendants moved to dismiss the counts on the grounds that the statute in issue was unconstitutionally vague and that the information failed to charge the crime with sufficient specificity. The trial court granted the motion on the vagueness grounds.

This court declined to review the Constitutionality of the statute because it held that the validity of the information could be disposed of on the unconstitutional sufficiency of the information grounds. Initially this court recognized that tracking the language of a criminal statute is generally sufficient to charge a crime. In situations when the statutes language is general, however, supplemental factual allegations may be necessary to allege the offense with precision and particularity.

> This may be necessary when the statute defines the offense in general terms and the accusation using the statutory language does not clearly and specifically apprise the accused of what he must defend against.
> 392 So. 2d at 1324.

This court then held in Covington, that the general language of

the anti-fraud statute was insufficient to charge the defendants with that crime.

> In the instant case, the information merely tracked the statute. The offense is then defined in broad, general terms. There was no supplemental description of the alleged misconduct. Without more particular factual allegations, the information failed to convey notice of the accusations with sufficient precision and clarity.
>
> 392 So. 2d at 1324.

Accord, Ferrell v. State, 358 So. 2d 843 (Fla. 3d DCA 1978) where an information charging aggravated battery, which tracked the language of the relevant statute, was held deficient because it did not specifically allege the description of th underlying battery committed; and State v. Cadieu, 353 So. 2d 150 (Fla. 1st DCA 1977) where an information charging a lewd or lascivious assault was held deficient because its generic terms did not adequately inform the defendant of the actions with which he was charged.

In the present case Count V merely tracks the language of the concealing evidence statute. It fails to specifically allege what investigation respondents allegedly concealed evidence from and what "duly constituted" law enforcement agency was conducting the investigation. The failure of the indictment to be precise prejudices appellees in the preparation of their defense and leaves them open to excessive double jeopardy prosecutions.

Finally, Petitioner's argument that a bill of particulars could solve the vagueness problems might have merit had respondents

been charged by an information. These charges, however, were brought by indictment. It is well established that a statement of particulars cannot cure fundamental defects in an indictment. See _Black v. State_, 360 So. 2d 142 (Fla. 2d DCA 1978) wherein it was held that an indictment which failed to allege venue was insufficient to support a conviction even though the missing information was supplied by a bill of particulars.

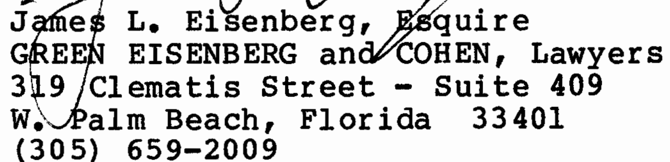
CONCLUSION

Based upon the above arguments and authorities, Respondent, CLEO D. LECROY, requests that this Court affirm in it's entirety the opinion of the Fourth District Court of Appeal which affirmed the trial court's order suppressing statements and evidence and dismissing Count V.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of February, 1984, by U. S. Mail a true copy of the above was furnished to JOY B. SHEARER, Assistant Attorney General; MICHAEL DUBINER, Esquire, Counsel for Respondent Jon LeCroy; and Respondent Cleo D. LeCroy.

Respectfully submitted,



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