IN THE SUPREME COURT OF FLORIDA

Case No. 64,744

STATE OF FLORIDA,

Petitioner

-vs-

CLEO D. LECROY and
JON M. LECROY,

Respondents

RESPONDENT, JON M. LECROY'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner, the State of Florida, was the Appellant in the Fourth District Court of Appeal and the prosecution in the Trial Court. The Respondants, Cleo D. LeCroy and Jon M. LeCroy, were the Appellees and the Defendants, respectively, in the lower courts. In the brief, the parties will be referred to as they appear before this Honorable Court, and as the "State" and "Cleo" or "Jon."

The symbol "R" will designate the Record on Appeal.

STATEMENT OF THE CASE

The Respondants were indicted for two (2) counts of First Degree Murder, two (2) counts of Armed Robbery and one (1) Count of Concealing Evidence (R 758-760). Respondent filed a Motion to Suppress Statements (R 854-855) and Physical Evidence (R 863-864) and a Motion to Dismiss the Concealing Evidence charge (R 837-838, 839).

After several days of hearings, the Trial Court suppressed certain statements made by Respondant Jon LeCroy as well as certain physical evidence (R 962-980). The Trial Court also dismissed the Concealing Evidence charge (R 964-965, 973).

The State appealed these and other rulings to the Fourth District Court of Appeals. In an opinion reported at 435 So.2d 354 (Fla. 4th DCA 1983), the Court affirmed the Trial Court's rulings wih regard to the Motions previously mentioned.

The Fourth District Court of Appeals in a separate opinion certified the following question to this Court as a matter of great

public interest:

> Where statements made by appellants when measured by traditional factual tests are found to have been given voluntarily and without coercion or inducement, they may nonetheless be rendered legally involuntary and therefore subject to being suppressed under Miranda v. Arizona, 384 U.S. 436 (1966) where, immediately following the reading of the Miranda warnings the following statement is also read:
>
> > This statement is taken primarily in order to refresh your memory at the time you may be called to testify, if and when this matter goes to court.

STATEMENT OF FACTS

On January 7, 1981, the Palm Beach County Sheriff's Office received a report that John and Gail Hardiman had failed to return from a camping trip (R 44).

Respondents, Jon and Cleo LeCroy came to Brown's Farm Hunt Area on January 9, 1981, to assist the police in the search for the missing couple(R 46).

In the morning hours of January 11, 1981, Jon LeCroy found the bodies of John and Gail Hardiman (R 63). He was taken to the Sheriff's Office and was arrested at approximately 10:00 a.m. - 11:00 a.m. On that date, at approximately 3:30 p.m., Jon LeCroy was interviewed by Detective Browning and Detective Copeland (R 71-72). Jon made an exculpatory statement at this time (R 71-72).

Jon LeCroy informed the detectives about a .38 caliber firearm involved in the case (R 74). He agreed to go to Miami with the detectives to recover it (R 394). Jon did not tell the police the location of this firearm (R 392-393).

During the trip to Miami, Jon was crying (R 395). He said, "My God, My God, I can't believe he did it. I know he did it" (R 395). He further stated, "My brother killed them both, I know it, I know it but I can't believe it" (R 395). A little later, Jon asked, "What kind of trouble am I going to be in" (R 396)?

Jon then stated, "I want an attorney" (R 396). The Trial Court found that Jon LeCroy informed the detectives of his desire to have an attorney at that time (R 975). At the time Jon made his request for an attorney, he was crying heavily (R 413). He had lost control of his emotions (R 413).

When Jon requested an attorney, Detective Driggers thought that, "he wanted a lawyer and not to be questioned any more about the case" (R 453). Yet, Detectives Driggers and Copeland did nothing about an attorney after Jon made his request (R 414-415). They continued to Miami to recover the gun (R 414).

After Jon requested a lawyer, his attitude towards the police changed (R 448-449). Jon "clammed up" (R 449).

At the time Jon requested an attorney, neither of the Respondents had told the police the location of the .38 caliber firearm (R 544, 547, 552, and 392-393). The police did not even know in what section of Miami the house they were going to was located (R 453). The Trial Court found that Detective Driggers was driving to a then unknown destination in Miami (R 975) (Emphasis of Trial Court).

Even after Jon LeCroy requested an attorney, Detective Driggers continued asking Jon for directions to the home in Miami where the firearm was located (R 453, 454). Detective Driggers specifically recalls that he asked Jon for directions (R 454). The Trial Court found that Detective Driggers asked Jon LeCroy for directions from time to time (R 975). Jon brought the detectives to a

home in Miami where a .38 caliber firearm was recovered (R 399).

After the gun was recovered, Jon was taken to his parents' home in Miami. At the LeCroy residence, Jon asked his father to provide him with an attorney four or five times in the presence of Detective Copeland (R 402, 414). Jon's father, refused to get him an attorney (R 402).

Jon LeCroy was taken back to Belle Glade after leaving his parents' home. During this trip, Detective Copeland says that Jon LeCroy asked, "How about my polygraph" (R 404)?

After Jon was returned to the Belle Glade Sub Station, Detective Browning approached Jon LeCroy and asked Jon if he would be willing to talk to Detective Browning (R 78). Jon told Detective Browning that if he promised that Jon could have a polygraph, Jon would talk to Browning (R 160). Detective Browning said, "That is fine" (R 161).

The Trial Court found that Detective Copeland had informed Detective Browning that Jon LeCroy had requested an attorney during the trip to Miami (R 975, 404). Detective Browning denies that he was ever told that Jon LeCroy requested an attorney on the way to Miami (R 158).

On January 12, 1981, at 12:45 a.m., Detectives Browning and Copeland began their interrogation of Jon LeCroy (R 89). Detective Browning had noted a personality clash between Detective Copeland and Jon after their return from Miami (R 78). Jon did not want to talk to

Copeland anymore (R 159).

The questioning was tape recorded (R 89). Jon LeCroy was not read his Miranda warnings prior to the questioning (R 975-976). Instead, Jon LeCroy was told:

> This statement is taken primarily in order to refresh your memory at the time that you may be called upon to testify, if and when the matter goes to Court. (R 90).

Jon LeCroy then made an exculpatory statement which was inconsistent with the statement he made on January 11, 1981 (R 91-112).

Detective Browning admitted that his primary purpose in questioning Jon LeCroy on January 12, 1981, at 12:45 a.m., was to obtain incriminating statements from Jon (R 185). Detective Browning admitted that it was not totally correct to tell Jon that the statement was being taken primarily for the purpose of refreshing Jon's memory at trial (R 185-186).

On January 12, 1981, Jon LeCroy was taken to his First Appearance hearing (R 976). Prior to that hearing, Detective Browning met with an Assistant State Attorney, and informed her that he had scheduled a polygraph examination for Jon LeCroy that afternoon (R 117 and 180).

At the First Appearance Hearing, Jon requested that a Public Defender be appointed to represent him. The Public Defender was appointed to represent Jon LeCroy (R 976-977). The Public Defender requested that the First Appearance Judge issue a gag order so that the police could not speak to Jon LeCroy without first notifying the

Public Defender's Office (R 318). The State objected to the issuance of a gag order. The Judge refused to issue the gag order (R 977). The Judge was not told that Jon had previously invoked his right to counsel or that Jon was to be taken to a polygraph examination after the First Appearance hearing (R 343).

The Public Defender was not notified that Jon was to be questioned after the First Appearance hearing. No notice was given to the Public Defender that Jon was to be given a polygraph examination that afternoon (R 378).

After the First Appearance hearing, Detectives Browning and Welty went into the holding cell where Jon had been taken (R 121). Jon was not advised of his Miranda warnings. Detective Browning explained to Jon that even though his Public Defender did not want him to speak to any police officer, he could do so (R 319). Jon was further told that, "the judge told us and him, while in Court, that it would be fine if you wanted to talk to any police officer. He could freely and voluntarily" (R 318). Jon was told, "your attorney said that you shouldn't talk to the police but if you want to, you can talk to the police and take a polygraph" (R 346). After being thus informed, Jon LeCroy agreed to take a polygraph examination.

Jon was taken from the holding cell to the jail and then to the polygraph examination (R 179). He was then taken to the Sheriff's Office for questioning (R 181).

Officer Browning read Jon LeCroy his Miranda warnings (R

977). Jon LeCroy gave an exculpatory statement which was inconsistent with his two previous statements. This statement was tape recorded. The Public Defender's Office was not notified that Jon LeCroy was to be questioned on January 12, 1982, at 8:43 p.m.

On January 13, 1981, Jon LeCroy was brought to the Sheriff's Office from the jail. The Public Defender's Office was not notified that Jon was to be questioned (R 978).

Detective Welty gave Jon LeCroy his Miranda warnings and then reiterated that the primary purpose of the statement was to refresh Jon's memory in Court (R 209).

On January 13, 1982, Jon LeCroy gave another exculpatory statement. During the questioning of Jon LeCroy, Detective Welty advised Jon that he could not be charged as an Accessory After the Fact (R 227). During the questioning Detective Welty accused Jon of lying, and Welty accused him of committing two murders (R 232, 233).

During the questioning of Jon LeCroy, both Detective Welty and Detective Driggers raised their voices at Jon LeCroy (R 362). Jon was crying through several of the taped and untaped statements that were taken from him (R 363).

EXPLANATORY NOTE AND OBJECTION

The Trial Court suppressed Respondant's Jon LeCroy's statements based on several grounds. The Trial Court also suppressed a .38 caliber firearm (R 979). The Trial Court also dismissed the Concealing Evidence charge (R 964-965, 973).

The Fourth District Court of Appeals certified only one (1) question to this Court, whether or not there was a violation of the dictates of Miranda v. Arizona, 384 U.S. 436 (1966).

Petitioner's brief argues eight (8) points. Only a portion of Point IV refers to the quesion certified by the Fourth District Court of Appeals.

This Court, in Truskin v. State, 425 So.2d 1126 (Fla 1983), recognized its power to discuss issues ancillary to those certified to it by district courts of appeal. However, the Court stated:

> ...we recognize the function of district courts as courts of final jurisdiction and will refrain from using that authority unless those issues affect the outcome of the petition after review of the certified case.

Sub judice, the extranious issues raised by Petitioner will in no way affect the outcome of this cause after review of the certified question before this Court. The Trial Court found several other bases, in addition to the basis certified to the Court by the Fourth District Court of Appeals, to suppress each of the Respondant's, Jon LeCroy's statements. None of these issues was certified to this Court. Additionally, the suppression of the .38 caliber firearm and

the Trial Court's dismissal of the Concealing Evidence charge was upheld by the Fourth District Court of Appeals and these questions were not certified to this Court.

This Court's appellate jurisdiction is a limited one. See, Florida Rules of Appellate Procedure, Rule 9.030(a). The only issue which should be argued before this Court is the issue certified by the Fourth District Court of Appeals.

As Petitioner has addressed several other issues determined by the Trial Court, Respondant feels it is incumbent upon him to respond to Petitioner's brief on all issues as they apply to him. Points I - III of Respondant's brief concern the Trial Court's suppression of statements obtained from Respondant,Jon LeCroy. Point IV concerns the Trial Court's suppression of a .38 caliber firearm. Point V concerns the dismissal of the Concealing Evidence count. However, Respondant urges this Court to limit its consideration to only the issue raised by the question certified by the Fourth District Court of Appeals.

It should also be noted that several of the issues raised by Petitioner only have applicability to Co-Respondant, Cleo LeCroy. Respondant will not address these issues in his brief.

POINTS INVOLVED

I

WHETHER THE TRIAL COURT CORRECTLY SUPPRESSED THE STATEMENT OBTAINED FROM JON LE CROY MADE ON JANUARY 12, 1981, AT 12:45 A.M.

II

WHETHER THE TRIAL COURT CORRECTLY SUPPRESSED THE STATEMENT OBTAINED FROM JON LE CROY MADE JANUARY 12, 1981, AT 8:43 P.M.

III

WHETHER THE TRIAL COURT CORRECTLY SUPPRESSED THE STATEMENT OF JON LE CROY MADE ON JANUARY 13, 1981.

IV

WHETHER THE TRIAL COURT CORRECTLY SUPPRESSED THE SEIZURE OF THE .38 CALIBER FIREARM

V

WHETHER THE TRIAL COURT CORRECTLY DISMISSED THE CONCEALING EVIDENCE COUNT OF INDICTMENT

POINT I

THE TRIAL COURT CORRECTLY SUPPRESSED THE STATEMENT OBTAINED FROM JON LECROY MADE ON JANUARY 12, 1981, at 12:45 A.M.

I. INTRODUCTION

The Trial Court, based on the totality of circumstances ruled that the statement obtained from Respondent on January 12, 1981, at 12:45 a.m., was inadmissible on several grounds (R 976). Each ground is independently sufficient to suppress the statement. Each ground is also to be considered in the totality of the circumstances surrounding the taking of the statement. Each ground will be discussed separately below.

The Trial Court's conclusions of fact come to this Court with a presumption of correctness. Shapiro v. State , 390 So2d 344 (Fla. 1980). In testing the accuracy of the Trial Court's conclusions of fact, this Court must interpret the evidence and all reasonable deductions and inferences which may be drawn therefrom in the light most favorable to the Trial Court's conclusions. Shapiro, supra. Where a Trial Court determines the voluntariness of a confession and evaluates the totality of the circumstances surrounding the confession, its ruling comes to the Appellate Court clothed with presumption of correctness. Bova v. State, 392 So.2d 950 (Fla. 4th DCA 1980). It is the duty of the Appellate Court to, "interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustain the Trial Court's rulings." Bova

v. State, supra. See also, Roberts v. State, 390 So.2d 769 (Fla. 3d DCA 1980).

II. VIOLATIONS OF RESPONDENT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS AS CONSTRUED IN MIRANDA V. ARIZONA

A. Interrogation After Request for Counsel.

Miranda v. Arizona, supra, declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation. Edwards v. Arizaona, 451 U.S. 477 (1981). Where an accused asks for counsel during questioning, police initiated custodial interrogation must cease. Edwards, supra.

In Edwards, supra, the Supreme Court found that the use of a confession obtained after the accused requested counsel violated his rights under the Fifth and Fourteenth Amendments. The Court held:

> That when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.

Florida Courts have likewise held that when an accused requests counsel all interrogation must cease. Buehler v. State, 381 So.2d

746 (Fla. 4th DCA 1980), Harris v. State , 396 So.2d 1180 (Fla. 4th DCA 1981), Bowen v. State , 404 So.2d 145 (Fla. 2d DCA 1980) and Jones v. State , 346 So.2d 639 (Fla. 2d DCA 1977).

An accused may waive his right to have an attorney present after he has invoked his right to counsel. See , Edwards , supra . However, once a defendant asserts his right to counsel, the State has a heavy burden to prove a subsequent statement is the product of a knowing and intelligent waiver of the right to remain silent. See, Buehler , supra. The Courts will "indulge in every reasonable presumption against waiver." Buehler, supra, See, also, Jones v. State, supra.

Florida Courts have recognized that relatively little pressure by the police may overcome a suspect's will to remain silent. Bowen v. State , supra . Courts will carefully scrutinize the actions of interrogating officers where a Defendant has asserted his right to remain silent.

After an accused has requested counsel, a subsequent statement will be inadmissible even if it was not the product of direct interrogation. Jones , supra . The United States Supreme Court has held that the Miranda safeguards come into play whenever a person in custody is subjected to express questioning or its functional equivalent. See, Rhode Island v. Innis , 446 U.S. 291 (1980). Where the police attempt to obtain incriminating statements by continuing to converse with an accused after he has invoked his rights

under Miranda , the police actions will be considered interrogation. See , Jones , supra .

The Trial Court found that Respondent informed Officers Copeland and Driggers of his desire to have an attorney during the trip to Miami (R 975). Respondent stated, "I want an attorney" (R 396). At the time he requested an attorney, he was crying heavily (R 413). He lost control of his emotions at that time (R 413). After Respondent requested a lawyer, his attitude towards the police was different (R 448-449). He "clammed up" (R 449).

Detective Driggers and Copeland did nothing about an attorney after Respondent requested counsel (R 414-415). They continued to travel to Miami to recover the guns (R 414). When Respondent requested a lawyer, Detective Driggers knew that "he wanted a lawyer and not to be questioned anymore about the case" (R 453).

After Respondent's request for an attorney, Detective Driggers continued asking Respondent for directions to the home in Miami (R 453-454). The Trial Court found that Detective Driggers asked Jon LeCroy for directions from time to time (R 975). Without requesting directions from Respondent, the detectives had no idea where the house they were going to was located (R 413, 453). The Trial Court found that Detective Driggers was driving to a then unknown destination in Miami (R 975) (Trial Court emphasis).

After the gun was recovered, Respondent was brought to his parents' home. Jon asked his father, "will you get me an attorney?"

four or five times (R 402, 414). Detective Copeland was present when these requests were made (R 402). Respondent's father, refused to get Respondent an attorney (R 402).

The Trial Court found that on January 11, 1981, after returning from Miami, Detective Copeland informed Detective Browning that Respondent had requested an attorney during the trip to Miami (R 975). Shortly thereafter, Detective Browning approached Respondent and asked him if he would be willing to talk to Detective Browning (R 78). Jon gave an exculpatory statement on January 12, 1981, at 12:45 a.m.

Sub judice, there was a clear and unequivocal request for an attorney made by Respondent during the trip to Miami (R 975). It is equally clear that the detectives hearing the request for counsel ignored the request entirely (R 414-415). They continued to travel to Miami to recover the gun they were after (R 414). They knew the gun would provide incriminating evidence agaist Respondent. The detectives initiated further questioning after Respondent requested an attorney by asking Respondent directions which they needed in order to recover this incriminating evidence (R 975, 453-454).

The facts before this Court are similar to the facts in Buehler, supra. In Buehler, officers were transporting the Appellant. The Appellant indicated to the officers that he wanted to speak to his attorney before he answered questions. During the trip, one of the officers began a conversation with the Appellant. The Appellant gave an inculpatory statement. The Court in Buehler found that the State

failed to demonstrate a knowing and intelligent waiver of the Appellant's right to remain silent and to consult an attorney. The Court further found that the officers engaged in a course of conduct designed to subtly avoid the effect of the Appellant's refusal to give a statement. In the instant case, Detective Driggers continued to question Respondent as to the location of the home in Miami where the incriminating evidence could be found (R 975, 453-454). Detective Driggers continued the questioning despite the fact that he knew Jon, "wanted a lawyer and not to be questioned any more about the case" (R 453). As in Buehler , supra, the officers here subtly avoided Respondent's request for counsel.

Petitioner argues that the detectives scrupulously and continuously observed Respondent's request for counsel (Petitioner's brief at page 30). The facts show otherwise. Detective Copeland admitted that he and Detective Driggers did nothing about an attorney after Jon requested counsel (R 414-415). The Trial Court found that Detective Driggers continued to question Respondent after the request for an attorney (R 975).

Petitioner also argues that Respondent's request for a polygraph examination was initiation of dialogue under Edwards , supra . This position entirely ignores the questioning by Detective Driggers during the trip to Miami which was for the sole purpose of obtaining incriminating evidence against Respondent (R 453, 454, 975). The violation of Respondent's rights took place at the time Detective

Driggers questioned Respondent concerning the location of the home in Miami. Subsequent statements by Respondent were fruits of this violation and clearly cannot be used to show that Respondent initiated questioning by the police. Wong Sun v. United States , 371 U.S. 471 (1963).

Petitioner cites Cannady v. State , 427 So.2d 723 (Fla. 1983) and Waterhouse v. State , 429 So.2d 301 (Fla. 1983) for the proposition that the police can make further inquiry to clarify a defendant's wishes if the defendant requests counsel and at the same time continues to confess. In Cannady , supra ., the defendant stated "I think I should call my lawyer." The defendant immediately thereafter continued his confession. This Court found that further inquiry to clarify the suspect's wishes was proper, Sub judice , the Respondent clearly and unequivocably stated "I want an attorney" (R 396). The subsequent questioning by Officer Driggers was not designed to clarify Respondent's wishes with regard to the desire for counsel. Respondent's desire was clear (R 453). Officer Drigger's questioning was designed to elicit an incriminating statement, the location of the firearm being sought by the police.

Respondent invoked his right to counsel. The police initiated further interrogation after this request for counsel. The State below failed to meet the heavy burden of proving that any subsequent statements from Respondent were the product of a knowing and intelligent waiver of his right to remain silent and consult an

attorney. Therefore, the Trial Court did not err in suppressing Respondent's statement made on January 12, 1981, at 12:45 a.m.

B. Dilution of Miranda Warnings

The Supreme Court in Miranda v. Arizona , supra , never required a ritualistic incantation of the words suggested in the Miranda decision. See California v. Prysock , 453 U.S. 355 (1981). Thus, where a suspect has all of his rights under the Miranda decision fully conveyed to him, his confession will be admissible even though the police fail to read his rights precisely as formulated by the Miranda decision.

However, when a suspect is not fully advised of his rights under Miranda , or those rights are diluted, the suspect's Fifth and Sixth Amendment Rights are violated and a subsequent confession is inadmissible. Cribbs v. State , 378 So.2d 316 (Fla. 1st DCA 1980), James v. State , 223 So.2d 52 (Fla. 4th DCA 1969), United States v. Stewart , 576 F.2d 50 (5th Cir. 1978) and California v. Prysock , supra . Where a suspect is not advised that he has a right to have counsel present during an interrogation and that counsel could be appointed for him before a hearing, the statement is inadmissible. Stewart , supra . Where a suspect was not told that any answers he gave could be used against him, the warning was held inadequate. United States v. Fowler , 476 F.2d 1081 (7th Cir 1973). Where a suspect was advised of his Miranda warnings but was not advised that he was entitled to an attorney prior to and during interrogation, the

warnings were found to be inadequate. James , supra .

In the instant case, the Trial Court found that Respondent was not given the warnings required under Miranda v. Arizona , supra , prior to the taped statement made on January 12, 1981, at 12:45 a.m. (R 976). Instead, Respondent was told:

> This statement is taken primarily in order to refresh your memory at the time that you may be called upon to testify, if and when the matter goes to Court (R 90).

The Trial Court found that the above-quoted admonition is inconsistent with Respondent's right to remain silent both before and during trial and is inconsistent with the warning that any statement would be used against him at trial (R 970). The Fourth District Court of Appeal upheld the Trial Court's suppression of the Respondent's statements on this ground. See, State v. LeCroy, supra .

The contested admonition diluted and vitiated the warnings required under Miranda v. Arizona , supra . The Miranda decision required that a suspect be told that anything said can and will be used against him in Court. The Supreme Court in requiring a suspect to be warned of this right stated:

> 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.

After being told that his statement was being taken primarily for the purpose of refreshing his memory, the Respondent could no longer presume that anything he said could and would be used against him in Court. Thus, he was unaware of the consequences of foregoing the right to remain silent.

In Cribbs v. State , supra , the defendant was given the standard Miranda warnings. He then attempted to place a telephone call to the Public Defender's Office. A police officer told him that the Public Defender could not represent him unless the Court appointed the Public Defender. The Defendant was then informed that, "your rights still stand." He then confessed. The Court in Cribbs , supra, found that the officer's remarks, "vitiated the Miranda warnings previously given Cribbs." Sub judice, just prior to Respondent's statement he was not informed of his Miranda rights. Instead, he was told that the primary purpose of the statement was to refresh his memory. As in Cribbs , supra , Respondent's Miranda warnings were vitiated and diluted.

Petitioner argues that the Trial Court suppressed the statement made on January 12, 1981, at 12:45 a.m., because it incorrectly ruled that law enforcement officers were required to use

the exact language of the warnings in Miranda v. Arizona , supra . This argument misses the thrust of the Trial Court's ruling. The Trial Court ruled that the warning given to Respondent was inconsistent with his right to remain silent and inconsistent with the warning that any statement made would be used against him (R 970). We do not have a situation where a suspect is fully informed of all his rights under Miranda but is not informed of his rights in the exact language set forth in Miranda opinion. Rather, we have a situation where the suspect is given inconsistent and diluted Miranda warnings which did not fully inform him of his rights under Miranda v. Arizona, supra.

Petitioner further argues that the contested warning, "may have slightly misstated the use to which the confession would be put" (Petitioner's brief at page 20). On the contrary, the challenged admonition did not slightly misstate the use to which Respondent's statement would be put. Rather, the challenged statement completely misstated the use to which Respondent's statement would be put. The additional language was a prejudicial dilution of Respondent's Miranda warnings which vitiated and diluted the other warnings given to Respondent previously.

Petitioner argues that the Trial Court should have determined the propriety of the incorrect advisement based upon the "totality of the circumstances analysis." The Trial Court correctly determined that the improper advisement must be analyzed using the

criteria set forth in Miranda v. Arizona , supra ., and its progeny. See also, State v. LeCroy, supra, at page 356. The Trial Court found that the improper advisement did not meet the standards set forth in Miranda v. Arizona , because the Respondent's rights were diluted and vitiated.

The Trial Court also ruled that the challenged admonition deluded the Defendant as to his true position and thus rendered the Respondent's subsequent statements involuntary. This ruling will be discussed in the Voluntariness Section of this Brief, infra .

Respondent's rights under Miranda v. Arizona , supra ., were violated by the above-quoted admonition. This admonition prejudicially diluted and vitiated Repondant's Fifth and Fourteenth Amendment rights. Therefore, the Trial Court did not err in suppressing Respondent's statement made on January 12, 1981, at 12:45 a.m.

III. THE STATEMENT OBTAINED FROM RESPONDENT WAS INVOLUNTARY

A. Statement Given in Exchange for a Promise

A confession to be admissible in evidence must be shown to have been voluntarily made. Brewer v. State . 386 So.2d 232 (Fla 1980).

A direct or implied promise may not be used to extract a confession. Bram v. United States , 168 U.S. 532 (1897). A confession should be excluded from evidence if the attending

circumstances or the declarations of those present are calculated to delude the prisoner as to his true position or to exert improper and undue influence over his mind. Bram , supra ., and Foreman v. State, 400 So.2d 1047 (Fla 1st DCA 1981).

A confession obtained by any direct or implied promises, however slight, is inadmissible. Brewer, supra, Foreman, supra, Fillinger v. State, 349 So.2d 714 (Fla. 2d DCA 1977) and M.D.B. v. State, 311 So.2d 399 (Fla. 4th DCA 1975).

In the instant case, Detective Browning approached Appellee and asked him if he would be willing to talk (R 78). Respondent told Browning that if he promised that Respondent could have a polygraph, Respondent would talk with Browning (R 160). Detective Browning agreed to that arrangement (R 161). The Trial Court found that Respondent's willingness to give the taped statement was conditioned upon being given a polygraph examination (R 976). Furthermore, the Trial Court found under the totality of the circumstances, that the statement given on January 12, 1981, at 12:45 a.m., was not freely and voluntarily given.

Petitioner does not argue that Respondent's statement of January 12, 1981 at 12:45 a.m., was not given in exchange for a promise. In fact, Petitioner admits that Respondent was promised a polygraph in exchange for his statement (Petitioner's brief at page 7).

It is undisputed that Respondent was promised a polygraph examination in exchange for the statement given on January 12, 1981,

at 12:45 a.m. A statement may not be obtained by any direct or implied promises, however slight. Therefore, the Trial Court did not err in suppressing Respondent's statement of January 12, 1981, at 12:45 a.m.

B. Deluding Respondent

If the circumstances surrounding a confession delude a suspect as to his true position, the confession is involuntary. Brewer , supra and Fillinger , supra . The Supreme Court in Bram v. United States, supra stated:

> The confession should be excluded if the attending circumstances, or the declarations of those present at the making of the confession, are calculated to delude the prisoner as to his true position, or to exert improper and undue influence over his mind. 168 U.S. at 542-43.

See also Brewer , supra and Fillinger , supra .

If a suspect is deceived, or tricked, or misrepresentations are made to him, these are factors that must be considered when viewing the totality of the circumstances surrounding the confession. Gaspard v. State , 387 So.2d 1016 (Fla. 1st DCA 1970).

In the instant case, Respondent was told prior to his statement on January 12, 1981, at 12:45 a.m., that:

> This statement is taken primarily in order to refresh your memory at the time that you may be called upon to testify, if and when the matter goes to Court (R 90).

Detective Browning admitted that his primary purpose in taking the

statement from Respondent was to get incriminating statements from Respondent (R 185).

It is hard to imagine another statement which could be more calculated to delude a suspect. A suspect at least has the right to know the purpose for which his statement is being taken, Miranda v. Arizona, supra. Here, not only was Respondent deluded, he was also deliberately deceived as to the primary purpose of his statement (R 185).

Petitioner argues that Respondent's statement was the product of Respondent's "will to confess." It must be noted that Respondent's statement made on January 12, 1981, at 12:45 a.m. was an exculpatory statement in which Respondent completely denied involvement in the crimes charged (R 89-112). Thus, it is ludicrous to argue that Respondent's statement was the product of a "will to confess."

The Trial Court, after examining the totality of the circumstances, ruled that the statement obtained from Respondent on January 12, 1981, at 12:45 a.m., was not freely and voluntarily given. The Trial Court found that the above-quoted admonition deluded Respondent as to his true position (R 976). The Trial Court's conclusions of fact and determinaion of voluntariness, arrived at after evaluating the totality of circumstances comes to the Appellate Court clothed with a presumption of correctness. Shapiro v. State, supra, and Bova v. State, supra.

The above-stated admonition has been examined previously in

Knowles v. State , 407 So.2d 259 (Fla. 4th DCA 1981). In that case, the Court affirmed per curiam the Trial Court's finding of voluntariness. In a specially concurring opinion, Judge Anstead noted that in other instances, such conduct might well be the factor that tips the scales against a finding of voluntariness. This Court presently has before it a statement which was found to be deficient by the Trial Court on several grounds. The deluding of Respondent certainly was a factor that tipped the scales against a finding of voluntariness.

Respondent was told that the primary purpose of his statement was to refresh his memory. This statement deluded and deceived Respondent. Under the totality of the circumstances, this admonition rendered Respondent's statement on January 12, 1981, at 12:45 a.m., involuntary. Therefore, the Trial Court did not err in suppressing Respondent's statement given on January 12, 1981 at 12:45 a.m.

IV. CONCLUSION

Based on all of the factors discussed supra, the Trial Court corcectly suppressed Respondent's statement given on January 12, 1981 at 12:45 a.m.

POINT II

THE TRIAL COURT CORRECTLY SUPPRESSED RESPONDENT'S STATEMENT ON JANUARY 12, 1981, AT 8:43 P.M.

I. INTRODUCTION

The Trial Court suppressed Respondent's statement taken on January 12, 1981, at 8:43 p.m., based on the totality of the circumstances on several grounds (R 977). Each ground must also be considered as a factor in determining under the totality of the circumstances whether the statement was voluntary. The Trial Court's conclusions of fact and determinaion of voluntariness, arrived at after evaluating the totality of circumstances come to this Court clothed with a presumption of corrrectness. Shapiro , supra , and Bova , supra .

II. FRUIT OF TAINTED STATEMENT

The Supreme Court in Brewer v. State , supra stated:

> Once it is established that there were coercive influences attendent upon an initial confession the coercion is presumed to continue "unless clearly shown to have been removed prior to a subsequent confession." 386 So.2d at 236.

See , Wong Sun v. United States , supra and Brown v. Illinois , 422 U.S. 590 (1975).

To determine if coercive influences have been removed, the Trial Court must determine from the totality of the circumstances whether, "the influence of the coercion that produced the first confession was

dissipated so that the second confession was the voluntary act of a free will." Brewer , 386 So.2d at 236.

In the instant case, Respondent was taken to his First Appearance hearing on January 12, 1981 (R 976). Prior to that hearing, the Assistant State Attorney was informed of the scheduled polygraph examination (R 117, 180). Respondent requested the appointment of the Public Defender. The Public Defender was appointed to represent Respondent (R 976-977). The Public Defender asked the Judge to issue a gag order so that the police could not speak to Respondent without first notifying the Public Defender (R 318). Detectives Browning and Welty were present at that First Appearance hearing and heard the request for a gag order. The Judge denied the gag order (R 977).

The First Appearance Judge was not notified that Respondent had requested an attorney the previous day (R 343). Neither the Judge nor the Public Defender was notified that a polygraph examination was scheduled immediately after the First Appearance hearing (R 343). After the hearing, Detective Browning again discussed the polygraph with the Assistant State Attorey (R 180).

After the hearing, Detectives Browning and Welty went into the holding cell where Respondent was detained (R 121). Respondent was not advised of his Miranda warnings. Detective Browning told Respondent that even though his Public Defender did not want him to speak to any police officer, he could do so (R 319). Respondent was also told that the Judge said it would be fine if he wanted to talk to any police

officer (R 318). He was also told that, "your attorney said that you shouldn't talk to the police but if you want to, you can talk to the polce and take a polygraph" (R 346). Respondent was not advised of his right to have an attorney present at the polygraph examination. Jon then agreed to take a polygraph examination.

Respondent was taken to the polygraph examination and then returned to the Sheriff's Office (R 179, 181). At the Sheriff's Office, Respondent was read his Miranda warnings (R 977). Respondent gave an exculpatory statement which was inconsistent with his two previous statements.

The influence of the coercion that produced the first statement was not dissipated. Under these facts the taint was worsened. Even after Respondent requested the appointment of counsel and after counsel was appointed the detectives continued their pursuit of Respondent. Respondent was not out of the influence of the officers he admittedly disliked during the time between interrogations. Respondent was not given a chance to privately confer with counsel. Respondent's First Appearance hearing was brief and purfunctory. Under the totality of circumstances, nothing of significance happened to break the stream of events and dissipate the coercive influences exerted on Respondent. See , Brewer , supra .

The facts of Brewer , supra , closely parallel the facts in this case. In Brewer , after an initial unlawful confession, the Defendant had his First Appearance hearing. After the hearing the

Defendant, who was in custody, was approached by the same officers that obtained his confession. The officers wanted a written version of his statement. The Defendant wrote out a confession. The Court in Brewer , supra , ruled that the First Appearance hearing was not sufficient to dissipate the coercive influences exerted on the Defendant. Here, the only significant event was Respondent's appearance before the Judge. As in Brewer , the brief appearance before a First Appearance Judge was not sufficient to break the stream of events and dissipate the coercive influences exerted on the Respondent.

Respondent's statement on Janary 12, 1981, at 12:45 a.m., was involuntary. The coercive influences attendant upon the initial confession were not removed prior to the statement on Janary 12, 1981, at 8:43 p.m. Therefore, the Trial Court did not err in suppressing Respondent's statement of January 12, 1981, at 8:45 p.m.

III. INTERROGATION AFTER REQUEST FOR COUNSEL

Respondent relies on and will not reiterate the law and argument cited in Issue One, Section II A, supra . Respondent requested an attorney during the trip to Miami on January 11, 1981. At the First Appearance hearing, Respondent requested the appointment of a Public Defender. The Public Defender was appointed to represent Respondent (R 976-977). After he hearing, Detectives Browning and Welty went into the holding cell (R 121). Among other things, Respondent was told that the Judge had stated that it would be fine if Respondent

wanted to talk to any police officer (R 318). Respondent was not advised of his Miranda warnings at this time. Respondent then agreed to take a polygraph examination.

The detectives here reinitiated questioning after Respondent's request for counsel on January 11, 1981, in violation of the dictates of Edwards , supra . The detectives then initiated further questioning of Respondent after his explicit request for counsel at the First Appearance hearing. Both detectives attended the hearing (R 121, 318). Both presumably heard Respondent's request that the Public Defender be appointed to represent him. Both detectives heard the request for a gag order. Despite Respondent's request for counsel at that hearing, the detectives continued further custodial interrogaion in violation of Respondent's Fifth and Sixth Amendment rights.

Petitioner argues that Respondent initiated further interrogation. Petitioner attempts to justify continued questioning after Respondent's two requests for counsel by stating that the police were merely fulfilling their promise to give Respondent a polygraph examination in exchange for his prior statement (Petitioner's Brief page 33). This argument bases the detectives right to question Respondent on the indisputably unlawful promise made to him the day before. This argument ignores all police misconduct which took place after Respondent was taken into custody. This argument also ignores Respondent's unequivocal requests for counsel during the trip to Miami and at the First Appearance hearing. Even if Respondent had

previously agreed to take a polygraph examination, once he invoked his right to counsel, the police could not initiate further custodial interrogation of Respondent. See Edwards , supra . The Trial Court found that it was the detectives, not Respondent , that initiated further questioning after Respondent requested an attorney at the First Appearance Hearing by approaching Respondent in the holding cell and then taking him to the polygraph examination (R 977).

The police initiated interrogation after Respondent's request for counsel on January 11, 1981, and again after he requested counsel at the First Appearance hearing. Therefore, the Trial Court did not err in suppressing Respondent's statement.

IV. VIOLATION OF RESPONDENT'S SIXTH AMENDMENT RIGHTS

In Massiah v. United States , 377 U.S. 201 (1964), the Supreme Court held that a violation of basic Sixth Amendment protections occurred when Federal Agents deliberately and serrepititiously elicited incriminating statements from a defendant after he was Indicted and in the absence of counsel. Florida Courts have adopted this rule. Dismukes v. State , 324 So.2d 201 (Fla. 1st DCA 1975) and Malone v. State , 390 So.2d 338 (Fla. 1980).

The United States Supreme Court in Brewer v. Williams , 430 U.S. 387 (1977) held that Sixth Amendment violations can occur absent serreptitious conduct on the part of law enforcement officers. The Court in Brewer v. Williams , supra , stated:

> That the incriminating statements were elicited serreptitiously in the Massiah

> case and otherwise here, is constitutionally irrelevant. 430 U.S. at 400.

The Supreme Court in Massiah , supra , applied the Sixth Amendment right to counsel in a post-indictment situation. See also, Dismukes, supra, and Malone, supra . However, the Courts have ruled that a suspect's Sixth Amendment right to counsel attaches at any "critical stage" of the proceedings. Estelle v. Smith , ___U.S. _____, 101 S.Ct. 1866 (1981) and Brewer , supra .

An accused may waive his Sixth Amendment right to counsel during a critical stage of the proceedings. However, Courts must indulge in every reasonable presumption against waiver and this strict standard applies equally to a waiver of the right to counsel at trial or at a critical stage of pretrial proceedings. Brewer, supra.

In Florida, an accused is entitled to the appointment of counsel under Fla. R. Crim. Pro. 3.111(a) when:

> He is formally charged with an offense, or as soon as feasible after custodial restraint or upon his first appearance before a committting magistrate, whichever occurs earliest.

Thus, under Florida law, an accused is entitled to the appointment of counsel at his First Appearance hearing.

The Trial Court ruled that it was suppressing Respondent's statement of January 12, 1981, at 8:43 p.m., in part, on the basis of a violation of Respondent's Sixth Amendment right to counsel (R 977-978). Thus, the Trial Court determined Respondent was facing a

critical stage in the proceedings against him at the time he spoke to the detectives and that Respondent did not waive his right to counsel in the holding cell. The facts show that the confrontation in the holding cell, polygraph examination and subsequent statement were critical stages in Respondent's prosecution. Furthermore, the State below failed to meet its heavy burden in showing that Respondent waived his Sixth Amendment privilege. Respondent had a right to and was appointed a Public Defender at the First Appearance hearing. The statements elicited would ultimately form an important part of the State's evidence against him. As in Brewer , supra, Respondent had already been arrested and committed by the Court to confinement in jail.

Respondent did not waive his Sixth Amendment Right to counsel after his First Appearance hearing. Although Respondent agreed to take a polygraph examination, he was not asked to and did not specifically waive his right to have counsel present. Only after Respondent was told that the First Appearance Judge had said that it would be fine if he wanted to talk, did he agree.

Respondent's agreement to take the examination was not an intentional relinquishment or abandonment of his right to counsel. This Court must view Respondent's alleged waiver in context and must, "indulge in every reasonable presumption against waiver" Brewer, supra. It cannot be said under these facts that Respondent waived his Sixth Amendment right to counsel.

In Estelle v. Smith, supra, a defendant charged with a capital offense was given a psychiatric examination without counsel being notified. The Court in Estelle, supra, held that the defendant's Sixth Amendment right to counsel was violated because defense counsel was not notified in advance of the psychiatric examination and because the defendant was denied the assistance of his attorneys in making the decision of whether or not to submit to the psychiatric examination. Here, the Public Defender was not notified that Respondent was to be questioned or given a polygraph examination and Respondent was denied the assistance of his Public Defender in making the significant decision of whether or not to submit to the polygraph examination and give a subsequent statement.

Petitioner argues that the Trial Court in essence held, that once an attorney was appointed, Respondent could not voluntarily choose to give a statement to the police. The Trial Court did not so hold. As stated above, an accused may waive his Sixth Amendment right to counsel. However, courts indulge in every reasonable presumption against such a waiver. Brewer, supra. Here, there was no waiver of Respondent's Sixth Amendment right to counsel.

Petitioner further argues that Estelle, supra, turned on the fact that the defendant was not made aware of his right to counsel before submitting to the psychiatric examination. Petitioner argues that this lack of awareness distinguishes Estelle, supra, from the instant case. The Petitioner's argument has no merit. The Supreme

Court in Estelle, supra, specifically found that:

> Defense counsel, however, were not notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness, and Respondent was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's finding could be employed. 101 S.Ct. at 1877.

Here too, Respondent's counsel was not notified in advance of the polygraph examination and subsequent statement. Here too, Respondent was denied the assistance of his attorney in making the decision of whether to submit to the examination.

When questioned in the holding cell, during the polygraph examination and during the questioning on January 12, 1981, at 8:43 p.m., Respondent was facing a critical stage in the proceedings against him. Respondent was denied his Sixth Amendment right to counsel. Respondent did not waive his right to counsel. Therefore, the Trial Court did not err in suppressing Respondent's statement given on January 12, 1981, at 8:43 p.m., based on a denial of Respondent's Sixth Amendment right to counsel.

V. CONCLUSION

Based on the totality of the circumstances, the Trial Court did not err in suppressing Respondent's statement given on January 12, 1981, at 8:43 p.m.

POINT III

THE TRIAL COURT CORRECTLY SUPPRESSED THE STATEMENT OF JON LE CROY MADE ON JANUARY 13, 1981.

Under the totality of the circumstances, the Trial Court ruled that the statement taken on January 13, 1981, should be suppressed (R 978). Each ground relied upon by the Trial Court is independently sufficient to exclude the statement. Each is also a factor in determining from the totality of circumstances whether the statement was voluntary.

Again, the Trial Court's conclusions of fact and determination of voluntariness comes to this Court clothed with a presumption of correctness, Shapiro, supra and Bova, supra.

Respondent will rely on the previous discussions of the Trial Court's rulings in Points One and Two. Respondent will only discuss the few additional pertinent facts necessary to determine if Respondent's statement was the "fruit" of the prior tainted statements.

Respondent was questioned on January 12, 1981, at 8:43 p.m. The next day, he was brought to the Sheriff's Office and was again questioned by Detectives Welty and Driggers (R 978, 209), Again, the Pupblic Defender's Office was not notified that Respondent was to be questioned (R 978). Respondent was read his Miranda warnings and was again told that the primary purpose of the statement was to refresh his memory in Court (R 209).

The Trial Court based on the totality of the circumstances suppressed Respondent's two prior taped statements. As previously stated, once it is found that there were coercive influences attendant upon the taking of an initial confession, the coercion is presumed to continue unless it is clearly shown to have been removed prior to a subsequent confession. Brewer v. State, supra.

The State below, presented no proof to show that the initial coercion was removed prior to Respondent's statement on January 13, 1981. The influence of the initial coercion that produced Respondent's statements on January 12, 1981, was not dissipated so that the statement made on January 13, 1981, was a voluntary act of free will. See, Brewer, supra. In fact, the police illegality continued on January 13, 1981. The Trial Court found that Detective Welty initiated furher questioning after Respondent invoked his right to counsel (R 978). Respondent again was misled as to the primary purposes for which the statement was to be used (R 209).

The taint and coercion of Respondent's initial statements continued through the statement on January 13, 1981. The State below failed to show that the coercive influences attendant upon Respondent's statements on January 12, 1981, had been removed. The Trial Court did not err in suppressing Respondent's statement given on January 13, 1981, as the fruit of the prior tainted statements and the other grounds listed, supra.

POINT IV

THE TRIAL COURT CORRECTLY SUPPRESSED THE SEIZURE OF THE .38 CALIBER FIREARM.

The "fruit" of an unlawful statement obtained by exploitation of the illegal statement shall not be admitted into evidence against a defendant unless the evidence has been obtained by means sufficiently distinguishable to be purged of the primary taint, Wong Sun, supra. In Wong Sun, supra, a suspect made an unlawful statement which led the police to the home of another person where narcotics were located. The Supreme Court determined that evidence seized in this manner should be suppressed.

Recently, the Supreme Court and Florida Courts have narrowed a defendant's right to object to illegally obtained evidence. The United States Supreme Court in Rakas v. Illinois, 439 U.S. 128 (1978), stated that Fourth Amendment rights are personal rights which may not be vicariously asserted. However, the Fourth Amendment concept of standing has not been applied to violations of suspect's Fifth and Sixth Amendment rights. See, Rakas, supra, United States v. Salvucci, 488 U.S. 83 (1980), Norman v. State, 388 So.2d 613 (Fla. 3d DCA 1980), Smith v. State, 400 So.2d 27 (Fla. 2d DCA 1981), State v. Hutchinson, 404 So.2d. 361 (Fla. 2d DCA 1981) and Dean v. State, 406 So.2d 1162 (Fla. 2d DCA 1981).

Sub judice, the detectives violated Respondent's Fifth and Sixth Amendment Rights, under Miranda supra. by questioning Respondent

after he requested counsel (R 453, 454). The recovery of the .38 caliber firearm was obtained by exploitation of the illegal police initiated questioning. See, Wong Sun, supra. Respondant cannot argue that the gun was obtained by means sufficiently distinguishable to be purged of the primary taint. See, Wong Sun, supra and Brewer v. United States, supra.

Petitioner argues in effect that Respondant initiated further questioning by giving the officers directions after requesting a lawyer. However, the Trial Court found that the police initiated questioning (R 976). The Trial Court fund that Officer Driggers from time to time asked Respondant for directions (R 975). This was the initiation of questioning after Respondant requested counsel. Thus, the seizure of the firearm was "a fruit" of the continued interrogation of Respondant after his request for counsel.

Petitioner further argues that the firearm should not be suppressed as the seizure falls within the inevitable discovery exception. See also, Dissenting opinion in State v. LeCroy, supra, at page 358-363. This argument completely ignores the facts elicited at the Motion to Suppress. The testimony revealed that at the time the firearm was seized, Co-Respondant, Cleo LeCroy, and Respondant each had made one statement. Neither statement revealed the location of the .38 caliber firearm (R 544, 547, 552, 392-393). As noted by the Fourth District Court of Appeals, there is no evidentiary indication that the .38 caliber firearm would have been

discovered but for the statement made by Respondant after he had requested an attorney. See State v. LeCroy, supra at 357.

Petitioner argues that Respondant lacked standing to contest the seizure of the firearms. Petitioner claims that Respondant cannot show "injury in fact" to Respondant's rights and would be basing his claim for relief on the rights of a third party. Petitioner cited Rakas, supra and Salvucci, supra, for this proposition. As stated previously, Rakas, supra and Salvucci, supra, stand for the proposition that defendants challenging a violation of their Fourth Amendment rights must prove that their own rights have in fact been violated. Petitioner cited no cases for the proposition that a defendant challenging the fruit of a Fifth Amendment violation must prove "standing." Furthermore, in the instant case, Respondant's own rights have in fact been violated. Respondant had a right to be free from police initiated questioning after requesting an attorney. The police ignored Respondant's request for an attorney and continued to quetion him in order to obtain incriminating evidence. These facts show that Respondant's rights, in fact, have been violated.

The .38 caliber firearm was seized by exploitation of the unlawful statement obtained from Respondant. Therefore, the Trial Court did not err in suppressing the seizure of the .38 caliber firearm.

POINT V

THE TRIAL COURT CORRECTLY DISMISSED COUNT V OF THE INDICTMENT.

The Trial Court dismissed Count V of the Indictment on two grounds discussed below (R 965).

A. Vagueness

Where an Indictment, alleging all the essential elements of a crime, tracks the statutory language of the crime charged, the allegations will normally be sufficient to initiate a prosecution. State v. Covington, 392 So.2d 1321 (Fla. 1981). However, the statutory language and descriptive factual allegations must:

> state the nature and the cause of the allegation without misleading the accused in concerting his defense. Covington, supra at 1323.

Even if the Indictment tracks the statute, if the allegations are still vague, indefinite, inconsistant or calculated to mislead the defendant or expose him to double jeopardy, the Indictment is insufficient. Covington, supra. See also, Beatty v. State, 418 So.2d 271 (Fla. 2nd DCA 1982).

An Information charging violations of anti-fraud provisions in the Sale of Securities Law, merely tracking the statutory language without a supplemental description of the alleged misconduct was subject to a Motion to Dismiss. Covington, supra. An Information

charging a violation of the RICO Statute by tracking the statutory language was held to be insufficient because it was not supplemented by appropriate allegations of the particular act deemed to constitute the offense. Beatty, supra. See also, Battle v. State, 365 So.2d 1035 (Fla. 3d DCA 1978).

Respondant is charged in Count V of the Indictment with Tampering or Fabricating with Physical Evidence. Section 918.13 Florida Statutes reads as follows:

> (1) No person, knowing that a criminal trial proceeding or an investigation by a duly constituted prosecuting authority, law enforcement agency, grand jury or legislative committee of this state is pending or is about to be instituted, shall:
>
> (a) alter, destroy, conceal, or remove any record, document or thing with the purpose to impair its verity or availability in such proceeding or investigation.

Count V of the Indictment in pertinent part charges that Respondant

> did knowingly and unlawfully, knowing that a criminal investigation by a duly constituted law enforcement agency was pending and/or in progress, concealed a 30.06 rifle and a .38 caliber revolver with the purpose to impair their availability in said investigation, contrary to Florida Statute 918.13.

Count V of the Indictment in this cause is vague, indefinite, inconsistent and calculated to mislead the Respondant in the

preparation of his defense and is likely to expose him to the danger of a second prosecution. Although Count V tracks the statutory language of Florida Statute 918.13, it fails to name the criminal investigation that was pending or in progress. Furthermore, Count V does not inform Respondant of the specific acts which he allegedly committed which constituted concealment of the firearms named in Count V.

Petitioner's argument in the self-incrimination section of his brief clearly shows the prejudicial vagueness of Count V. Petitioner in his brief argues that Petitioner is not charged with merely concealing contraband in Count V. Respondant quotes the Assistant State Attorney's representation that:

> The Defendants are charged with intentionally hiding evidence by overt acts such as trying to sell or dispose of evidence, to impede the investigation (R 935).

Without this representation, Respondant would not know what specific conduct constituted concealment of the firearms on his part. Furthermore, the State below is not bound by these representation of the Assistant State Attorney. Count V as charged would allow the Respondant to be prosecuted for the overt acts of trying to sell or dispose of evidence and later be subject to prosecution for other acts of concealment he might have engaged in.

Petitioner further argues that Count V's recitation of the items concealed puts Respondants on notice of the alleged criminal acts

(Petitioner's brief page 42). In reality, the list of items concealed sheds no light on Respondant's acts which allegedly constitute concealment and gives no indication of the type of criminal investigation which was pending at the time of the concealment.

Lastly, the Petitioner argues that Respondant could seek a Statement of Particulars which would supply the allegations omitted in Count V of the Indictment. A Statement of Particulars was filed by the State in this cause (R 769-772). The Statement of Particulars filed does not apprise the Respondant of the acts whch constituted concealment or the nature of the criminal investigation which was pending at the time Respondant allegedly concealed the firearms.

Count V of the Indictment is vague, indefinite, inconsistent and is calculated to mislead the Respondent in the preparation of his defense. It also exposes him to the danger of a second prosecution for the same crime. Therefore, the Trial Court did not err in dismissing Count V of the Indictment.

B. Self-Incrimination

An individual may not be prosecuted for failure to comply with a statute where compliance subjects the individual to a real and appreciable risk of self-incrimination. Leary v. United States, 395 U.S. 6 (1969), Marchetti v. United States, 390 U.S. 39 (1968), Grosso v. United States, 390 U.S. 62 (1968), and Haynes v. United States, 390 U.S. 85 (1968).

In Leary, supra, the Petitioner was prosecuted for knowingly

transporting, concealing and facilitating the transportation and concealment of marijuana without having paid a transport tax imposed by the Marijuana Tax Act. The United States Supreme Court found:

> If read according to its terms, the Marijuana Tax Act compelled Petitioner to expose himself to a "real and appreciable" risk of self-incrimination, 395 U.S. at 16.

The Supreme Court further found that transmittal of the information required under the Marijuana Tax Act:

> would surely prove a significant 'link in a chain' of evidence tending to establish his guilt under the State marijuana laws then in effect. 395 U.S. at 16.

The Court in Leary, supra, found that a timely and proper assertion of the privilege against self-incrimination should have provided a complete defense to prosecution under the Act. See also, Marchetti, supra, Grosso, supra and Haynes, supra.

Respondent is charged in Count V of the Indictment with concealing two firearms. These are the same firearms that Respondant is alleged to have robbed in Counts III and IV of the Indictment (R 964). Respondant's compliance with Florida Statute 918.13 would have subjected Respondant to a real and appreciable risk of self-incrimination. Compliance with he Statute would have required Respondant to have brought forth the fruits of an alleged robbery. Such a requirement is inconsistent with Respondant's Fifth Amendment privilege against self-incrimination.

Petitioner distinguishes Leary, supra by stating that only communicative disclosures tending to incriminate are protected by the privilege against self-incrimination. The Trial Court found that this argument was a distinction without a difference under the facts of this case (R 965). The requirements of Florida Statute 918.13 under the facts of this case would require Respondant to bring forth the fruits of hs alleged criminal activity. To that extent, Respondant's actions would be communicative in nature and would also tend to incriminate him. Respondant's failure to conceal the fruits of his alleged crime would prove a significant link in the chain of evidence tending to establish his guilt and thus would violate his Fifth Amendment privilege against self-incrimination.

Petitioner further argues that Respondant's conduct goes beyond concealing evidence and Count V punishes Respondant for taking affirmative steps to dispose of evidence. (Petitioner's brief pages 45-46). Petitioner has misconstrued the Trial Court's ruling on this issue. The Court did not rule that Florida Statute 918.13 was unconstitutional as applied because it required Respondants to "turn themselves into authorities." Furthermore, it is not argued that Florida Statute 918.13 could never be used to prosecute a Defendant. However, where an individual is accused of a crime, requiring him not to conceal the fruits of the crime or requiring him to bring forth the fruits of the crime violates the individual's Fifth Amendment privilege agaist self-incrimination. See, Leary, supra,

Marchetti, supra, Grosso, supra, and Haynes, supra.

In the instant case, compliance with Florida Statute 918.13 would have subjected Respondant to a real and appreciable risk of self-incrimination. Furthermore, compliance would prove a significant link in the chain of evidence tending to establish Respondant's guilt of the other crimes charged in the Indictment. Thus, prosecution under Florida Statute 918.13, under the facts of this case, violates Respondant's privilege against self-incrimination. Therefore, the Trial Court did not err in dismissing Count V of the Indictment.

CONCLUSION

Based on the foregoing arguments and on the authorities cited herein, Respondent respectfully requests this Honorable Court to affirm the Trial Court's Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished to the Office of the Attorney General, 111 Georgia Avenue, West Palm Beach, Florida, and to James L. Eisenberg, Esquire, Suite 409, 319 Clematis Street, West Palm Beach, Florida, this 28th day of February, 1984.

MICHAEL DUBINER, ESQUIRE