IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CLEO D. LeCROY, et al.,

Respondent.

CASE NO. 64,744

PETITIONER'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 Respondents, 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" when appropriate.

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

STATEMENT OF THE CASE

The Respondents were charged by indictment with two counts of first degree murder, two counts of armed robbery, and one count of impairing an investigation by concealing evidence (R 758-759). Both Respondents filed motions to dismiss the armed robbery counts (R 784-785; 832), and to dismiss the concealing evidence charge, Count V (R 782-783; 786; 837-838; 839). They also filed motions to suppress their confessions (R 854-855; 859-860; 882-883) and physical evidence (R 863-864; 896-899).

After conducting hearings, the trial court entered an order ruling on the foregoing motions as well as others that were not appealed (R 962-980). The State appealed the adverse rulings dismissing Counts III-V and

suppressing the evidence and confessions to the Fourth District Court of Appeal. In an opinion reported at 435 So.2d 354 (4th DCA Fla. 1983), the court reversed the trial court's dismissal of Counts III and IV, armed robbery, but otherwise affirmed the trial court's rulings. The court denied the State's motion for rehearing, but certified the following question to this Court as a matter of great public importance:

> 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 THE FACTS

Joyce LeCroy, Respondents' mother, had responded to media broadcasts about John and Gail Hardeman, who had been reported missing (R 504). Officer Welty contacted Joyce and her husband, Thomas LeCroy, by telephone, and learned that the LeCroys, including their two sons (Respondents) had been camping. The sons had told the parents about sighting people matching Hardemans' description (R 505). After conferring with the LeCroys in person and hearing Cleo's story, the officers requested pieces of the LeCroys' clothing. The three male LeCroys all said that they wanted to cooperate with the police to show that they weren't suspects. All of the LeCroys were free to refuse if they chose (R 510-511). After consulting with his superior, Welty went to Mr. and Mrs. LeCroy and asked if they would mind coming to the substation. Mr. LeCroy said something like, "I will be glad to go to clear ourselves and to show you we are not suspects." All the LeCroys accompanied Welty (R 515-517; R 295). Judge Harper found that this accompaniment was a voluntary decision of the LeCroys (R 969-971).

On January 11, Cleo made a taped confession which "was given freely and voluntarily and with an intelligent understanding on the part of the defendant of his rights under Miranda v. Arizona, 86 S.Ct. 1602 (1966), and of his

right of a juvenile to consult with his parents . . . no threats, promises or improper inducements were made or offered to defendant in exchange for the statement." (R 969; 516-517; 520-522). In light of the statement, "there was sufficient legal probable cause to make a warrantless arrest of Respondents." (R 969). Cleo admitted that he had met John and Gail Hardeman prior to the shooting incident (R 541). He admitted that he was hunting in the woods and shot at a wild pig. The shot ricocheted around the trees (R 529). Cleo used a .12 gauge shotgun and was carrying a .22 pistol (R 530). Cleo then saw John Hardeman laying on the ground (R 531; 542-543). He said that he panicked. He heard a bunch of twigs break, turned around and fired three times with his .22 at a brown jacket that was coming towards him (R 533; 544). At first, Cleo said that he wasn't sure who was in the jacket, but admitted that it "had to have been Gail" Hardeman wearing John Hardeman's jacket (R 534-535). He then admitted that he was "positive" it was Gail (R 536; 539). He saw blood squirt out of her (R 559). Later in the questioning, Cleo admitted that he killed Gail because he did not want her to be a witness (R 575-576). After the incident, Cleo told his brother what had happened (R 545). Cleo said that he was telling Welty this information to "get the blame off everybody else." (R 538). Based on all the variations in Cleo's accounts, he was arrested (R 581).

Up to this point, the trial judge found that there had been no violations of Respondents' constitutional rights (R 970).

The original waiver of Miranda rights occurred when Welty asked the LeCroys for an article of clothing at 10:10 a.m. (R 512-513). These rights were re-read to Cleo before Officer Welty took the first taped statement (R 520). This statement concluded at 2:20 p.m. (R 577). Cleo then asked to talk to Officer Browning (R 614-615). At about 5:00 p.m. (R 614), Browning advised Cleo of his Miranda rights. Cleo told Browning that he had not been completely honest with Welty and wanted to tell the truth (R 615). Browning then took a taped statement which began with another traditional Miranda rights waiver (R 616-617; 624-627). Before questioning, however, Browning made the following preliminary comment upon which the trial judge based his order of suppression:

> 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 628).

After taking the statement, Officers Browning and Welty took Cleo to Miami to recover guns that he had spoken about (R 74-75). On the way, certain incriminating statements were made. In Miami, two weapons belonging to the LeCroys were seized (R 584-585), those being a .22 caliber pistol and a rifle (R 585-586).

Although some of the testimony concerning Jon LeCroy is repetitive, some evidence is peculiar to issues in which he is involved. Officer Copeland took a statement from Jon at or about 3:30 p.m. (R 71). Jon made the statement freely and voluntarily, and with an intelligent understanding of his Miranda rights. No threats, promises or improper inducements were made. The complained about representation by police, that the primary purpose of the statement was to refresh the witness' memory, was not made at this time (R 387-394). This unchallenged confession led to a trip to Miami, and the guns that were later seized (R 392-394).

On the way to Miami, Jon sat in the rear of an unmarked police car without wearing handcuffs. He repeatedly stated, "My God, My God, I can't believe he did it. I know he did it," referring to Cleo (R 394-396). Then he said, "What kind of trouble am I going to be in?" Copeland said, "Jon, I don't know." Jon said, "I want an attorney." Copeland responded, "Okay, fine." Jon said, "What's going to happen to me?" Copeland responded, "Jon, I can't respond to you any more. You want an attorney. Let's keep it at that." Copeland had begun taking notes, but when Jon requested an attorney, Copeland put his "pad upon the dashboard." (R 396-397). Sergeant Driggers then said, "Now, Paul, be sure you do not ask him any more questions, period. Let's just shut up about it." (R 397).

According to Copeland, Jon extemporaneously volunteered directions (R 398-399). Driggers testified that from time to time, he asked Jon for directions. They arrived at their destination where Jon assisted the officers in recovering the firearms from the Harris and LeCroy residences (R 399; 402). During the entire traveling, Copeland refused to talk to Jon (R 400). While at the LeCroy home, Jon asked his father several times to get an attorney for him, but his father angrily refused (R 402). The officers were bystanders to the discussion between father and son (R 403).

Afterwards, the officers and Jon began their return to Belle Glade. Little conversation occurred after Jon's initial request, and he never again asked for an attorney (R 403). Upon arrival in Belle Glade, Jon asked, "How about my polygraph?", to which Copeland replied, "Jon, you asked for an attorney, no?" Jon responded, "I want a polygraph." The officers went inside the station (R 404). Shortly thereafter, Copeland informed Browning that Jon had requested an attorney and a polygraph examination. At that point, Jon began "yelling that he wanted a polygraph," and Browning went over to speak with him (R 404-405).

Browning denied that Copeland told him about Jon's request for an attorney (R 79; 161). Browning acknowledged he promised to give Jon a polygraph in exchange for his statement. Browning asked Jon if he would be willing to

talk with him, and Jon said he would if Browning "would promise him that he could take a polygraph" (R 79). At 12:45 on the morning of January 12, 1981, Officer Browning took a tape recorded statement from Jon. Browning himself did not give Jon Miranda warnings (R 114), but he did read:

> ...this statement is taken primarily in order to refresh your memory at the time you may be called upon to testify if and when the matter goes to court. (R 115).

Judge Harper suppressed this statement.

After taking the 12:45 A.M. statement from Jon, Officer Browning attempted to procure a polygraph operator (R 120). In the morning, Jon was taken to his first appearance hearing. The public defender was appointed (R 120). After Jon was returned to the holding cell, Browning and Welty approached Jon and said, "You have an attorney. Your attorney doesn't want you to talk to us. He doesn't want you to take a polygraph. Do you still want to take a polygraph?" Jon said he did (R 121).

After giving Jon his Miranda warnings and asking him if he was waiving his rights to an attorney, knowing that one had been appointed, Jon answered affirmatively, and the polygraph was administered (R 122). He was then transported back to Belle Glade. From the time of the polygraph to 8:43 P.M., Jon never mentioned his lawyer (R 122-123).

At 8:43, Browning gave Jon Miranda warnings but

did not include the above-quoted portion about refreshing his recollections. (R 126-127). In addition, Browning reminded Jon that his public defender did not wish for him to make a statement (R 127).

Jon LeCroy gave another statement at 6:54 P.M. on January 13, 1981. Prior to the giving of this statement, Officer Welty gave Jon "traditional Miranda warnings" and reminded him that the public defender did not wish for him to make any statements. Nevertheless, Jon agreed to talk. Officer Welty then added, "This statement is taken primarily in order to refresh your memory at the time you may be called upon to testify when this matter goes to court." (R 205-209).

Concerning the seizure of a .38 caliber firearm, according to Jon, the gun originally belonged to his brother Cleo, who asked Jon to dispose of it (R 392-393). Jon led the police to the guns in Miami (R 394). They arrived at a house belonging to a third person. Everyone went inside the third party's house, and the guns were seized (R 399).

EXPLANATORY NOTE

This appeal contains eight issues. Since this court has accepted the certified question, it has jurisdiction to review the other issues decided on appeal as well. Hillsborough Association For Retarded Citizens, Inc. v. City of Temple Terrace, 332 So.2d 610 (Fla. 1976). Issues I-III concern Cleo LeCroy, his confessions, and subsequent seizures of evidence. Points IV-VII concern Jon LeCroy, his confessions, and subsequent seizures of evidence. Many of the issues are continuous of preceding issues. The police engaged in an ongoing investigation, and many of the issues hinge on earlier occurrences. Some of the points involve facts or arguments which are somewhat repetitious, but an attempt has been made to limit repetition to instances where it serves a useful purpose. The question certified by the Fourth District Court of Appeal has a bearing on Points I-VI, but is primarily discussed in Point I. The inevitable discovery exception addressed by the disserting opinion is discussed in Points III and VII.

Issue VIII concerns the granting of the Motions to Dismiss Count V of the indictment and pertains to both Respondents.

POINTS INVOLVED

I.

WHETHER THE LOWER COURTS ERRED IN SUPPRESSING THE CONFESSION OF CLEO LeCROY?

II.

WHETHER THE LOWER COURTS ERRED IN SUPPRESSING STATEMENTS MADE BY CLEO LeCROY TO BROWNING AND WELTY ON THE WAY TO MIAMI?

III.

WHETHER THE LOWER COURTS ERRED IN SUPPRESSING THE SHOTGUN, .22 CALIBER PISTOL AND 30.06 RIFLE?

IV.

WHETHER THE LOWER COURTS ERRED IN SUPPRESSING THE CONFESSION OF JON LeCROY MADE AT 12:45 A.M. ON JANUARY 12, 1981?

V.

WHETHER THE LOWER COURTS ERRED IN SUPPRESSING THE CONFESSION OF JON LeCROY MADE AT 8:43 P.M. ON JANUARY 12, 1981?

VI.

WHETHER THE LOWER COURTS ERRED IN SUPPRESSING THE CONFESSION OF JON LeCROY MADE AT 6:54 P.M. ON JANUARY 13, 1981?

VII.

WHETHER THE LOWER COURTS ERRED IN SUPPRESSING THE .38 CALIBER FIREARM?

VIII.

WHETHER THE LOWER COURTS ERRED IN DISMISSING COUNT V OF THE INDICTMENT?

ARGUMENT

I.

THE LOWER COURTS ERRED IN SUPPRESSING THE CONFESSION OF CLEO LeCROY.

INTRODUCTION

The trial judge expressly found that the police investigation was absolutely proper up until the time Officer Browning took a second taped statement, State's Exhibit 3, from Respondent Cleo LeCroy. The sole basis of suppressing that confession was an introductory comment made by Browning concerning use of the confession. On appeal, the court upheld the trial judge's ruling, finding that but for the introductory comment, the confession would have been held to be voluntarily made.

Petitioner asserts the trial judge erred in suppressing Cleo's statement, and the Fourth District erred in affirming this order. By way of background, Petitioner will review the trial judge's findings of fact and law with regard to the motion, supplying supporting record references in brackets:

Respondent Cleo LeCroy voluntarily accompanied Officers Welty and Copeland to the Belle Glade Police Substation on the morning of January 11, 1981, followed by his parents. No Fourth Amendment seizure occurred at this time. [Joyce LeCroy, Appellee's mother, had responded to media

broadcasts about John and Gail Hardeman, who had been reported missing (R 504). Officer Welty contacted Joyce and her husband, Thomas LeCroy, by telephone, and learned that the LeCroys, including their two children (Respondents), had been camping. The children had told the parents about sighting people matching Hardiman's description (R 505). After conferring with the LeCroys in person and hearing Cleo's story, the officers requested pieces of the LeCroy's clothing. The three male LeCroys all said that they wanted to cooperate with the police to show that they weren't suspects. All the LeCroys were free to refuse if they chose (R 510-511). After consulting with his superior, Welty went to Mr. and Mrs. LeCroy, and asked if they would mind coming to the substation. Mr. LeCroy said something like, "I will be glad to go to clear ourselves and to show you we are not suspects." All the LeCroys accompanied Welty (R 515-517). Also see (R 295).]

On January 11, Cleo made a taped confession, State's Exhibit 2, which "was given freely and voluntarily and with an intelligent understanding on the part of the defendant of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), and of his right as a juvenile to consult with his parents... No threats, promises, or improper inducements were made or offered to defendant in exchange for the statement." [See (R 516-517; 520-522)]. In light of the

statement, "there was sufficient legal probable cause to make a warrantless arrest" of Respondents. [Cleo admitted that he had met John and Gail Hardeman prior to the shooting incident (R 541). He admitted that he was hunting in the woods and shot at a wild pig. The shot ricocheted around the trees (R 529). Cleo had used a .12 gauge shotgun and was carrying a .22 pistol (R 530). Cleo then saw John Hardeman laying on the ground (R 531; 542-543). He said that he panicked. He "heard a bunch of twigs bust," turned around, and fired three times with his .22 at a brown jacket that was coming towards him (R 533; 544). At first, Cleo said that he wasn't sure who was in the jacket, but admitted that it "had to have been Gail" Hardeman wearing John Hardiman's jacket (R 534-535). He then admitted that he was "positive" it was Gail (R 536; 539). He saw blood squirt out of her (R 559). Later in the questioning, Cleo admitted that he killed Gail because he did not want her to be a witness (R 575-576). After the incident, Cleo told his brother what had happened (R 545). Cleo said that he was telling Welty this information to "get the blame off everybody else." (R 538). Based on all the variations in Cleo's accounts, he was arrested (R 581).]

The trial judge found that up until this point, there had been no violations of Respondents' constitutional rights. However, a subsequent statement obtained from

Respondent was suppressed solely because of a comment made by Officer Browning.

THE ISSUE

The original waiver of Miranda rights occurred when Welty asked the LeCroys for an article of clothing at 10:10 A.M. (R 512-513). These rights were re-read to Cleo before Officer Welty took the first taped statement (R 520). This statement concluded at 2:20 P.M. (R 577). Cleo then asked to talk to Officer Browning (R 614-615). At about 5:00 P.M. (R 614), Browning advised Cleo of his Miranda rights. Cleo told Browning that he had not been completely honest with Welty and wanted to tell the truth (R 615). Browning then took a taped statement which began with another traditional Miranda rights waiver (R 616-617; 624-627). Before questioning, however, Browning made the following preliminary comment upon which the trial judge based his order of suppression:

> 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 628).

The trial judge held that this comment mandated suppression of the confession. Two grounds stated in support of this ruling were that 1) Miranda v. Arizona requires law enforcement officers to use the exact language

of that case, and 2) Officer Browning's comments were calculated to delude the prisoner as to his true position (R 970). On appeal, the court held the comment by Officer Browning was a fatal dilution of the Miranda warning, even though the court acknowledged the statements would have been given despite the comment.

The Petitioner submits the lower court's rulings were incorrect. In California v. Prysock, 453 U.S. 355 (1981), the Supreme Court stated,

> This Court has never indicated that the "rigidity" of Miranda extends to the precise formulation of the warnings given a criminal defendant...(citations omitted). This Court and others have stressed as one virtue of Miranda the fact that the giving of the warnings obviates the need for a case-by-case inquiry into the actual voluntariness of the admissions of the accused...(citations omitted). Nothing in these observations suggests any desirable rigidity in the form of the required warnings.
>
> Quite the contrary, Miranda itself indicated that no talismanic incantation was required to satisfy its strictures. 453 U.S. at 359.

In short, the courts do not require a verbatim recital of the words of the Miranda opinion, 453 U.S. at 360.

Therefore, contrary to the lower courts' opinion, the fact that the Miranda warnings may have been slightly

altered does not necessarily mean that the confession was legally involuntary. The additional comment by Officer Browning should not have been held to automatically exclude the confession; rather the courts should have decided whether, based on the totality of the circumstances, the confession was voluntarily made. Burch v. State, 343 So.2d 831 (Fla. 1977).

In the instant case, as the Fourth District acknowledged in its certified question, Cleo's taped statement (Exhibit 3) was, when measured by traditional tests, given voluntarily and without coercion or inducement. Cleo and his family had willingly accompanied the police to the Belle Glade substation in an effort to clear themselves. Miranda warnings had been given several times throughout the day between 10:10 A.M. and 5:00 P.M. There was absolutely no evidence of coercion or inducement through all those warnings, and Cleo voluntarily gave a taped statement (State's Exhibit 2), earlier in the afternoon, which was held admissible. Cleo himself sought out Officer Browning, specifically telling Browning that he hadn't been completely honest in his previous statement, and he wanted to tell the truth. Other than the alleged error committed by Browning in stating that the statement was being taken primarily to refresh Cleo's memory at the time he might be called to testify in court, there is absolutely no

other indication that Cleo was improperly induced or coerced into giving the statement. The statement itself (R 624-645) shows Cleo was anxious to talk, and clearly evidenced a "will to confess." Hawkins v. Wainwright, 399 So.2d 449 (4th DCA Fla. 1981).

The alleged improper inducement in the instant case was far less than in other cases where courts have found confessions voluntary. In Hawkins v. Wainwright, supra, the police officer told the defendant that his "was a serious crime and that the people in the community were enraged." The officer said that he did not believe the crime happened that way, and that if the defendant told the truth, the officer would see that the truth got out. There was additional evidence that the tape was shut off several times as the defendant "broke down and cried a little bit." Toward the end of the recorded statement, the defendant said, "They're going to kill me; they're going to kill me." The court reviewed the length of the confession and the defendant's willingness to clear his conscience, and refused to believe that the officer's somewhat confusing statement could have evoked such a lengthy confession. Instead, the court held that the defendant exercised his "will to confess."

In the instant case, Cleo was clearly aware that anything he said could be used against him in a court of

law. The extra language may have slightly misstated the use to which the confession would be put, but it did reiterate that Cleo would be "called upon to testify." In light of the numerous other warnings, and the fact that Cleo was aware that he was under investigation, it cannot be said that the confession was extracted by circumstances "calculated to delude" the confessor. There have been many cases where the court held a confession to be voluntary, despite alleged improper inducement by a police officer: Williams v. State, 69 So.2d 766 (Fla. 1953) ("It'll make it easier, if you tell me the truth."); Frazier v. State, 107 So.2d 16 (Fla. 1958) ("Get right and tell us what you know about this case."); and Paramore v. State, 229 So.2d 855, 858 (Fla. 1969), which stood for the proposition that telling an accused that it would be easier on him if he told the truth did not render a confession involuntary.

In terms of reported decisions, the Florida courts have faced the exact issue raised here only once prior to the decision in the instant case. In Knowles v. State, 407 So.2d 259 (4th DCA Fla. 1981), the police added the same language to the Miranda warnings that was added in the instant case. Ironically, in Knowles, the court held suppression of the confession was not required. Although the majority did not write an opinion, Judge Anstead, in concurring, stated that the incorrect statement increased the

State's burden but where the statement was shown to be voluntary, it was admissible despite the officer's comment. The Petitioner maintains that the "totality of the circumstances" analysis used in Knowles was the correct approach; one extraneous representation by the police should not render an otherwise valid confession involuntary.

In sum, Miranda does not require suppression of an otherwise valid confession due to an isolated misstatement by an officer. In the instant case, repeated correct warnings were given by the police, Cleo made one admissible taped statement, and he was undisputedly willing to speak to Officer Browning. The law did not require suppression of his confession and the lower court erred in so holding. This court should answer the certified question in the negative and hold that the officer's comment was merely one factor to be considered in a totality of the circumstances analyses. Based upon the totality of the circumstances in the case sub judice, Cleo's taped statement (State's Exhibit 3) should be ruled admissible.

II.

THE LOWER COURTS ERRED IN SUPPRESSING STATEMENTS MADE BY CLEO TO BROWNING AND WELTY ON THE WAY TO MIAMI.

The trial judge suppressed Cleo's statements to Officers Browning and Welty which were made during a car trip to Miami (R 970-997), and the Court of Appeal affirmed. State v. LeCroy, 435 So.2d 354, 356 (4th DCA Fla. 1983). These statements were made shortly after Cleo had given a taped confession to Browning. (See Point I of this brief). The sole basis for suppressing the statements were that they were "fruits of the poisonous tree" under Wong Sung v. United States, 371 U.S. 471 (1963).

Therefore, if this court upholds the State's position in Point I on appeal by finding the confession given to Browning was voluntary, then the suppression of these latter statements must also be reversed because there was no "poisonous tree." The statements made during the car trip were simply Cleo's continuing voluntary admissions.

III.

THE LOWER COURTS ERRED IN SUPPRESSING THE SHOTGUN, .22 CALIBER PISTOL AND 30.06 RIFLE.

The trial judge suppressed the Miami seizure of three weapons [a rifle belonging to the victims, and two weapons belonging to the LeCroys (R 584-585)] as fruits of Cleo's confession to Officer Browning, and the District Court affirmed on that basis. Therefore, if this court reverses Point I on appeal by finding the confession admissible, then it must also reverse the instant suppression because there was no "poisonous tree" under Wong Sung v. United States, supra.

Furthermore, as pointed out by the dissenting opinion, the seizure of the weapons should not have been suppressed on other grounds. Detective Browning spoke to Cleo and took an oral statement from him prior to the taped statement in which the improper comment was made. The oral statement was essentially the same as the taped statement, so the obtaining of the taped statement was "nothing more than ritualistic formality - all the facts had been legally obtained prior to the error committed in State's Exhibit 3." State v. LeCroy, supra, at 362. Since the information about the location of the weapons was obtained prior to any illegality, they should not have been deemed "fruit of the poisonous tree," but rather held

to be admissible.

Additionally, the weapons were not necessarily fruits of Cleo's confession. As will be discussed in point IV, infra, Jon LeCroy also led the police to the LeCroy residence where the shotgun and pistol were recovered (R 585-586).

In United States v. Ceccolini, 435 U.S. 268, 274 (1978), the court, quoting from Nardone v. United States, 308 U.S. 338, 341 (1939), stated that:

> ...the facts improperly obtained do not become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others...

The "facts" here alleged to be "improperly obtained" from Cleo were the location of the shotgun and pistol. Knowledge of those facts was gained from Jon LeCroy, an "independent source," and could be used against Cleo.

Cleo cannot challenge the propriety of Jon's statement leading police to the LeCroy residence because Cleo lacks standing: he cannot show "injury in fact" to his rights, and he would be basing his claim for relief on the rights of a third party. Rakas v. Illinois, 439 U.S. 128, 139 (1978), (concerning Fourth Amendment rights). Therefore, regardless of whether Jon's statements are deemed voluntary, Cleo cannot challenge evidence seized as a result of those statements. The shotgun and pistol

should not be suppressed in Cleo's trial.

As for the rifle, it was seized from the house of a third person, and Cleo similarly has no standing to contest a seizure from a place where he has no expectation of privacy. Rakas, supra; United States v. Salvucci, 448 U.S. 83 (1980). Officers Browning and Welty went to a residence belonging to a family named "Elliot." Cleo had given the Elliot son a rifle. Browning and Welty asked the Elliot parents if they could see the gun. One of the Elliots handed the gun to the police, who checked the serial number and determined that it did, in fact, belong to the Hardemans (R 584-585). Cleo cannot demonstrate standing to challenge this seizure, and this gun should not be suppressed as evidence.

In summary, if this court finds Cleo's confession to Browning valid, then the sole basis of suppressing seizure of these weapons no longer exists, and they should be admissible in evidence. Even if Cleo's confession was involuntary, the police already knew about the weapons' location prior to any illegal occurring. Moreover, the police had knowledge that the shotgun and pistol were located at the LeCroy residence from Jon LeCroy, an independent source. Cleo lacked standing to challenge the validity of Jon's statements. Finally, Cleo also lacked standing to contest the seizure of the rifle from the Elliot residence.

IV.

THE LOWER COURTS ERRED IN SUPPRESSING THE CONFESSION OF JON LeCROY MADE AT 12:45 A.M. ON JANUARY 12, 1981.

The above-referenced statement was suppressed by the trial court on two grounds: (1) the police questioned Jon LeCroy after he requested counsel, and (2) the police representation referred to in Point I of the brief "deluded the defendant as to his true position." (R 976). On appeal, the court upheld the suppression on the basis of the police officer's statement and did not decide the question of whether Jon had waived his right to counsel.

As to the alleged misrepresentation by the police, the Petitioner relies on Point I of this brief. Additionally, Petitioner would point out that Jon was given Miranda warnings in the morning of January 11 (R 290-291), and again given warnings at 3:30 P.M. prior to his first statement (R 71). A persuasive indication that the Respondent understood those warnings was his request for a lawyer. There is no indication that the one representation by the police fatally deluted the other effective warnings. The statement was, based on the totality of the circumstances, the product of Jon's "will to confess." Hawkins v. Wainwright, supra.

The issue of whether the statement was improperly obtained following a request for counsel requires further discussion, since if the State prevails in Point I, it will

need to be decided.

The trial court made the following finds of fact (R 974-976), with supporting record references suppled by Petitioner in brackets: Respondent Jon LeCroy voluntarily accompanied Officers Welty and Copeland to the Belle Glade substation on the morning of January 11, 1981. This was not an arrest, but probable cause did exist. [Joyce LeCroy, Respondent's mother, responded to media broadcasts about the missing Hardeman couple. When contacted by police, she told the officers that her family had been camping, and that her sons had seen the Hardemans recently (R 45). Officer Browning went to the area and had several conversations with all the LeCroys (R 46). The LeCroys' sons also voluntarily agreed to take authorities to the area where the Hardemans had last been seen (R 51-59). On the morning of January 11, Browning discovered that Jon had made a $100 bet with a game officer that he could find the Hardemans' bodies (R 61). A body was found in 30 minutes (R 62-65; 70). Soon after, Officer Welty read the LeCroys their Miranda rights, although none were then under arrest (R 290-291). All the LeCroys wanted to cooperate (R 293-294). Mr. LeCroy said, "No problem, anything we can do to help in this investigation, we will be glad to do." (R 291). Jon LeCroy willingly gave up clothing to be tested by a police dog to determine if they had been previously near the Hardemans' bodies (R 67). The

dog indicated Jon's prior presence (R 69). Welty went up to the LeCroys, and asked if they would mind coming to the Belle Glade substation. All the LeCroys willingly came (R 295; 515-517)].

Officer Copeland took a statement from Jon at about 3:30 P.M. [(R 71)]. Jon made the statement freely and voluntarily, and with an intelligent understanding of his Miranda rights. No threats, promises or improper inducements were made. The complained about representation by police that the primary purpose of the statement was to refresh the witness' memory was not made at this time [R 389-394]. This unchallenged confession led to a trip to Miami, and the guns that were later seized (R 392-394).

Judge Harper then stated, "During the 6:30 P.M. trip to Miami on January 11, 1981, the defendant informed Officers Copeland and Driggers of his desire to have an attorney." This occurred at about the time the group entered Broward County, travelling south. [On the way to Miami, Jon sat in the rear of an unmarked police car without wearing handcuffs. Jon repeatedly stated, "My God, My God, I can't believe he did it. I know he did it," referring to Cleo (R 394-396). Then he said, "What kind of trouble am I going to be in?" Copeland said, "Jon, I don't know." Jon said, "I want an attorney." Copeland responded, "Okay, fine." Jon said, "What's going to

happen to me?" Copeland responded, "Jon, I can't respond to you anymore. You want an attorney. Let's keep it at that." Copeland had begun taking notes, but when Jon requested an attorney, Copeland put his "pad up on the dashboard." (R 396-397). Sergeant Driggers then said, "Now, Paul, be sure you do not ask him any more questions, period. Let's just shut up about it." (R 397).

Judge Harper's order (R 975) continues: Driggers continued to drive to a then unknown destination in Miami. According to Copeland, Jon extemporaneously volunteered directions [(R 398-399)]. Driggers testified that from time to time, he asked Jon for directions. In any event, they arrived at their destination, where Jon assisted the officers in recovering the firearms from the Harris and LeCroy residences [(R 399; 402). During the entire travelling, Copeland refused to talk to Jon (R 400)]. While at the LeCroy home, Jon asked his father several times to get an attorney for him, but his father angrily refused [(R 402). The officers were bystanders to the discussion between father and son (R 403)].

Thereafter, the officers and Jon began their return to Belle Glade. Little conversation occurred [after Jon's initial request, he never again asked for an attorney (R 403)]. Upon arrival in Belle Glade, Jon asked, "How about my polygraph?", to which Copeland replied, "Jon, you

asked for an attorney, no." [Jon responded, "I want a polygraph." The officers went inside the station (R 404)]. Shortly thereafter, Copeland informed Browning that Jon had requested an attorney and a polygraph examination. At that point, Jon began "yelling that he wanted a polygraph," and Browning went over to speak with him [(R 404-405)].

Browning denied that Copeland told him about Jon's request for an attorney [(R 79; 161)]. Browning acknowledged he promised to give Jon a polygraph in exchange for his statement. [Browning asked Jon if he would be willing to talk with him, and Jon said he would if Browning "would promise him that he could take a polygraph." (R 79)]. At 12:45 on the morning of January 12, 1981, Officer Browning took a tape recorded statement from Jon.

While the trial judge correctly cited the law that further interrogation is forbidden once a suspect in police custody requests an attorney, Miranda v. Arizona, 384 U.S. 436 (1966); Edwards v. Arizona, 451 U.S. 477 (1981), it was misapplied to the facts in the instant case. Here, Officers Copeland and Driggers scrupulously and continously observed the Respondent's request for counsel. It was Jon, not the police, who initiated a new dialogue by demanding a polygraph examination. In Edwards v. Arizona, supra, the court held if a defendant initiates a discussion with the police after requesting counsel, they are not pro-

hibited from listening to his volunteered statements and if interrogation then ensues, the question is whether there has been a knowing and intelligent waiver under all the circumstances. Likewise, in Cannady v. State, 427 So.2d 723 (Fla. 1983), the defendant asked for a lawyer but at the same time continued to confess his guilt. This court held the police could make further inquiry to clarify his wishes, and the defendant's subsequent statement was admissible. See also, Waterhouse v. State, 429 So.2d 301, 305 (Fla. 1983).

Therefore, in the instant case, Jon's request for counsel was superseded by his sua sponte demand for a polygraph. None of the officers made any statement "reasonably likely" to induce Jon into demanding the possibly incriminating polygraph test. Since it was Jon who initiated the dialogue, the officers were not precluded from taking the taped statement, and it should have been ruled admissible.

V.

THE LOWER COURTS ERRED IN SUPPRESSING THE CONFESSION OF JON LeCROY MADE AT 8:43 P.M. ON JANUARY 12, 1981.

After taking the statement referred to in Point IV of this brief, Officer Browning attempted to procure a polygraph operator (R 120). Judge Harper's order continues: "On the afternoon of January 12, 1981, defendant [Jon] was taken to his first appearance hearing. The public defender was appointed." (R 976) [R 120]. After Jon was returned to his holding cell, Officers Browning and Welty approached Jon and told him, "You have an attorney. Your attorney doesn't want you to talk to us. He doesn't want you to take a polygraph. Do you still want to take a polygraph?" Jon said he did. (R 977) [R 121].

Accordingly, after Jon was given Miranda warnings, and was asked if he was waiving his right to an attorney, knowing one had been appointed, to which he said yes, Jon was given a polygraph (R 122). He was then transported back to Belle Glade. From the time of the polygraph till 8:43 P.M., when the statement was taken, Jon never mentioned his lawyer (R 122-123). At 8:43, Officer Browning gave Jon Miranda warnings and did not include the previously-discussed comment about refreshing his recollection. (R 126-127). In addition, Browning "to his credit" reminded Jon his public defender did not wish for him to make a statement (R 977,

122).

Judge Harper suppressed the statement, finding it was obtained in violation of Jon's right to counsel and it was the "poisoned fruit" of the 12:45 A.M. statement (discussed in Point IV) which contained an improper admonition. The court of appeal did not reach the right to counsel question because it found the refreshing recollection statement dispositive. However, if this court accepts the State's position set forth in Point I, then the "poisoned fruit" portion of the trial court's ruling must necessarily fall.

Regarding the right to counsel argument, it was Jon himself who lifted the prohibition against interrogation when he initiated the discussion about the polygraph which would necessarily involve potentially incriminating questions. (See Point IV, supra.) The police, by approaching him in his cell, were merely fulfilling their part of the earlier agreed-to bargain by giving Jon the requested (demanded?) polygraph examination. By the time the taped confession was given, police were proceeding under the same belief that Jon wished to continue talking without his attorney (See R 123):

> He was very congenial, very cooperative, He had a very good rapport with Detective Welty and was more than cooperative. He was very

> pleased with the fact that we allowed him to take a polygraph.

Then Jon gave the confession.

The trial judge co-mingled two separate ideas: 1) All interrogation must cease when a defendant requests counsel unless he initiates a new discussion; and 2) interrogation need not cease merely because an attorney has been appointed, unless the defendant requests to have that attorney present. The first idea was discussed in Point IV of this brief; Jon initiated a new discussion. The second idea was touched upon by Judge Harper, but not applied. In essence, the Judge held that once an attorney was appointed, that as a matter of law, his client could not, even if he voluntarily chose to do so, give a statement to police. This is contrary to the prohibition that counsel should not be "thrust" upon a defendant. See, Faretta v. California, 422 U.S. 806 (1975), concerning the right of a defendant to proceed at trial without counsel if he so chooses. Moreover, this court held that the formal appointment of a public defender at first appearance did not initiate legal representation since nothing was done towards actually providing legal counsel. In the instant case, as in Palmes v State, 397 So.2d 648 (Fla. 1981) the interview took place at the defendant's request and he waived counsel. Investigating officers are not required to convince a defendant that he needs an attorney. Id.

The trial judge also held, citing Estelle v. Smith, 451 U.S. 454 (1981), the confession should be suppressed because defense counsel was not notified that his client would be given a polygraph examination or that a statement would be taken. Estelle v. Smith does not require such notice to counsel. Rather, Smith turned on the fact that the defendant was not made aware of his right to counsel before submitting to a psychiatric exam, which would be a factor in his sentencing. This lack of awareness distinguishes Smith from the instant case, because Jon knew he had a right to an attorney. As stated by the Supreme Court: "We do not hold that respondent was precluded from waiving this constitutional right." 451 U.S. 471, footnote 16. If the defendant could waive the presence of his counsel, then there was no requirement that his counsel be notified before the waiver.

In short, although counsel was appointed prior to the polygraph exam, and the statement, nothing precluded Jon from freely and voluntarily proceeding without his attorney. The trial judge erroneously applied an incorrect legal standard in absolutely forbidding any interrogation absent notice to counsel, even if Jon willingly chose to cooperate.

VI.

THE LOWER COURTS ERRED IN SUPPRESSING THE CONFESSION OF JON LeCROY MADE AT 6:54 P.M. ON JANUARY 13, 1981.

Prior to the giving of the above-referenced statement, Officer Welty gave Jon "traditional Miranda warnings" and reminded him that the public defender did not wish for him to make any statements. Nevertheless, Jon agreed to talk. Officer Welty then added, "This statement is taken primarily in order to refresh your memory at the time you may be called to testify when this matter goes to court." (R 205-209).

The court suppressed this statement on the same grounds as the previous statements. (R 978). Issues IV and V are dispositive of this point. If Jon's initiating act of requesting a polygraph lifted the prohibition created by his request for counsel, and if he could waive the presence of his appointed counsel without notice to that counsel, then this last confession was valid. The extra, complained-of language did not erode Jon's understanding of his rights. He had been informed of his rights on the morning of January 11, 1981 (R 290-291), and again at 3:30 P.M. (R 71). During the car ride of January 11, he actually asked for an attorney. At 8:43 P.M. on January 12, he was again given Miranda warnings without the erroneous representation (R 126-127). Under the totality of the circumstances,

especially the uncontroverted willingness to cooperate, the statement was valid.

VII.

THE LOWER COURTS ERRED IN SUPPRESSING THE .38 CALIBER FIREARM.

Both the trial court and the court of appeal held suppression of the .38 as to Jon LeCroy was required because he gave the officers directions to the house where it was recovered after previously requesting a lawyer. This ruling was error for the record shows that after asking for a lawyer, Jon continued to offer directions and he led the police to the house where the gun was being kept. (R 398-399). The seizure was not the result of interrogation, but of Jon's willingness to co-operate. Rhode Island v. Innis, 446 US. 291(1980).

Even if the court should find the directions given by Jon were obtained in violation of his right to counsel, Petitioner urges this court to not invoke the exclusionary rule as to the .38, because its seizure should fall within the inevitable discovery exception. In his disserting opinion, Judge Andrews pointed out that the police already knew the location of the weapons prior to any illegality occurring (See Point III, supra), and he was convinced that armed with this knowledge, they could have ultimately found the weapons without Jon's directions. State v. LeCroy, supra, at 362-363.

The inevitable discovery exception was conceived in Brewer v. Williams, 430 U.S. 387, 406 n.12 (1977), and it has subsequently been applied in federal decisions.

United States v. Brookins, 641 F.2d 1037 (5th Cir. 1980); United States v. Twoney, 508 F.2d 858 (7th Cir. 1974); United States v. Huberts, 637 F.2d 630 (9th Cir. 1980); United States v. Miller, 666 F.2d 991 (5th Cir. 1982). As explained in United States v. Brookins, supra:

> Certainly, before any consequences so destructive of society's right to be protected from violent crimes (are) to be set in motion, there would have to be a respectible showing that (i) it was solely through such invalid source that identity was ascertained and (ii) there was no likelihood that it would have subsequently been discovered through other police efforts.

In the instant case, as Judge Andrews pointed out, the police had sufficient legally-obtained information to have led them to the location of the gun without Jon's directions. Accordingly, the .38 should be held admissible in evidence.

Finally, although the Court of Appeal did not address the Petitioner's argument on standing, the Petitioner would ask this court to rule that Jon lacked standing to contest the issue. Jon cannot show "injury in fact" to his rights but would be basing his claim for relief on the rights of a third party. Rakas v. Illinois, 439 U.S. 128 (1978); United States v. Salvucci, 448 U.S. 83 (1980) According to Jon's statement, the gun was originally in

his brother Cleo's possession, and Cleo asked Jon to dispose of it. (R 392-393). Jon led the police to the gun in Miami, where it was located at the house of a third person. (R 399). No violation of Jon's rights was demonstrated.

VIII.

THE LOWER COURTS ERRED IN DISMISSING COUNT V OF THE INDICTMENT.

The trial court dismissed Count V based on two grounds: A) The allegations are "so vague, indistinct and indefinite as to mislead and embarrass the defendant in preparation of his defense" under Fla.R.Crim.Pro. 3.140(o); and B) § 918.13 Fla. Stats. is unconstitutional as applied to this defendant. (R 963-965). The Court of Appeal affirmed, finding "no error in that aspect of the order." State v. LeCroy, supra, at 356.

A) Vagueness

The indictment charged that on a date certain, 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, contrary to Florida Statutes § 913.13.

The elements of § 918.13 (tampering with or fabricating physical evidence) are 1) knowledge of a pending criminal investigation, 2) concealment of anything, and 3) with the purpose of imparing the investigation. The indictment charges all three elements of offense of concealing evidence and adds specificity by describing the "thing" con-

cealed as a rifle and revolver. Recitation of a criminal statute is sufficient unless "the statutory language is so generic that it fails to inform the defendant specifically what allegedly criminal acts he committed." State v. Dilworth, 397 So.2d 292 (Fla. 1981). Even assuming arguendo that the statutory language by itself would not yield the charged crime with sufficient specificity, recitation of the items concealed put Respondents on notice of the alleged criminal acts. Respondents cannot show that proceeding under Count V would "embarrass" them in preparing their defense.

In addition, a simple remedy short of dismissal was available. Under Fla.R.Crim.Pro. 3.140(n), Respondents could seek and obtain a Statement of Particulars. Such Statement would contain the "place, date, and all other material facts of the crime charged." Rule 3.140(n) is designed to supply omitted information similar to that allegedly missing in the instant case. Fla.R.Crim.Pro. 3.220 (Discovery) yields further opportunities for Respondents to sharpen their defense. In fact, Respondents had filed and received information and access under the Rules of Criminal Procedure on February 25, 1981 (R 769-771), almost 10 months before the trial judge dismissed Count V for vagueness. (R 980).

In short, the charging document sufficiently alleged a specific crime, and Rules of Criminal Procedure pro-

vided other avenues to obtain specificity. Dismissal of Count V on the ground of vagueness was improper.

B. Constitutionality As Applied To Respondents

The trial judge held that prosecution of Respondents under Count V (tampering with physical evidence) would be violative of the Fifth Amendment privilege against self-incrimination. He reasoned that if a person who stole goods was required to report that theft and turn in that contraband, or face criminal prosecution under § 918.13(1)(a), he would necessarily have to forego that Fifth Amendment privilege. This result would be contrary to Leary v. United States, 395 U.S. 6 (1969)(R 964-965).

The trial judge erred in holding Leary as controlling precedent for two reasons: 1) The rule of Leary is limited to "communicative" disclosures tending to incriminate; and 2) Respondents were not charged under § 918.13 merely because they refused to turn themselves in to authorities, but because they took affirmative acts to interfere with the investigation.

1) Leary involved a statute requiring the filing of income and occupational tax forms by those dealing in marijuana. The Supreme Court held that giving such information would expose the defendant to a "real and appreciable" risk of self-incrimination. Leary cited Marchetti v. United States, 390 U.S. 39 (1968) where the court held that "the

Fifth Amendment privilege provided a complete defense to a prosecution for failure to register and pay" taxes on wagers because that information on illegal activity would be communicated to law enforcement officials; Grosso v. United States, 390 U.S. 62 (1968), where the court ruled an excise tax on proceeds from wagering unconstitutional for the same reason; and Haynes v. United States, 390 U.S. 85 (1968), where the court held that a federal statute requiring written registration of all firearms, including those obtained prior to enactment of the federal law, was unconstitutional because those who previously owned unregistrered guns might be placing themselves in danger of prosecution under state law. All of these cases involved compulsory communication of incriminating information by a defendant.

The privilige against self-incrimination referred to in Leary is limited to communicative acts. In Schmerber v. California, 384 U.S. 757, 764 (1966), the Supreme Court held that "the privilege is a bar against compelling 'communications' or 'testimony', but...compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." Also, see California v. Byers, 402 U.S. 424, 432-433 (1971).

§ 918.13(1)(a) does not compel any "communication" or "testimony." Appellees never had to make a "statement" of guilt to avoid prosecution. In addition, even if acts

necessary to escape punishment are considered "communication," none of those acts "necessarily" would incriminate Appellees. Jefferson v. United States, 488 F.2d 391, 393 (5th Cir. 1974). Count V in this case may result in multiple punishments for a single criminal act, but that is a different question. The Fifth Amendment privilege is not involved.

2) Even assuming arguendo that the Fifth Amendment is violated by punishing a defendant who merely conceals contraband, the facts of the instant case do not fall into that category. The State Attorney represented that:

> The defendant is not charged with failing to produce the weapons knowing an investigation was going on. 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).

This type of "tampering" is illegal activity at which the law is aimed. Chapter 72-315, § 2, Laws of Florida. Therefore, contrary to the trial judge's ruling, the acts constituting a violation of § 918.13(1)(a) were different than the acts constituting the theft.* In other words, Respondents

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*The trial judge should have waited until after trial evidence was complete to determine the accuracy of the prosecutor's assertion. Generally, see State v. Kapner, 394 So.2d 541, 543 (Fla. 4th DCA 1981).

are not being punished merely because they refused to turn themselves in to authorities (which the trial judge held was a valid exercise of their Fifth Amendment privilege); their crime was taking affirmative steps to dispose of the gruns. There is no Fifth Amendment right to dispose of evidence.

In summary, Count V was erroneously dismissed, as it was neither vague, nor did it penalize Respondents for exercising their Fifth Amendment rights.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited therein, the Petitioner respectfully requests that this court reverse the Order of Suppression entered by the trial court and upheld on appeal by the Fourth District Court of Appeal, reinstate Count V of the indictment, and remand with appropriate directions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 3rd day of February, 1984 by United States Mail to Michael Dubiner, Esq., of DUBINER & BLUMBERG, 325 Clematis Street, Suite B, West Palm Beach, FL 33401, and to James L. Eisenberg, Esq., of GREEN, EISENBERG & COHN, 319 Clematis Street, Suite 409, West Palm Beach, FL 33401.

Of Counsel