IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. CLEO D. LeCROY and JON M. LeCROY, Respondents.	)	CASE NO. 64,744

PETITIONER'S REPLY 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

Petitioner relies on the Statement of the Case set forth in its Initial Brief.

STATEMENT OF THE FACTS

Petitioner relies on the Statement of the Facts set forth in its Initial Brief.

RESPONSE TO THE RESPONDENTS' OBJECTION TO ANCILLARY ISSUES

Both Respondents, citing Trushin v. State, 425 So.2d 1126 (Fla. 1982), assert this Court has jurisdiction only to review the question certified to it by the Court of Appeal, which is addressed primarily in Point I of Petitioner's

brief. Petitioner maintains this Court has jurisdiction to consider all of the issues.

In Trushin, the petitioner raised six issues, none of which were addressed at the trial level and two of which had not been raised in the Court of Appeal. In those circumstances, this Court declined to address the issues which were outside the scope of the certified question. By contrast, in the instant case, all eight points presented concern rulings of the trial court which were raised and decided on appeal. Moreover, the certified question has a bearing on six of the eight points raised. The inevitable discovery exception discussed in Points III and VII was the subject of the dissenting opinion in the Court of Appeal. In his specially concurring opinion denying rehearing, the dissenting judge stated,

> I concur in the denial of the Motion for Rehearing, not because I feel it is without merit, but because I am confident that the Supreme Court will accept certification and place the vehicle of justice back on its proper path, so that its ultimate destination may be reached.

In view of this Court's longstanding view that it has jurisdiction to consider all issues decided on appeal once it has accepted a certified question, Hillsborough Association for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So.2d 610 (Fla. 1976), the dissenting judge's confidence is well placed (at least to the extent that the issues will be reviewed).

Finally, as to Point VIII, the trial court found Fla. Stat. 918.13 unconstitutional as applied to the Respondents

and the Court of Appeal affirmed. Accordingly, this Court has jurisdiction independently as well as pursuant to the certified question. Fla. Const. Article V, §3(b)(1).

Therefore, all of the issues raised by the Petitioner are properly before this Honorable Court.

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.

The Petitioner maintains the confession was voluntary, for the Respondent Cleo was properly advised of his rights as required by Miranda v. Arizona, 384 U.S. 436 (1966) and the subsequent statement by the interrogating officer did not conflict with or fatally dilute the warnings previously given. The case of Cribbs v. State, 378 So.2d 316 (1DCA Fla. 1980), cited by Respondent, is distinguishable for there the officer completely misled the defendant by telling him, incorrectly and contrary to Florida law, he could not have counsel until the court made an appointment. In the instant case, the statement did not contradict the Miranda warnings, which were given to Cleo repeatedly. See, United States v. Johnson, 467 F.2d 630, 637 (2nd Cir. 1972) [where defendant properly advised of rights, fact he wasn't told he could "break off" interrogation didn't render confession involuntary]; Breedlove v. State, 413 So.2d 1, 6 (Fla. 1982) [where defendant advised of rights, officer's statement, "eventually you will talk to us" was not a threat which tainted the rights waiver].

As to Cleo's claim that he didn't understand the warnings because he at one point in the statement asserted the right to bear arms is one of the Ten Commandments, this does not negate the other overwhelming evidence of voluntariness. In fact, the Court of Appeal expressly found the statement was made knowingly and voluntarily when measured by traditional

factual tests, as evidenced by the wording of the question certified. Cleo's juvenile status likewise does not render the confession involuntary, for the determination of voluntariness is made by inquiry into the totality of the circumstances for both juveniles and adults. Fare v. Michael C., 442 U.S. 707 (1979). On the totality of the circumstances herein, the Court of Appeal found not that the statement was the result of a promise or otherwise involuntary, for the opinion states:

> If the sole test to be applied in appraising the voluntariness of these statements was the traditional one of whether the statements were in fact given voluntarily and without coercion or inducement, we would find them admissible.

State v. LeCroy, 435 So.2d 354, 356 (4DCA Fla. 1983). In that respect, the Court of Appeal was correct. Petitioner asks this Court to find that the court below erred in holding that the Miranda warnings were diluted to the point that the statement was legally involuntary.

II.

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

Petitioner relies on its Initial Brief, but would add that this issue is properly before the court, even if the court finds validity to the Respondent's "objection to addition of ancillary issues," since, as Respondent agrees, the admissibility of these statements rests entirely on this Court's resolution of Point I, which is the Petitioner's discussion of the certified question.

III.

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

Respondent does not address the Petitioner's argument, which is also made by the dissenting judge in the court below, that the seizure of the guns should be admitted even if the statement discussed in Point I is suppressed, because of the inevitable discovery exception to the exclusionary rule. Petitioner would again rely on that argument, as well as its argument that the police seizure of the guns stemmed from an independent source, i.e., the statement of Jon LeCroy (R 394).

IV.

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

Petitioner relies on its Initial Brief regarding its position that the extraneous statement by the officer did not dilute the Miranda warnings or induce the statement. Petitioner will reply to the Respondent's arguments that the statement was inadmissible because it followed a request for counsel and that it was made in exchange for a promise.

First, as to the request for counsel, the Appellant maintains that the 12:45 a.m. statement was admissible because it was Jon who initiated the conversation by demanding a polygraph examination (R 404, 471). Even assuming arguendo that the police did ask for directions to Miami and their doing so was interrogation the statement at issue was given much later, after they had returned to Belle Glade, and it was Jon who initiated the dialogue by insisting on a polygraph. There was sufficient attenuation between the car ride and the giving of the 12:45 a.m. statement to make the latter statement admissible. Brewer v. State, 386 So.2d 232, 236 (Fla. 1980); State v. Oyarzo, 274 So.2d 519 (Fla. 1973); Nettles v. State, 409 So.2d 85, 89 (1DCA Fla. 1982); Leon v. State, 410 So.2d 201 (3DCA Fla. 1982). The United States Supreme Court made it clear in Edwards v. Arizona, 451 U.S. 477, 485 (1981), that a suspect may countermand a previous request for counsel by volunteering statements, and nothing prohibits the police from listening to them and using them at trial.

Second, the police officer's agreement to give the Respondent a polygraph was not the type of promise which would invalidate the statement. The polygraph was not a benefit or reward, and the Respondent stated his reason for wanting it was to prove he was telling the truth (R 95). The Respondent, in the taped statement itself, acknowledged no promises had been made to him (R 95, 111). Therefore, the giving of the polygraph was not an inducement to the confession. Smith v. State, 422 So.2d 1065 (1DCA Fla. 1982); Gilvin v. State, 418 So.2d 996, 998 (Fla. 1982); LaRocca v. State, 401 So.2d 866 (3DCA Fla. 1981).

V.

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

The Respondent argues first that his 8:43 p.m. statement was properly suppressed as it was the fruit of his earlier 12:43 a.m. statement. Obviously, if this Court accepts the Petitioner's argument in Point IV, supra, that the 12:43 a.m. statement is admissible, then that basis for suppressing the 8:43 p.m. statement no longer exists.

The Respondent's next argument is that the officers' approach to Jon and their asking him if he still wanted to take a polygraph constituted reinterrogation so the statement subsequently obtained was inadmissible. The Petitioner maintains the police were simply responding to Jon's earlier demand for a polygraph, and it was Jon who chose to waive counsel, take the polygraph, and give a statement (R 121-122).

The Respondent's third argument, that the statement was obtained in violation of his right to counsel, must also fail. On January 12, Jon had been arrested and had his first appearance, but he had not been indicted. In addition to that distinguishing factor, the cases of Brewer v. Williams, 430 U.S. 387 (1978) and Massiah v. United States, 377 U.S. 201 (1964), cited by Respondent, do not otherwise support his position. It has never been held that an indicted defendant may not be questioned in counsel's absence. In Massiah, the court held the defendant's right to counsel was undermined by surreptitious questioning. As the Supreme Court explained

in United States v. Henry, 447 U.S. 266, 273 (1980), an accused speaking to a known government agent (as in this case), is typically aware his statements may be used against him. In Brewer, the court found a Sixth Amendment violation because the police ignored an express agreement with the defense attorney and the defendant told the police he would talk to them after he saw a lawyer. The court in Brewer emphasized it did not hold the defendant could not, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments, but only that he did not waive them under the circumstances of the case.

As this Court has long recognized, a defendant's right to counsel is personal and he may choose to waive it. State v. Craig, 237 So.2d 737 (Fla. 1970). The record shows in this case Jon was aware of his right to counsel, but he chose to forego that right, take the polygraph, and give the 8:43 p.m. statement.

VI.

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

Petitioner relies on its Initial Brief.

VII.

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

Petitioner relies on its Initial Brief.

VIII.

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

The Respondents assert the charging document was vague in that it failed to more specifically identify the investigation that was being impaired. Petitioner maintains the charge was sufficiently alleged because the date of the crime was given, all of the statutory elements were alleged, and the exact items tampered with were described. The indictment was not vague.

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 Petitioner's Reply Brief on the Merits has been mailed 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 AND COHEN, 319 Clematis Street, Suite 409, West Palm Beach, FL 33401, this 16th day of March, 1984.

Of Counsel