IN THE SUPREME COURT OF FLORIDA

CLEO DOUGLAS LECROY,

Petitioner,

vs.

Case No. 76,144

HARRY K. SINGLETARY, JR.,
Secretary, Florida Department
of Corrections,

Respondent.
_____/

STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PROCEDURAL HISTORY

Cleo and Jon LeCroy were indicted for the first-degree murders and armed robberies of John and Gail Hardeman, allegedly committed on January 4, 1981. Their trials were severed, and Cleo LeCroy was convicted in February 1986 of the felony murder of John Hardeman and the premeditated murder of Gail Hardeman.[1] He was also convicted of the two counts of armed robbery.

The jury returned a recommendation of life by a vote of eight to four for the murder of John Hardeman and a recommendation of death by a vote of seven to five for the murder of Gail Hardeman, which the trial court followed, sentencing LeCroy to life imprisonment for the murder of John Hardeman, to death for the murder of Gail Hardeman, and to consecutive 30-year sentences of imprisonment for the armed robberies. As to the murder of Gail Hardeman, the trial court found the existence of three aggravating factors: the contemporaneous convictions for the murder and armed robbery of John Hardeman, commission of the murder during an armed robbery, and commission of the murder to avoid arrest. In mitigation, the trial court found no significant history of prior criminal activity and LeCroy's age of seventeen at the time of the crime, the latter of which it gave great weight. It rejected

[1] Jon LeCroy was subsequently acquitted of both murders.

LeCroy's nonstatutory mitigating evidence. This Court affirmed his convictions and sentences, LeCroy v. State, 533 So. 2d 750 (Fla. 1988), and the United States Supreme Court denied his petition for writ of certiorari, LeCroy v. Florida, 492 U.S. 925 (1989).

On May 17, 1990, then-Governor Martinez signed a warrant for LeCroy's execution. LeCroy filed a petition for extraordinary relief and for a writ of habeas corpus, which included a request for stay of execution. Following the State's response, this Court granted a stay on June 19, 1990, in order for LeCroy to file a motion for postconviction relief. In its order, this Court gave LeCroy until October 10, 1990, to file any postconviction motion with the circuit court and any amended habeas petition with this Court. After obtaining additional time from the circuit court, LeCroy filed a motion for postconviction relief raising twelve claims on December 14, 1990, and an amended habeas petition raising six claims on December 10, 1990. On April 1, 1992, LeCroy filed a memorandum of law to accompany the habeas petition. Since the State never responded to the amended habeas petition, and LeCroy elected not to amend the petition when he filed his initial brief from the denial of postconviction relief, this response follows.

REASONS FOR DENYING THE WRIT

ISSUE I

WHETHER APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO CHALLENGE ON APPEAL THE TRIAL COURT'S USE OF A SPECIAL DISTRICTING PROCESS TO SELECT JURORS (Restated).

In his amended habeas petition, LeCroy claims that his direct appeal attorney, Charles Musgrove, should have, but failed to, challenge on appeal, the special districting process used to select the petit jurors in his case. **Amended habeas pet.** at 5-17. Specifically, LeCroy claims that, by administrative order, Palm Beach County was divided into two jury districts: one encompassing the eastern part of the county (the Glades district) and one encompassing the western part of the county (the West Palm Beach district). According to LeCroy, the registered voters in the Glades district were disproportionately black compared to those in the West Palm Beach district. Those defendants, such as himself, who committed their crimes in the West Palm Beach district were deprived of a fair cross-section of the circuit because those minority jurors in the Glades district were excluded from the West Palm Beach jury rolls. As a result, he was deprived of the equal protection of the law. Id.

LeCroy alleges that his trial counsel made this argument in the trial court, where it was rejected, but that appellate counsel,

"without a tactic or strategy, failed to address this significant issue on direct appeal." Id. at 6. According to LeCroy, since this Court later found this special districting process to be unconstitutional in Spencer v. State, 545 So. 2d 1352 (Fla. 1989), appellate counsel's failure to raise this issue prejudiced his appeal.

In order to prevail on a claim of ineffective assistance of appellate counsel, LeCroy must show that counsel's alleged omissions constitute a substantial deficiency that falls measurably outside the range of professionally acceptable performance and that such deficient performance compromised the appellate process so as to undermine confidence in the correctness of the result. Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993). Appellate counsel cannot be faulted for failing to raise an issue that either was not preserved for appeal by trial counsel or does not constitute fundamental error. Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991).

For the following reasons, LeCroy has failed to show either deficient performance or prejudice. First, the record does not support LeCroy's claim that trial counsel preserved this issue for appeal. LeCroy's codefendant/brother, Jon LeCroy, apparently filed a motion to dismiss the indictment based on the improper districting procedure. At the hearing on the motion, LeCroy's

attorney adopted Jon LeCroy's motion and argument at the hearing.[2] Jon LeCroy's attorney argued that section 905.01(1), Florida Statutes (1979), required that grand jurors be procured and empaneled in the same manner as petit jurors.[3] Palm Beach County's chief administrative judge, however, had issued an administrative order in 1980 that divided the circuit into two jury districts. The administrative order applied only to petit juries and specifically exempted grand juries, which were to be selected from registered voters within the entire circuit. According to counsel, the exemption for grand jurors violated section 905.01(1), and thus the grand jury that indicted the LeCroys was improperly impaneled. Counsel did not argue that the administrative order was improper, only that it unfairly exempted grand juries from the districting process:

> MR. DUBINER [JON LECROY'S ATTORNEY]: The next one is to challenge the petit jury panel.
>
> I have handed you Administrative Order 1.06-180, which was signed by Judge Rudnick, who was the chief judge on January 10th, 1980,

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[2] Cleo LeCroy's record on appeal does not include Jon LeCroy's motion to dismiss, but does include his own "Motion to Dismiss and Quash Jury Panel," which differs in substance from Jon LeCroy's argument at the hearing. (R 4150-53).

[3] Section 905.01(1), Florida Statutes (1979), read in pertinent part as follows: "The provisions of law governing the qualifications, disqualifications, excusals, drawing, summoning, supplying deficiencies, compensation, and procurement of petit jurors shall apply to grand jurors."

and I am asking the Court to take judicial notice of that administrative order, as it relates to this motion.

THE COURT: Let me read your motion first.

In other words, what you are saying is that since the Grand Jury was drawn from the county, at large, whereas the petit jury is drawn only from the eastern jury district --

MR. DUBINER: The manner of procurement is not the same as for the petit jury and under 905.01, Subsection 1, they are required to be procured in the same manner.

THE COURT: Well, have you got any case law that supports you -- I mean by case law that I doubt if there is any.

MR. DUBINER: There has been no case law on this issue. It has been ruled on several times in this county. My understanding, it has never been ruled on in any other county.

THE COURT: Do you have a similar motion filed?

MR. EISENBERG [CLEO LECROY'S ATTORNEY]: This is the only one where I did not, but I would like to adopt Mr. Dubiner's, or I will file another one, if you wish. It would just be identical.

THE COURT: Do you have any objection to him adopting that, to save time?

MR. BAKER [PROSECUTOR]: No, sir.

THE COURT: Do you want to be heard on this one or do you want to give it some thought, because this is a new animal to me. I never heard of such a thing, but I don't know whether it has any merit or not, to be

quite honest with you, because I never had [the] experience of practicing law in a county where they had more than one jury district.

You know anything about the underlining [sic] issues that he is raising there? The statute says that a man has a right to be tried by a jury from the entire county as a whole.

MR. DUBINER: It doesn't really say that, but it says that a Grand Jury must be procured in the same manner as the petit jury, so that would be the effect of it.

THE COURT: Well, what about the statute that recreated the Glades Jury District?

* * * *

[Court reads §40.015, Fla. Stat. (1979)].

So that statute authorized you to pick the petit jury from that district.

MR. DUBINER: No question about it. We are not arguing that there is anything illegal about the administrative order. However, the Grand Jury that was selected from Palm Beach County, as a whole, is selected illegally, because the statute requires that the Grand Jury be procured in the same manner as the petit jury. Therefore, the Grand Jury was selected illegally, even though the administrative order is not illegal, as it relates to the petit jury.

THE COURT: Well, you are challenging the petit jury panel? You are not challenging the Grand Jury panel?

MR. DUBINER: Judge, that is the heading of the motion. In the motion, itself, we are requesting the relief that we are requesting, that a new panel be brought in or that you

dismiss the indictment returned by the Grand Jury, sitting in and for Palm Beach County.

Basically, what we are asking is that the indictment be dismissed because it was selected, the Grand Jury was selected improperly.

* * * *

THE COURT: [Reads section 905.01(1)].

In other words, they are saying that Grand Jurors should be selected and qualified similarly, the same as petit jurors.

MR. DUBINER: Exactly. In our court administrative order it says that petit juries are drawn from the jury district in which they are.

THE COURT: Right.

MR. DUBINER: And the Grand Jury is drawn from Palm Beach County as a whole, clear violation of the statute.

THE COURT: And Judge Rudnick says that this order does not affect the Palm Beach County Grand Jury, which shall be drawn from the county at large and that sentence there, you are saying that he had no authority to do that, because that is a modification of the law, really?

MR. DUBINER: Exactly, Judge. If he was going to alter it as to the petit jury, he would be required to alter it as to the Grand Jury, as well.

(R 791-96) (emphasis added).

Contrary to LeCroy's assertion in his habeas petition, his trial attorney did not preserve for appeal the same argument that

he raises in his petition. In his petition, he claims that his petit jury was improperly impaneled because the districting process systematically excluded a significant portion of the black population from the eastern district jury pool. In the trial court, however, he argued that the grand jury was improperly impaneled because it had not been procured from the same geographical area as his petit jury, contrary to section 905.01(1). Since trial counsel did not make the same argument in the trial court that LeCroy makes in his petition, LeCroy cannot fault appellate counsel for failing to raise on appeal the argument he raises in his petition. See Medina, 586 So. 2d at 318.

In Nelms v. State, 596 So. 2d 441 (Fla. 1992), the defendant challenged the same administrative order on the same ground that LeCroy raised in the trial court--a violation of section 905.01(1). Both the trial court and the district court of appeal rejected Nelms' challenge. After this Court determined in Spencer that the administrative order was unconstitutional because of the systematic exclusion of blacks from the eastern district jury pool, Nelms sought postconviction relief under Spencer.[4] This Court ultimately

[4] Nelms also relied on Moreland v. State, 582 So. 2d 618 (Fla. 1991), wherein this Court determined that Spencer was not a fundamental change in the law, and thus not subject to retroactive application. In Moreland, however, this Court determined that Spencer should have been applied retroactively to Moreland's case because Moreland had raised the same issue in the trial court and on appeal while Spencer was pending. Fundamental fairness dictated

affirmed the denial of this claim:

> We indicated in Moreland that had the petitioner failed to raise the issue of the constitutionality of the jury pool at trial and on direct appeal, he would not be entitled to relief. Nelms did not raise at trial or on direct appeal the issue upon which we granted relief in Moreland. His statutory challenge to the grand jury cannot be equated to the constitutional claim regarding petit jury selection upon which relief was granted in *Moreland*. The fundamental fairness or uniformity concerns present in that case are not present here. Further, Spencer, the first case recognizing this claim, was decided more than three years after Nelms' conviction was affirmed. Defense counsel cannot be held ineffective for failing to anticipate the change in the law.

Nelms, 596 So. 2d at 442 (citations omitted).

As an alternative argument, LeCroy claims in his petition that "[e]ven if there were no ineffective assistance of counsel claim, the issue would be properly before th[is] Court at this juncture, as it involves fundamental error." **Amended habeas pet.** at 11. In other words, LeCroy alleges that he may raise his Spencer claim now, despite trial counsel's failure to raise it in the trial court, because the districting process was fundamentally erroneous and did not need to be preserved. This same argument, however, was rejected in Moreland and Nelms. In Moreland, this Court held that,

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application of Spencer because Moreland would have prevailed in this Court had his case been appealed to this Court rather than the district court.

had the defendant not raised the issue at trial and on appeal, he would not have been entitled to relief. 582 So. 2d at 620 n.3. Similarly, in Nelms, as excerpted above, the defendant failed to raise the Spencer issue at trial and on appeal. Thus, he was precluded from raising it for the first time in a motion for postconviction relief. 596 So. 2d at 442. See also Bergelson v. State, 581 So. 2d 918, 919 (Fla. 4th DCA 1991) (finding Spencer claim not preserved for appeal because not raised at trial level). Since LeCroy failed to raise the Spencer issue at trial and on appeal, and since Spencer should not be applied retroactively to LeCroy's case, this claim should be denied.

ISSUE II

WHETHER APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO CHALLENGE ON APPEAL THE TRIAL COURT'S COMMENTS TO THE JURY REGARDING JUROR SEQUESTRATION (Restated).

In his habeas petition, LeCroy claims that his appellate counsel was ineffective for failing to challenge on direct appeal the propriety of comments made by the trial court to the jury. At the conclusion of the guilt phase, the trial court dismissed the jury for the day and told them to return the following morning for jury instructions and deliberations. During this informational monologue, the trial court made the following complained-of comments: "Under Florida law, if a jury is required to go into an overnight recess after the deliberations have begun, under Florida law I am required to lock you up in a hotel, not lock you up but keep you sequestered in a hotel where you can't separate, . . ." (R 2912-13). LeCroy claims that these comments were per se reversible error because they were given without prior notice to defense counsel, they were "coercive by the actual threat that the jury would be 'locked up,'" and they constituted a de facto Allen charge which was given prematurely. **Amended habeas pet.** at 17-19.[5]

When viewed in context, the trial court's comments were not

[5] LeCroy raised these same allegations in Claim VII of his motion for postconviction relief, but has not appealed the denial of that claim. See LeCroy v. State, case no. 89,995.

erroneous, and thus not a meritorious basis for appeal. The record reveals that following the close of the State's case the trial court and the parties had a lengthy discussion about the logistics of the trial. Among other things, they discussed whether LeCroy would put on a defense, how much time the parties wanted for closing arguments, and whether to instruct the jurors the following day or wait until the morning after so they would not have to be sequestered. (R 2899-2902). Ultimately, the parties agreed to have the charge conference in the morning, call the jurors in after lunch for closing arguments, dismiss them for the day, and then call them back the following morning for instructions and deliberations. (R 2902-03). On the off-chance the jury failed to reach a decision by the end of that day, the court questioned the parties about sequestration, and both the State and the defense waived sequestration. (R 2903-04). The court then said to the parties,

> I am going to call in the jury and I am going to mention to them the reason we are doing it is to avoid an overnight sequestration, but I am going to tell them that nobody is rushing them to a judgment. They are to take all of the time they want. The case is important to the State and to the Defense and there is a lot at stake here and I will ask them to be patient because they have been very patient, very attentive.

(R 2908). The trial court asked the prosecutor if he had any

objection to the suggested comments, and the prosecutor replied that he did not. (R 2908-09). The court then asked defense counsel if he was ready for the jury to return, and he replied in the affirmative. (R 2909).

Contrary to LeCroy's first allegation, the trial court did not make the complained-of comments without notice to counsel and an opportunity to be heard. While the court did not express the exact content of his comments, such was not required. Defense counsel was on notice of the content and had an opportunity to make appropriate suggestions. Moreover, following the court's comments to the jury, the judge specifically asked the parties if they had any objection to the comments, and both replied in the negative. (R 2914). Thus, LeCroy was not deprived of his right to notice and an opportunity to be heard.

As for the effect of the complained-of comments, the reference to "locking up" the jurors for the night was innocuous in its context. After he said it, the judge quickly cured any negative impression by explaining that the jurors would be unable to separate once deliberations had begun. Then he explained that the parties had "agreed to avoid that possibility," i.e., sequestration. Trial counsel obviously did not consider the comments worthy of a mistrial because he made no objection to them. And since trial counsel made no objection to them, appellate

counsel was precluded from raising them on appeal without claiming fundamental error. See Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991). In context, they were far from fundamentally erroneous.

Finally, the complained-of comments in no way amounted to an Allen charge. In fact, the trial court went out of its way to explain that by telling the jury about sequestration it was not urging them to rush to judgment. Rather, it was informing them of the process and what to expect in the next couple of days. It was not trying to engineer a quick verdict. Again, since the comments were not fundamentally erroneous, appellate counsel was not ineffective for failing to raise a nonpreserved and a nonmeritorious issue. Medina, 586 So. 2d at 318; Groover v. State, 656 So. 2d 424, 425 (Fla. 1995). This claim should be denied.

ISSUE III

WHETHER APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO CHALLENGE ON APPEAL THE TRIAL COURT'S RESTRICTION OF MITIGATING EVIDENCE (Restated).

In his habeas petition, LeCroy claims that his appellate counsel was ineffective for failing to raise on appeal the trial court's restriction of mitigating evidence, namely, the testimony of Professor Victor Streib, a law professor from Cleveland State University College of Law. Professor Streib would have testified that the American Bar Association had approved a resolution opposing capital punishment for juveniles, that juveniles were not significant repeat offenders, and that capital punishment was not a deterrent to juveniles. **Amended habeas pet.** at 21-24.[6]

This Court has repeatedly held that such testimony is not mitigating evidence, as it does not relate to a defendant's character or record, or to the circumstances of the offense. Nor is it legal argument, but rather political debate better left to the legislature. E.g., Johnson v. State, 660 So. 2d 637, 646 (Fla. 1995) (affirming trial court's refusal to allow evidence or argument that death penalty is not deterrent and is more expensive than prison); Hitchcock v. State, 578 So. 2d 685, 689-90 (Fla.

[6] LeCroy raised these same allegations in Claim VI of his motion for postconviction relief, but has not appealed the denial of that claim. See LeCroy v. State, case no. 89,995.

1990) (affirming trial court's refusal to allow testimony of sociologist that defendant's execution would not deter others and would cost more than imprisonment). Appellate counsel cannot be faulted for failing to raise a nonmeritorious issue on appeal. Groover v. State, 656 So. 2d 424, 425 (Fla. 1995). Therefore, this claim should be denied.

ISSUE IV

WHETHER APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO CHALLENGE ON APPEAL THE TRIAL COURT'S REJECTION OF MITIGATION (Restated).

In his habeas petition, LeCroy claims that his appellate counsel was ineffective for failing to raise on appeal the trial court's rejection of mitigating evidence and its failure to set forth specific findings regarding each aggravating and mitigating factor presented as required by Campbell v. State, 571 So. 2d 415 (Fla. 1990). **Amended habeas pet.** at 24-32. LeCroy raised these allegations, though framed as trial court error or trial counsel error, in Claim V of his motion for postconviction relief. (PCR 724-33). The trial court denied the claim as procedurally barred, since LeCroy could have, but did not, challenge the court's rejection of mitigation on direct appeal. (PCR 1004). LeCroy is challenging the denial of this claim in his direct appeal in case no. 89,995.

This Court has held numerous times that "[h]abeas corpus is not to be used to relitigate issues that have been determined in a prior appeal." Porter v. Dugger, 559 So. 2d 201, 203 (Fla. 1990). This Court has also condemned similar practices of seeking second and third bites at the apple: "By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850

petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material." Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987), sentence vacated on other grounds, 943 F.2d 1477 (11th Cir. 1991). Since LeCroy raised this issue in his 3.850 motion and appeal therefrom, he is procedurally barred from raising it again under the guise of ineffective assistance of appellate counsel in this habeas petition.

Even were it not barred, however, it is wholly without merit. In order to prevail on a claim of ineffective assistance of appellate counsel, LeCroy must show that counsel's alleged omissions constitute a substantial deficiency that falls measurably outside the range of professionally acceptable performance and that such deficient performance compromised the appellate process so as to undermine confidence in the correctness of the result. Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993). LeCroy has failed to show either deficient performance or prejudice.

The trial court heard and considered all of the evidence LeCroy details in his habeas petition. In its written sentencing order, the court analyzed the mitigation presented and found the existence of two statutory mitigating factors: LeCroy's lack of a significant criminal history and his age. (R 4870-78). Although it discounted LeCroy's age because it believed that LeCroy was

"mentally and emotionally mature," it nevertheless gave this mitigating factor great weight. To the extent LeCroy believes the trial court should have given it even greater weight, the weight to be given a mitigating factor is within the trial court's discretion. Windom v. State, 656 So. 2d 432, 440 (Fla. 1995) ("The relative weight given each mitigating factor is within the judgment of the sentencing court."); Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995) ("Once the factors are established, assigning their weight relative to one another is a question entirely within the discretion of the finder of fact . . . ."). "Reversal is not warranted simply because an appellant draws a different conclusion." Sireci v. State, 587 So. 2d 450, 453 (Fla. 1991).

As for the nonstatutory mitigation rejected by the trial court, it is within that court's discretion to determine whether nonstatutory mitigation "is truly of a mitigating nature." Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). Here, the trial court assessed LeCroy's behavior while on probation prior to the murders, his family ties and support, his assistance in helping to locate the victims' bodies, his recent marriage, the closeness of the jury's vote, and his potential for rehabilitation, but decided that such evidence, in its opinion, did not constitute mitigating circumstances. Given the discretionary nature of the decision, appellate counsel cannot be faulted for failing to raise

this issue on appeal. See Groover v. State, 656 So. 2d 424, 425 (Fla. 1995).

As for LeCroy's assertion that the trial court failed to detail the mitigating evidence in its written order, Campbell would not apply to LeCroy's case since his sentence was imposed in 1986, four years before Campbell issued. See Gilliam v. State, 582 So. 2d 610 (Fla. 1991) (refusing to apply Campbell retroactively). Thus, again, appellate counsel cannot be faulted for failing to raise a nonmeritorious issue. Groover, 656 So. 2d at 425. This claim should be denied.

ISSUE V

WHETHER APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO CHALLENGE ON DUE PROCESS GROUNDS THE EXCLUSION OF HEARSAY STATEMENTS MADE BY LECROY'S CODEFENDANT (Restated).

In his habeas petition, LeCroy claims that appellate counsel was ineffective for failing to raise a due process violation and cite to Chambers v. Mississippi, 410 U.S. 284 (1973), when challenging on appeal the trial court's exclusion of hearsay statements made by LeCroy's codefendant/brother. He further alleges that, because of counsel's deficient conduct, this Court "ignored the Chambers principle that state evidentiary rules do not outweigh a defendant's right to fundamental fairness and due process." **Amended habeas at** 37-38.

LeCroy argued on direct appeal from his conviction that the trial court erred in prohibiting the admission of Jon LeCroy's statements under the "statement against (penal) interest" exception to the hearsay rule. In order for a statement to qualify under this exception, the proponent must show that (1) the declarant is unavailable, (2) the statement tends to expose the declarant to criminal liability and is offered to exculpate the accused, and (3) corroborating circumstances exist to show the trustworthiness of the statement. Maugeri v. State, 460 So. 2d 975, 977 (Fla. 3d DCA 1984), cause dismissed, 469 So. 2d 749 (Fla. 1985). In affirming

the trial court's exclusion of this evidence, this Court held that Jon's statements either were not against his interest or were too ambiguous:

> [A]t his own trial, Cleo attempted to develop a defense which placed the responsibility for the crimes, in whole or part, on Jon. He now argues that the trial court erred in refusing to admit hearsay evidence that Jon told others that he had seen dead bodies before and was the last to see the victims alive which, appellant urges, is a statement against interest within the meaning of section 90.804(2)(c), Florida Statutes (1979). Concerning the statement that Jon saw the victims last, this is based on the testimony of a witness that Jon said he saw the victims at 11 a.m. the day of the murder and the testimony of another witness that Cleo told him he last saw the victims at approximately 10:30 a.m. Thus, appellant reasons, Jon made an admission against interest by saying he saw the victims after Cleo. We do not agree that a hearsay statement by Jon that he saw the victims at 11 a.m. is an admission against interest. Another witness testified he saw Cleo with the victims around 10 a.m. and Cleo admitted in his statement to the police that he had conversed with the victims that morning, for approximately twenty minutes, that they had separated, and that the killings occurred later after a period of hunting. As to Jon saying that he had seen dead bodies before, the statement is meaningless without further development and could only have been developed by calling Jon as a witness. The state points out that had this been done, the state would have been able to elicit Jon's statement to the police that he had seen the victims['] bodies shortly after Cleo killed them. This would have been consistent with Cleo's statements to the police that he told Jon of the killings, and the approximate

> location of the bodies, shortly after the crimes. We see no error. Moreover, as the state argues, even if it was error, the error was clearly harmless. Evidence showing that Jon had also been indicted and had some role in either the crimes or in attempting to conceal the crimes was given to the jury. We do not see how this ambiguous hearsay could have affected the verdict.

LeCroy v. State, 533 So. 2d 750, 754 (Fla. 1988) (footnotes omitted).

Citing to Chambers, LeCroy claims that Jon's statements should have been admitted under a due process theory to support his defense that Jon committed the murders. Since trial counsel requested their admission under Chambers, appellate counsel should have pursued this theory of admission on appeal. **Amended habeas pet.** at 33-34.

Chambers, however, does not allow *cart blanche* admission of otherwise inadmissible evidence. In fact, it requires a showing of reliability: "The hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability." 410 U.S. at 300. In Chambers, the Supreme Court found reliable, despite their hearsay nature, three separate confessions to three separate people by someone other than the accused, because each "was made spontaneously to a close acquaintance shortly after the murder," because each "was

corroborated by some other evidence in the case," because of the sheer number of confessions, because of the self-incriminatory nature of each confession, and because the declarant was available for cross-examination at the trial. Id. at 300-01.

Unlike in Chambers, Jon LeCroy did not confess to shooting the victims. Rather, Jon told Deputy Alderman in Officer Hannah's presence that he saw the victims at 11:00 a.m. and that he (Jon) had seen dead bodies before five or six days earlier. (R 2162-67, 2173-75). Jon also told Elsie Bevan, a volunteer reserve wildlife officer with the Game and Fish Commission, that he was the last person to see the victims alive. (R 2296-99). These statements, which were innocuous by themselves, were not made to a "close acquaintance shortly after the murder," but were made to a police officer and a reserve wildlife officer during a preliminary search for the victims' bodies. Neither Cleo nor Jon were suspects at the time, but Jon was eager to assist the police in searching for the victims.

More importantly, unlike in Chambers, there was no other evidence which corroborated the statements, or the inference that Jon committed the murders. In Chambers, there was a sworn confession by the same declarant, an eyewitness to the shooting, testimony that the declarant was seen with a gun immediately after the murder, and proof that he owned a .22 caliber revolver and

later purchased a new weapon. 410 U.S. at 300. Here, there was little, if anything, to tie Jon to the crime. After all, he was acquitted of both murders in his separate trial and could not be prosecuted as an accessory after the fact because of his familial status. LeCroy, 533 So. 2d at 754 n.2 & n.3.

Further, unlike in Chambers, LeCroy's statements were not self-incriminating. In assessing their admission under the "statement against interest" exception, this Court found that Jon's statements were not admissions against interest. LeCroy, 533 So. 2d at 754.

Finally, the Supreme Court relied heavily in Chambers on the fact that the declarant was available at the trial for cross-examination by the state. This fact was important because Mississippi did not recognize the "statement against (penal) interest" exception to the hearsay rule. Since Florida does recognize such an exception and actually requires that the declarant be unavailable, this distinction is further reason not to apply Chambers to this case. In fact, this Court recently agreed with the state in another capital case that Chambers should be limited to its facts because of the peculiarity of Mississippi evidence law. Gudinas v. State, 22 Fla. L. Weekly S181, 185 (Fla. Apr. 10, 1997).

Under the facts of the present case, any exclusion of Jon

LeCroy's statements from the guilt phase of Cleo LeCroy's trial would not have resulted in a due process violation under Chambers. LeCroy provided no circumstances to show the reliability of Jon's statements. Without such a showing, Jon's statements would not have been admissible during the guilt phase of LeCroy's trial. Thus, appellate counsel cannot be faulted for failing to raise a nonmeritorious claim. Groover v. State, 656 So. 2d 424, 425 (Fla. 1995). This claim should be denied.

ISSUE VI

WHETHER APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO CHALLENGE ON APPEAL ARGUMENTS AND INSTRUCTIONS WHICH DILUTED THE JURY'S SENSE OF RESPONSIBILITY FOR SENTENCING (Restated).

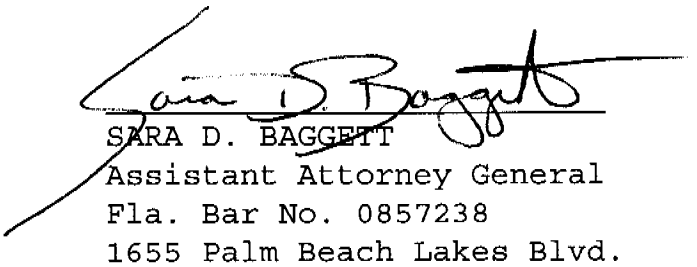
In his habeas petition, LeCroy claims that appellate counsel was ineffective for failing to challenge on appeal arguments and instructions which diluted the jury's sense of responsibility for sentencing in violation of Caldwell v. Mississippi, 472 U.S. 32 (1985). **Amended habeas pet.** at 39-40. Besides the fact that trial counsel did not object to the arguments and instructions complained of, LeCroy concedes that Caldwell does not apply in Florida. While he urges this Court to "reconsider that view," he presents no reason, much less a compelling one, for this Court to do so. Consequently, this claim should be denied.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for writ of habeas corpus.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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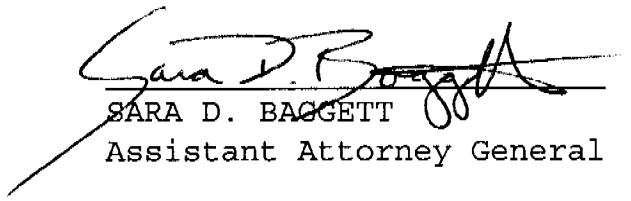
CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Stephen M. Kissinger, Chief Assistant CCR, Office of the Capital Collateral Representative, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, this 10th day of July, 1997.



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