IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1207
DCA CASE NO. 3D04-2340

NICKULIS GILLIS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

For acts committed on or about July 25, 2002, the State charged Petitioner[1] by information on August 15, 2002, with: Count 1 violating §§ 782.04(2) and 775.087, Fla. Stat. (2002)–murder in the second degree with a firearm; and, Count 2 violating §§ 812.13(2)(A) and 775.087–armed robbery with a firearm or deadly weapon. On July 25, 2002, Petitioner murdered Daniel Martin ("victim"/"Martin"), by shooting Martin with a gun during the course of a robbery. (R: 21-24). On September 4, 2002, a grand jury indicted Petitioner on three counts: Count 1 violating §§ 782.04(1) and 775.087, Fla. Stat. (2002)–murder in the first degree; Count 2 violating §§ 812.13(2)(A) and 775.087, Fla. Stat. (2002)–armed robbery with a firearm; and, Count 3 violating § 843.02, Fla. Stat. (2002)–resisting an officer without violence. (R: 26-28).

On July 25, 2002, Petitioner gave the police a sworn statement. In that sworn statement, he was again given his *Miranda*[2] warnings. These consisted of the following: 1) The right to remain silent which included the right not to speak to the officer or to answer any of his questions. 2) If he chose to speak with the officer, then anything which he might say could be introduced into evidence in

[1] Petitioner, NICKULIS GILLIS, was the defendant below, and Appellee, THE STATE OF FLORIDA was the prosecution below. The symbols "R" and "T" refer to the record on appeal and the transcripts of the proceedings, respectively.
[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

court against him. 3) If he "wanted a lawyer to be present during questioning at this time or anytime hereafter, you are entitled to have the lawyer present."[3] 4) If he could not afford the services of an attorney, then he would be provided one at no cost. After each question, Petitioner was asked if he understood that right and he so affirmed. (R: 318-20). Petitioner's *Miranda* form was signed at 2:32 p.m. on July 25, 2002, or about 5½ hours after the murder. (R: 320-21).

After the *Miranda* rights were readministered, Petitioner was asked about the events leading up to and including the murder. The following exchange took place:

Q Calling your attention to today's date, July 25, 2002, at approximately 9:45 in the morning, did you go to the Exxon gas station located on the corner of NW 151 Street and 22 Avenue?
A Yes, sir.
Q Why did you go there?
A For some money.
Q How were you planning to get the money?
A Rob a motherf***er.
Q Did you have a weapon?
A Yes.
Q What kind?
A A thirty-eight .357.
* * *
Q Did you see a man who was near a scooter?
A Yes, sir.
Q Was he a black man?
A He was red, though.
Q Was there anybody with him?
A Yes.

[3] (R: 320, lns 5-7).

Q Who?
A A white lady.
Q Did you approach this man? Did you walk up to this man?
A Yes.
Q What did you say?
A What he got.
Q What does he got?
A Yes.
Q Was that you intending to take what he had?
A Yes, sir.
Q Did he produce anything from his pockets?
A Yes, sir.
Q What?
A A marijuana joint, some change.
Q Where did he put that stuff.
A On the ground.
Q Did you pick any of it up?
A No, sir.
Q Did he do anything, like move?
A Yeah.
Q How?
A Trying to swing at me.
Q What did you do?
A Bust him.
Q Does that mean you shot him?
A Yes.
Q Did he fall?
A Yes, sir.

(R: 321-23). Petitioner stated that when he first approached the victim, he did not have the gun out, but pulled it out when the victim took a swing at him. He had the gun on his person, on his right side, with his shirt covering the gun. He confirmed that no one made him any promises or threatened or coerced him into giving his statement. (R: 324-25).

The *Miranda* form used to give Petitioner his *Miranda* warnings is included in the record and provides:

> 1. You have a right to remain silent and you do not have to talk to me if you do not wish to do so. You do not have to answer any of my questions. Do you understand that right?
> 2. Should you talk to me, anything which you might say may be introduced into evidence in court against you. Do you understand?
> 3. If you want a lawyer to be present during questioning, at this time or anytime hereafter, you are entitled to have the lawyer present. Do you understand that right?
> 4. If you cannot afford to pay for a lawyer, one will be provided for you at no cost if you want one. Do you understand that right?
>
> Knowing these rights, are you now willing to answer my questions without having a lawyer present?

At the end of each question, there are two spaces marked "Yes" and "No." Petitioner initialed "Yes" to each of these questions and signed and dated the form. (R: 330). On May 24, 2004, Petitioner filed a motion to suppress his statement to the police but did not raise the issue of the allegedly defective Miami-Dade Police Department ("MDPD") *Miranda* form in that particular motion. (R: 111-14).

On June 22, 2004, Petitioner filed a motion to suppress identification testimony by Ashlie Ynigo[4] and Takero Sharpe. Petitioner argued that the use by the MDPD of a single mugshot as the only photo in a photo line-up was unduly prejudicial to him. (R: 117-19).

[4] The witness' name is actually spelled "Ashley Yuinigo" and she will be referred to as "Yuinigo." (T: 416).

On June 24, 2004, the State responded to the motion to suppress identification testimony arguing that Yuinigo was not a casual observer. Instead, she: knew Petitioner from previous encounters having seen him about 10 times in a two-month period preceding the murder; and, stood only 2-3 feet from Petitioner when he fatally shot Martin. As such, she had a previous knowledge and recognition of Petitioner which provided an independent basis for identification. Under the totality of the circumstances, there was no irreparable misidentification of Petitioner. (R: 125-26).

On June 30, 2004, Petitioner filed a renewed motion to suppress statement. This time, defense counsel alleged that the MDPD *Miranda* form was defective for failing to form defendants of the right to terminate questioning at any time and/or the right to counsel during questioning. (R: 141-44).

On July 20, 2004, the State filed a response to the renewed motion to suppress statement to which it attached over 90 examples of *Miranda* forms used throughout Florida. The State argued that the *Miranda* warning given by MDPD was appropriate and sufficient and cited to *Cooper v. State*, 739 So. 2d 82, 85 (Fla. 1999) and *Johnson v. State*, 750 So. 2d 22, 25 (Fla. 1999). The State also pointed out that the Fourth District Court of Appeals reviewed 90 *Miranda* forms and only found the Broward County forms deficient for the failure to inform defendants of the right to consult with an attorney during questioning. *Roberts v. State*, 874 So.

2d 1225 (Fla. 4th DCA 2005). (R: 146-268).

On July 29, 2004, the State executed a search warrant on the following basis:

- That in Cell # PT6B2 of the Miami-Dade County Jail/Pretrial Detention Center there was evidence of a felony, murder, to wit a pair of red shoes or sneakers belonging to or in the possession of Petitioner.
- Two witnesses came forward, one actually witnessed the murder, Ms. Alice Hogan; the other witness, Herman Thomas ("Thomas") heard Petitioner demand Daniel's property and heard Daniel reply that he had nothing to give. A moment later, Thomas heard a gun shot and when he came around to see, he saw Petitioner fleeing the scene. Thomas told the affiant, MDPD Detective Enrique Chavarry ("Chavarry"), that at the time of the murder, he saw Petitioner's attire which included a pair of red shoes or sneakers.
- Petitioner was taken into custody at a nearby residence by Officer Smith ("Smith"). Petitioner was transferred from the custody of the police to that of the Miami-Dade Department of Corrections where he remained in their custody and control since the time of his arrest.
- The property room supervisor for the Miami-Dade Jail, Staci Rollins, confirmed that Petitioner did not receive any footwear nor did he release any footwear to anyone since his booking.
- Officers from the Department of Corrections assigned to the Pretrial Detention Center where Petitioner was housed confirmed on July 29, 2004, that Petitioner had red shoes or sneakers in his cell.

(R: 286-88).

On August 6, 2004, Petitioner filed a motion to suppress physical evidence wherein he sought to have red shoes seized from him suppressed. Petitioner argued the shoes were improperly seized where the State had a Corrections officer enter his cell and confirm that there were such shoes under his bunk. (R: 278-81).

On August 9, 2004, the parties stipulated that the DNA examined on a found Dolphins cap and a white T-shirt did not belong to Petitioner. The DNA found on

the Dolphins cap belonged to a person by the name of Samuel Bryant. The DNA found on the white T-shirt was not matched to any other person, including Martin. (R: 269).

After a jury trial, on August 13, 2004, the jury found Petitioner guilty of the lesser included offense of Second Degree Murder, and in possession of a firearm and, discharged a firearm and, as a result, caused the death or great bodily harm was inflicted upon Martin. The jury found Petitioner guilty of the lesser included offense of attempted robbery with a firearm, which he discharged and as a result, caused the death, or inflicted great bodily harm, upon Martin.[5] (R: 443-45). He was sentenced as to Counts 1 and 2 to a term of natural life in prison with a minimum mandatory of life with the terms of Counts 1 and 2 running concurrently along with court costs of $410. He received 751 days of credit time served. (R: 448-50, 452-54, 456-58).

Motion to Suppress Hearing–Photo Identification

On August 9, 2004, the trial court heard testimony as to suppression of Petitioner's identification based on the mugshot, photo line-up. Testifying were Yuinigo,[6] MDPD Detective Chavarry, and Herman Thomas ("Thomas").

[5] The verdict form refers to "Daniel Martin" rather than "Martin Daniel" as in the Information. Yuinigo referred to her friend, however, as "Daniel Martin." (R: 443-45).

[6] In the motion to suppress, this witness is referred to as "Ashlie Ynigo."

Yuinigo's Testimony

On July 25, 2002, Yuinigo was with Martin when they went to a gas station to put gas in a moped. (T: 17). When asked by the State why she signed and dated the back of the photo of Petitioner, Yuinigo replied "Because that is who shot Daniel Martin." (T: 18, ln 18). Prior to July 25, 2002, she had seen Petitioner 7-10 times within a period of about 2 months and had last seen him about 2-3 days before the day of the murder. These sightings lasted for about 10-15 minutes at a time. She knew Petitioner by sight, but not by name. (T: 19-20, 25-26). On the day of the shooting, Yuinigo stood about three feet away from Petitioner, during regular daytime hours, when he shot Martin. There was nothing obscuring Petitioner's face from her view. (T: 20).

Yuinigo spotted Petitioner about five minutes after the moped had been stopped. When she turned, she saw Petitioner, but did not see him approach the moped. Less than a minute passed from the time Yuinigo saw Petitioner to the time he murdered Martin. Yuinigo knew instantly she had seen Petitioner before, even though she did not know him by name. She had regularly seen him in the area commonly known as "the triangle" in Opa Locka. (T: 21-22).

When Petitioner approached, he produced a gun which caused Yuinigo to pay very close attention to what was happening. When the police showed her Petitioner's photograph, they did not tell Yuinigo or give her the impression this

was the person they wanted her to identify regardless of whether he was the shooter. Yuinigo had no doubt the person pictured in the photograph was the shooter. Yuinigo knew the photograph was some sort of mugshot because it had MDPD written on it–the MDPD did not hide that fact from her. (T: 23-24). Yuinigo testified the fact the photo was a mugshot had no influence on her ability to identify the person pictured within it, Petitioner, as the killer. (T: 28).

Yuinigo did not speak during the confrontation between Martin and Petitioner, but she heard what was said as she stood next to Martin when Petitioner shot him. There were no other people around them when all this took place. (T: 27-28). Yuinigo heard the demand for Martin's property and Martin responded he had nothing and offered the keys to the moped. Martin moved toward Petitioner to try and take the gun away, but never touched the gun. The next thing Yuinigo heard was one gunshot, Martin fell to the pavement where Yuinigo held him. Petitioner fled. (T: 30-33).

Detective Chavarry's Testimony

Chavarry spoke with Yuinigo and after interviewing her, he showed her Petitioner's photograph. He showed her Petitioner's photograph because she stated she knew the killer. Another witness named Petitioner as Martin's killer. Based on that information, Chavarry produced Petitioner's photograph. (T: 33-35).

Yuinigo told Chavarry about her previous contact with Petitioner, she had

seen him about 7-10 times during the previous two months, but did not know his name. She last saw Petitioner a few days before the murder. Based on all this information, Chavarry opted to show Yuinigo one photo, instead of a six-photo line-up and he showed her Petitioner's photograph. Yuinigo replied with certainty and without hesitation that the person in the photograph was the person she saw kill Martin. (T: 35-38).

Chavarry testified that a six-photo line-up is normally shown to a witness who does not know the suspect. In this case, however, Yuinigo knew the killer, but not by name. As such, it was unnecessary to show her a six-photo line-up. He did not conceal from Yuinigo she was looking at a mugshot. (T: 37-38, 43).

Thomas' Testimony

Thomas was shown the copy of Petitioner's photograph—he signed and dated it because the person pictured therein shot another person. Thomas did not see Petitioner shoot Martin, but he heard the altercation and the shot. When the police showed up, he gave them Petitioner's name as "Nickulis." After he gave the police the name of Nickulis, the police showed him Petitioner's photograph. Thomas was familiar with Petitioner as he had seem him in the area, coming to the gas station where Thomas worked part-time. He had seen Petitioner in passing, exchanging pleasantries about once a week for about a year. (T: 47-49; 58).

On the day of the murder, Thomas was cleaning inside the store of the gas

station. He saw Petitioner outside the store. Thomas went outside and continued cleaning the gas station grounds. He was on the opposite side of the place where the murder took place. (T: 50-51). While cleaning, he heard loud voices. He recognized one of the voices saying, "give me the keys, give me the keys ..." (T: 51, lns 22-23). He heard the bang immediately after the demand for the keys. (T: 56). After hearing the bang, he ran to where he heard the noise and saw a young man on the ground, with a young lady kneeling over him. Thomas told the lady not to move the man. (T: 52). It only took him a few seconds to run to where Martin lay dying. The shooter had already fled. (T: 57). Thomas saw no articles of clothing laying around after the shooting. (T: 59).

The person whose voice Thomas recognized was the same person pictured in the photograph, Petitioner. (T: 51-52). When Thomas first saw Petitioner, they were about 20 feet apart and Petitioner was leaning against the window, facing Thomas. (T: 53-55). Thomas paid no attention to the writing on the photograph. He focused his attention instead on the pictured person. Thomas first gave his statement to the police and was then shown the photo. He gave the MDPD the name of the shooter as "Nickulis Gillis." He was not influenced by the fact that he was shown Petitioner's mugshot. (T: 57-58, 60).

Trial Court's Ruling

The trial court declared:

> If she (Yuinigo) had not seen him seven to ten times for a couple of seconds to I guess a minute each time as they pass(ed) each other in the triangle in Opa Locka.
>
> ***
>
> There would be no question, I would probably grant the motion but because of her familiarity with the person being in the area and her certainty that demonstrated near terms of the ID from that photograph and her better than not ability to see him many ways. She got to stand there while he's talking to somebody in broad daylight and then an identification usually it is a couple of seconds but given the length of her opportunity and the degree of attention, and level of certainty, I will deny the motion as to her. I find there is procedure (sic) was not the totality not unduly suggestive and in commission of a misidentification, certainly no irreparable identification.
>
> Listen, I know he (Thomas) (knew) him by name, seen him once a week for a year. Obviously, well aware of him, saw him several times even that day from the shirt, the length of the pants, the shoes, everything that is obviously (sic). He was questioned, took effect, that you would question his ID, I mean it got even stronger.
>
> ***
>
> Well he had less time to observe him at the actual moment of the shooting. He had all day to observe it sound(s) like. So I will deny the motion for the same reasons.

(T: 72-74).

Motion to Suppress Hearing–Red Shoes/Sneakers

On August 9, 2004, the trial court also heard testimony as to suppression of Petitioner's red footwear. At this hearing, Chavarry and Thomas testified.

Detective Chavarry's Testimony

Chavarry executed a search warrant at Petitioner's cell in the Miami-Dade County Jail. He entered Petitioner's cell and impounded a pair of red sneakers. The red sneakers were found next to a pair of flip-flop sandals labeled "Nick." The red sneakers and flip-flop sandals were under Petitioner's bunk. Chavarry brought the red sneakers to the courthouse. These were shown to Thomas who immediately identified the sneakers as those worn by the shooter. (T: 39-40).

Stipulations

The State in this case stipulated to the following facts: 1) another Assistant State Attorney called the Miami-Dade County Department of Corrections ("DOC") and asked a DOC officer to go to Petitioner's cell and confirm the presence of red shoes/sneakers; 2) a DOC officer went to Petitioner's cell, went inside, looked around and saw the shoes, which were not obscured in anyway, under Petitioner's bed; 3) the DOC officer did not enter the cell for purposes of institutional security; 4) the DOC officer did not seize the red sneakers; 5) once the red shoes/sneakers were confirmed as being in the cell, the State contacted Chavarry to come and execute a warrant and he signed the affidavit; and, 6) the sneakers were not in plain view from outside the cell. (T: 42-43, 75, 77, 80, 87).

The State discussed the warrant and informed the trial court that Thomas identified the shooter as wearing red shoes/sneakers. Shortly after the murder,

Petitioner holed up in a residence, he was taken from the residence into custody and from the headquarters right to the DOC. According to the DOC's property receipt records, Petitioner neither released nor received any footwear.

Thomas' Testimony

When Thomas first saw Petitioner, he wore long pants, a blue shirt with some sort of leaf print, and bright red, laced, high top sneakers which looked too big for his feet. Thomas was shown the sneakers Chavarry impounded from Petitioner's cell. Thomas had no doubt those were the sneakers Petitioner wore the day of the murder. About 5-10 minutes before the murder, Thomas saw Petitioner inside the store and noticed the sneakers. He also saw Petitioner a few days before the shooting wearing the same shoes. On the day of the murder, the closest Thomas got to Petitioner was about three feet and he saw the shoes. His view was unobstructed. (T: 61-67).

Trial Court's Ruling

After a recess, the trial court issued its ruling:

> ...Come that in July 29th, 2004, that the defendant has red shoes/slash sneakers in his cell ... exceeding that as I still believe that you had probable cause to issue the warrant and the affidavit would be sufficient and that it may be inferred in the four corners of the defendant (sic) that the red shoes to which he was seen with at the time could have been with him because he remained in [the] custody and in [the] control of the department since the time of his arrest.
>
> The arrest appeared to be after the incident and that advise that Mr. Gillis have not received any footware (sic) or release since the

> date of the booking with that said, he must still have the shoes that he had on at the scene of the crime. So that motion to suppress will be denied.

(T: 107-08, lns 8-25, 1-2, respectively).

Motion to Suppress Confession–Miranda Form

At the same hearing held on August 9, 2004, the trial court also considered Petitioner's motion to suppress his confession based on his allegation the MDPD *Miranda* form was deficient due to the *Roberts* decision. Petitioner alleged the MDPD form was defective as it did not inform a defendant s/he could stop talking to the police at any time and s/he had a right to consult with an attorney during the questioning. (T: 96). After the parties presented their arguments, the trial court denied the motion to suppress his confession. (T: 100-01).

Motion In Limine–Shirt and Hat

At the same hearing held on August 9, 2004, the State moved to prohibit the mentioning of a white T-shirt and a Dolphin hat found at the scene until such time as the defense established the relevance of these items. (T: 102-05). The trial court stated: "I will reserve on that but I will prohibit the defense from mentioning it to the jury as to such items to believe it is in anyway associated with this trial." (T: 105-06, lns 25 and 1-4, respectively).

Later on, the trial court made its ruling:

> Just because it [the shirt and hat] is discoverable do[es] not meet (sic) it is admissible.
> ***
> ***On that basis, I will preclude the defense from introducing any evidence regarding the shirt and hat until someone talk(s) about the white shirt and a hat being a part of this case.*** Otherwise, we will just be putting every article of clothing between the gas station and the house.

(T: 114-15, lns 16-25, 1, respectively)(emphasis added). As such, the defense could introduce the hat and shirt ***if*** it laid a proper predicate for doing so.

The Trial

Pre-Trial Matters

The jury trial commenced on August 10, 2004. Prior to opening arguments, the parties went through various photographs to stipulate as to admissibility. A discussion was held as to photograph 1N and 1M, a photograph of the entrance and exit wounds to the heart. The State proffered the bullet caused injuries to the rib cage and lung with the bullet entering and exiting Martin's heart. The State argued these photos were relevant because they showed how Martin died–how the bullet entered and exited the heart thereby explaining the matter and manner of the cause of death. The trial court ruled the photos were relevant to the State's case and overruled the objection. Photograph 1M showed Martin's heart by itself, clearly showing the backside of the heart and its exit wound. The trial court overruled both objections to photograph 1M and 1N. (T: 382-84).

The parties also went through various items to determine admissibility. The confession and red shoes/sneakers were admitted over defense counsel's renewed objections. The trial court overruled the confession objection on the same grounds as its previous ruling and simply had the shoes received. (T: 389-90).[7]

Yuinigo's Testimony

At the time of the murder, Yuinigo was 16 years old. (T: 439). She was with Daniel Martin on July 25, 2002 when they went to a gas station at about 9:00 a.m., in Opa Locka to put gas in a moped. Martin initially went inside to pay for the gas and she waited outside for him. She noticed no one around her while she waited. After Martin finished pumping the gas, he began to help her get mount the moped. Before she could get on, they were approached by a man waving a gun who told Martin to "give him all his sh**." (T: 418, ln 21, 420-22, 424, 440, 443, 448-49). After the gunman spoke, she turned around and clearly saw the gunman and the small, black gun in his hand–this only took a few seconds. Martin stood between her and the gunman, they stood closely together–not more than two feet apart. Her vision was unobstructed and there was good lighting. She recognized the gunman, but did not know his name. She had seen the gunman in the area,

[7] Photographs 1M and 1N became exhibits 5 and 6, respectively; Petitioner's statement became exhibit 16, and the shoes became exhibit 17; the *Miranda* form became exhibit 18; the written waiver became exhibit 19. (R: 392-93). The photographs which Yuinigo and Thomas each used to identify Petitioner as the killer were trimmed off to remove the mugshot information. (R: 395).

about 8-10 times in a two-month period, and had last seen him about a week before the shooting. (T: 422-26, 447-48).

Martin told the man he had nothing and began emptying his pockets, throwing gum and paper on the ground. He asked the assailant if he wanted the keys to the moped. The assailant said he wanted the keys to the moped. Martin threw the keys to the ground. When the gunman went to pick up the keys, Martin and the gunman began fighting. The gun went off once, the gunman ran, and Martin fell to the ground–foaming at the mouth, gasping for air. Yuinigo began screaming for help, the police arrived about five minutes later. (T: 419, 428-29, 431-33, 446, 453).

The gunman seemed nervous, his hand was shaking. He pointed the gun, which he held in his right hand, at Martin, Yuinigo, or both of them. (T: 427, 432, 443). Yuinigo described the gunman as between 5'5" and 5'6", about 25-26 years old, a black man with a dark complexion. The police arrived and began their investigation. She told the police she knew the gunman by sight, but not by name. Before she was shown a photograph of the suspect, she had no knowledge as to the following: the progress of the police investigation at the gas station; whether the MDPD had anyone in custody; or, what other witnesses may have told the MDPD. The police showed her a photograph and she identified Martin's killer. (T: 435-38, 443, 446-47). She identified the suspect in the photo as Martin's killer, "Because

that is who killed Daniel." (T: 438, ln. 10). She identified Petitioner as Martin's killer in open court. (T: 438).

At the time she was shown Petitioner's photograph, the police did not say anything to her to make her believe this was the person they wanted her to identify. Upon being shown Petitioner's photograph, she was 100% certain the person pictured therein was Martin's killer. Even as she sat in court, she had no doubt Petitioner was Martin's killer. (T: 438-39).

During cross-examination, defense counsel tried to lay a predicate for having the Dolphin hat admitted. Yuinigo, however, did not remember what Petitioner was wearing at the time of the murder. Defense counsel showed her a photograph of the hat and asked Yuinigo if she recognized it, but she did not remember seeing that hat at the scene. No further effort was made to lay a predicate as to the Dolphin hat. (T: 445). Defense counsel made no attempt to lay a predicate for the T-shirt.

Thomas' Testimony

Thomas worked part-time at the gas station where the murder took place. He was an eight-time convicted felon, seven for drug possession and one for burglary. In 1998, he sought help for his cocaine addiction. On the day of the murder, he consumed three beers over about a 24-hour period, but was not drunk nor had taken any drugs. The beer did not affect his ability to hear and see the

events which unfolded that day. (T: 456-58, 476, 483).

Thomas knew Petitioner and identified him in open court. Prior to the day of the murder, he would regularly see Petitioner in the neighborhood about twice a week for about a year. They would exchange pleasantries and so he was familiar with Petitioner's voice. On the day of the murder, he first saw Petitioner in the neighborhood and he greeted Petitioner. He next saw Petitioner at the gas station. Petitioner wore a red/bluish/gray shirt with some sort of print, long dark blue pants, and bright red, laced shoes. He thought the shoes were high tops but could not tell for sure because the pants covered the shoes. The shoes looked too big for Petitioner's feet. At the gas station and inside the station's store, Petitioner wore the same clothes. (T: 456-62, 464, 477-78).

Thomas went outside to continue his cleaning duties at the south side of the station. Martin and Yuinigo were on the north side of the store. He heard a voice demanding money, a second voice, a woman's, replied they did not have any money. He also heard the same male voice ask for keys. He next heard one gunshot. Thomas recognized the voice demanding money as belonging to Petitioner. From where he was, he could not see anything, but he heard everything. After he heard the gunshot, he ran to where he thought the shot came from. He saw Martin laying face down on the ground with Yuinigo over him, Petitioner was gone. He told Yuinigo not to move Martin, he could see blood and

knew Martin had been shot. He ran back inside the store and told his boss to call 911. Thomas saw no abandoned red shoes laying about. (T: 465-70, 479-81).

After the police arrived, Thomas was taken to the police station where he gave a statement. He identified Petitioner as the shooter and gave Petitioner first name to the police. After he gave the police this information, he was shown a photograph and asked if he knew the person pictured therein. Thomas told the police he knew that person. (T: 471-73).

Thomas identified the red shoes in open court as the ones worn by Petitioner the day of the murder. Upon seeing the shoes in open court, he had no doubt those were the same sneakers Petitioner wore that day. (T: 474-75).

During cross-examination, defense counsel made no attempt to lay a predicate as to the Dolphins hat or the white T-shirt. The jury, however, which had been allowed to ask questions by the trial court did direct a question to Thomas asking whether he remembered Petitioner wearing a hat, Thomas answered Petitioner wore no hat on that day. (T: 493-94).

Other Testimony

During the trial, the following relevant persons also testified: MDPD homicide officer James Calliger ("Calliger");[8] Opa Locka Police Chief James

[8]Calliger interviewed Thomas and showed him Petitioner's picture. Thomas told Calliger he knew the shooter by name and by sight. When he showed Thomas the

Smitty ("Smitty");[9] MDPD Detective Charles Maculley ("Maculley").[10]

MDPD Lead Homicide Detective John Parmenter's ("Parmenter")

He learned the name of the suspect, Nickulis Gillis, from Chief Smitty. Parmenter called Chavarry and gave him that information so Chavarry could pull a photo of the suspect and show it to Yuinigo. He knew Yuinigo knew the suspect by sight, but not by name. (T: 605-06).

He interviewed Petitioner at the police station. Parmenter did not wear a uniform, his weapon, nor his badge. He had an identification card pinned to his belt. He introduced himself and proceeded to go over the *Miranda* form. Prior to using the *Miranda* form, Parmenter asked Petitioner how far he had gone in school (9^{th} grade), if he could speak English (yes, he could), and whether he was high on anything (no, he was not). Prior to giving the *Miranda* rights, Parmenter observed Petitioner and noted: he did not appear under the influence of any drugs or alcohol; and, he appeared to understand Parmenter, he was not confused. Parmenter read the form aloud to Petitioner and also placed it in front of him so he could read

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photo, Thomas did not appear intoxicated or under the influence of any drugs or alcohol. (T: 494-97).

[9]Based on his investigation, he went to a residential rooming house. Once there, he saw Petitioner who wore some sort of dark shirt and refused to come out. He did not notice any abandoned red shoes at the gas station or in the area. (T: 507-14).

[10] He was present when Petitioner was taken into custody. Petitioner did not appear to be under the influence of any drugs or alcohol; was not unsteady on his feet, nor did he appear to have any injuries.

along. Parmenter read the form aloud to the jury. Petitioner had no questions of Parmenter nor did he ask for any clarifications. At no time did Petitioner ask for a lawyer. At that point, Parmenter began discussing the murder. At first, Petitioner denied ever being at the scene. He then changed his story and admitted to being there, but denied doing anything. Parmenter then told him he had been identified as the shooter. At that point, Petitioner confessed to the robbery and the shooting. Parmenter took his statement wherein he confessed to shooting Martin and described the events leading up to the shooting. The transcribed statement was admitted into evidence. (T: 611-40). Parmenter was present when Calliger showed Thomas Petitioner's photograph. Thomas did not appear to be under the influence of any drugs or alcohol. (T: 641-42). Defense counsel did not attempt to lay a predicate as to the Dolphins hat or the T-shirt through this witness.

DOC Property Room Supervisor Stacey Rollins' ("Rollins")

Rollins had the property records related to Petitioner's custody. Her office kept track of clothing brought to and released by inmates. Petitioner was brought clothing by family members on August 11, 2004 and he released clothing on January 4, 2004 (two pairs of pants, one jacket, underwear, and a shirt). There were no entries for receipt or release of footwear. Her records did not indicate any exchange of clothing between inmates. (T: 664-66).

MDPD Detective Chavarry

On the day of the shooting, he interviewed Yuinigo both at the scene and at the station. Aside from being hysterical and upset, she was able to tell him what happened. She knew the killer by sight, but not by name. He received information at the station as to the killer's identity, and with that information he produced a photo which he showed to Yuinigo–after she told him she knew the killer. There was no reason to do a photo line-up because she knew the killer. Yuinigo had no doubt about her recognition of the pictured person as the killer. (T: 667-71).

Chavarry executed a warrant for red shoes/sneakers at the Miami-Dade County Jail. He entered Petitioner's jail cell, Petitioner sat on his bunk under which Chavarry found red footwear. There was no other red footwear in the cell. Next to the red sneakers, he saw a pair of sandals labeled "Nick" and "Opa Locka." A crime scene technician impounded the shoes. (T: 671-75).

MDPD Criminalist Allan Kline ("Kline")

Kline tested the gunshot residue swab taken from Petitioner which came back positive for primer residue on the back of Petitioner's right hand and on the right side of the left hand. These results were consistent with the firing of a firearm. The swabs also came back positive for Martin. Martin's swabs were more indicative of a defensive, rather than aggressive, position. (T: 679-83).

Miami-Dade County Chief Medical Examiner Bruce Allan Hyme ("Hyme")

Hyme performed the autopsy on Martin and determined he died from a penetrating gunshot wound to the chest–a homicide. Hyme discussed the entrance wound which came through the left side of Martin's chest. (T: 688-91). He determined the projectile entered the left side of his chest, above the nipple, pierced the lobe of the upper left lung, and then pierced the main pumping chamber of the heart–the left and right ventral of the heart. Martin's death occurred within a fraction of a minute of his heart being pierced. Hyme identified State's exhibit 6 as the entrance wound and State's exhibit 5 as the exit wound. (T: 691-95).

The jury retired to deliberate and returned a guilty verdict as to the lesser included offense of second degree murder while possessing a firearm which was discharged resulting in the death or infliction of great bodily harm on Martin. The jury also found Petitioner guilty of the lesser included offense of attempted robbery with a firearm which discharged causing the death or infliction of great bodily harm to Martin. (T: 843-44). The trial court adjudicated Petitioner guilty as to both counts (T: 848) and sentenced him to life imprisonment for the second degree murder and life for attempted robbery with a firearm under the ten, twenty, life statute. The trial court found Petitioner qualified and so designated him as an habitual offender but did not sentence him as such. The life sentences to run concurrently with a minimum mandatory of life on both counts. (T: 866-68).

On appeal, the Third District rejected Petitioner's claims of error. The first error concerned the use of a single photographic lineup. The district court agreed it was unnecessarily suggestive, but there was no substantial likelihood of irreparable misidentification where Yuinigo: had seen Petitioner many times, was familiar with him, had seen him in broad daylight under heightened circumstances, and was certain of her identification. Thomas' identification was stronger and more reliable as he saw Petitioner at least once a week for a year and saw him several times the day of the murder and he accurately described Petitioner's clothing and shoes.

Petitioner next claimed error as to the suppression of his statement where he claimed the MDPD *Miranda* form was defective for not advising him he had the right to an attorney prior to questioning or the right to terminate the interview at any time. The district court noted the first claimed deficiency was raised and rejected by this Court in *Chavez v. State*, 832 So. 2d 730, 750 (Fla. 2002) and *Johnson v. State*, 750 So. 2d 22, 25 (Fla. 1999). The form tracked the *Miranda* language and was sufficient. As to the second issue, Petitioner relied upon cases from the Fourth District Court of Appeal which found the form used by the Broward Sheriff's Office defective for failing to inform the suspect that he could stop questioning at any time. The Third District Court of Appeal concluded the Miami-Dade form informed an accused s/he did not have to answer *any* questions posed by the officer and therefore implicitly warned the accused s/he could invoke

his right to remain silent at any time during the interrogation or terminate further questioning.

The district court also rejected his claim of error as to the seizure of his red sneakers. The district court reasoned a public jail cell does not share the same privacy as an individual's home, car, office, or motel room. Moreover, an arrestee's clothing and personal effects on his or her person may be taken, examined, and preserved for evidence.

SUMMARY OF THE ARGUMENT

I. The MDPD *Miranda* form complies with the requisites of the Florida Constitution and *Miranda*. The opinion of the Third District Court of Appeal is in conformity with *Chavez*, *Johnson*, and *Brown v. State*, 565 So. 2d 304 (Fla. 1990), *cert. denied*, 498 U.S. 992 (1990), *abrogated on other grounds, Jackson v. State*, 648 So. 2d 85 (Fla. 1994). Neither Florida nor federal courts require a talismanic incantation of their rights.

A.1. The issue of consulting with an attorney prior to questioning was last addressed by this Court in *Chavez* where the MDPD *Miranda* form was again upheld as sufficient. The Third District followed the law as declared by this Court when it affirmed as to this issue. The Broward Sheriff's Office ("BSO") form reported in *Roberts* is distinguishable from the MDPD form.

A.2. Neither *Traylor v. State*, 596 So. 2d 957, 961 (Fla. 1992) nor *Miranda* require an express warning to a defendant that s/he may terminate questioning at any time and the same question has been rejected by many other jurisdictions. In *Brown*, this Court squarely rejected such a requirement. If at any point a suspect indicates s/he wishes no longer wishes to speak, the questioning may either not begin or if it has begun must cease. The right to remain silent is inferred throughout questioning. The burden is on the police to cease questioning. The MDPD form explicitly and without limitation warns a suspect s/he does not have to answer ***any*** question posed by the police. Petitioner never gave any indication he wished to cease speaking with the police. The MDPD form meets the requirements of Art. I, § 9, Fla. Const., *Traylor*, *Brown*, and *Miranda*. The Fourth District Court's opinions in *Franklin v. State*, 876 So. 2d 607 (Fla. 4th DCA 2004) and *Roberts v. State*, 874 So. 2d 1255 (Fla. 4th DCA 2004) never mention this issue. The Fourth District Court's opinions in *West v. State*, 876 So. 2d 614 (Fla. 4th DCA 2004) and *Ripley v. State*, 898 So. 2d 1078, 1079 (Fla. 4th DCA 2005) provide no authority for concluding the BSO form was so deficient and were contrary to *Brown*.

Should this Court disagree with the State's position, the admission of the confession was harmless beyond a reasonable doubt given the compelling eyewitness testimony of Yuinigo and Thomas; Kline's testimony as to the gunshot

residue swabs taken from Petitioner and Martin; and, Medical Examiner Hyme's testimony.

B. The district court properly found that while the use of a single photographic lineup was unnecessarily suggestive, there was no substantial likelihood of irreparable misidentification given: Yuinigo's familiarity with Petitioner and the heightened circumstances of their encounter and the certainty of her identification; and, Thomas' familiarity with Petitioner, his encounter with Petitioner on the day of the murder and description of Petitioner's clothing and shoes.

C. The Third District Court properly rejected Petitioner's claims as to the seizure of his red sneakers. A public jail cell does not have the same privacy as an individual's home, car, office, or motel room. Furthermore, the clothing and personal effects on the person of an arrestee may be taken, examined, and preserved for evidence per Florida and federal law.

D. The Third District did not address this issue within the four corners of its opinion although it was raised below. The trial court properly required Petitioner to establish a predicate for the admission of a Dolphins' hat and a T-shirt found at the scene and the admission of autopsy photographs of Martin's wounded heart. Petitioner failed to establish a predicate and so the items were not admitted into evidence. The autopsy photographs showed the entrance and exit wounds caused by the bullet. These were properly admitted to illustrate Dr. Hyme's testimony and

the injuries he noted on Martin.

ARGUMENT

I. THIS COURT SHOULD REJECT THE HOLDINGS OF THE FOURTH DISTRICT COURT OF APPEAL AND AFFIRM THOSE OF THE THIRD DISTRICT COURT OF APPEAL.

A. THE MDPD *MIRANDA* FORM COMPLIES WITH THE REQUISITES OF *MIRANDA* AND THE FLORIDA CONSTITUTION. THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IS CONSISTENT WITH THE REQUIREMENTS OF FLORIDA AND FEDERAL LAW.

In *Traylor*, this Court held confessions are first reviewed under the Florida Constitution and if it passes that muster then the confessions are reexamined under the Federal Constitution. "When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein." *Id.*, 596 So. 2d at 962; *see* Art. I, § 9, Fla. Const.

As to Art. I, § 9, Fla. Const., the *Traylor* Court, after reviewing Florida law and experience under *Miranda* and its progeny stated, "we hold that to ensure the voluntariness of confessions, the Self-Incrimination Clause of Article I, Section 9, Florida Constitution, requires that prior to custodial interrogation in Florida suspects must be told that they have a right to remain silent, that anything they say will be used against them in court, that they have a right to a lawyer's help (e.g., before and during questioning), and that if they cannot pay for a lawyer one will be

appointed to help them." *Id.*, 596 So. 2d at 965-66.[11] Neither Florida nor federal courts require a talismanic incantation of these rights. *Thompson v. State*, 595 So. 2d 16, 17 (Fla. 1992); *State v. Delgado-Armenta*, 429 So. 2d 328, 329-31 (Fla. 3d DCA 1983); *California v. Prysock*, 453 U.S. 355, 359 (1981). Instead, all that is required is that the accused by 'adequately informed' of the *Miranda* warnings or their equivalent. *Duckworth v. Eagan*, 492 U.S. 195, 202-03 (1989)(The Court "never insisted that *Miranda* warnings be given in the exact form described in that decision. ... Reviewing courts therefore need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda*."). Additionally, the authorities were warned that if a suspect "indicates in any manner that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop." *Traylor*, 596 So. 2d at 966. This Court concluded the harmless error test applies to cases involving the admissibility of confessions, i.e., harmless beyond a reasonable doubt. *Id.*, 596 So.

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[11] In *Miranda*, the United States Supreme Court set forth the minimum warnings a defendant in custody must receive, but did not make the exact verbiage used mandatory. *Miranda* (A defendant must be warned: "prior to any questioning that he has the right to remain silent, that anything he says can be used against him a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.") *Id.*, 384 U.S. at 479; *Maxwell v. State*, 917 So. 2d 404 (Fla. 5th DCA 2006).

2d at 973; *Thompson*, 595 So. 2d at 18.

1. Consultation with an Attorney Prior to Questioning

This issue, specifically as to the MDPD *Miranda* form, was last addressed by this Court in *Chavez v. State*, 832 So. 2d 730, 750 (Fla. 2002):

> Chavez also asserts that his confession must be suppressed as involuntary because he was not properly advised of his right to consult with counsel before questioning. *See Taylor v. State*, 596 So. 2d 957, 957 n. 13 (Fla. 1992)(observing that "the suspect has the right to consult with a lawyer before being interrogated and to have the lawyer present during the interrogation"). Here, Chavez, who indicated that the had a twelfth-grade education, read the Metro-Dade *Miranda* form in Spanish, and initialed it. **This form has specifically been upheld as sufficient**. *See Cooper v. State*, 739 So. 2d 82, 84 n.8 (Fla. 1999)(approving this warning on the Metro-Dade rights form: "If you want a lawyer to be present during questioning, at this time or any time thereafter, you are entitled to have a lawyer present."). Thus, Chavez's claim that he was insufficiently informed of his *Miranda* rights fails.

See Johnson, 750 So. 2d at 25 (expressly rejecting as error the failure of the MDPD warning form to inform an accused of the right to counsel prior to and during questioning and referring to *Cooper* where the Court declared the MDPD form tracks the language of *Miranda*); *Cooper*, 739 So. 2d at 82 n.8 (defendant's claim the MDPD form was insufficient as the warning tracked the language of *Miranda*).

This Court may wish to note the form advises a defendant s/he may have a lawyer present "at this time," i.e., when the *Miranda* form is given, which occurs ***prior*** to the beginning of questioning, as well as informing him of his right to an

attorney "anytime hereafter." Given the preceding, the MDPD *Miranda* form which advises an accused of the right to the presence of an attorney "at this time," during, and after questioning has been explicitly upheld by the Florida Supreme Court and so the trial court properly denied the motion to suppress and the Third District Court of Appeal properly affirmed.

The BSO form as reported in *Roberts*, follows the language announced in both *Traylor* and *Miranda*, but is factually distinguishable from the form employed by the MDPD. The third warning on that form informs the accused: "You have the right to talk with a lawyer and have a lawyer present before ***any*** questioning." Plainly, the accused is told s/he may speak with a lawyer and have that lawyer present before any questioning The third warning of the MDPD form, however, more fully informs the accused that if s/he wants "a lawyer to be present during questioning at this time or anytime hereafter, you are entitled to have the lawyer present." The trial court properly denied the motion to suppress which the Third District properly affirmed.

2. Termination of Questioning at any Time

There is no requirement either in *Traylor* or in *Miranda* to give a defendant an express warning that s/he may terminate questioning at any time. While the United States Supreme Court has not squarely addressed this issue, this Court did

in *Brown*. In *Brown*, this Court squarely answered the same question in the negative. This Court declared:

> The right to cut off questioning is ***implicit*** in the litany of rights which Miranda requires to be given to a person being questioned. ***It is not, however, among those that must be specifically communicated to such person.*** The rights card which the detective used contained no mention of cutting off questioning, but, because *Miranda* does not require such a warning, the warnings given Brown were sufficient.

Id., 565 So. 2d at 306 (emphasis added).

Other jurisdictions which have considered this question have rejected such a requirement.[12] The *Traylor* Court warned that once a suspect indicates s/he no

[12] *See Green v. Alabama*, 45 So. 2d 243 (Ala. Crim. App. 1970)(no requirement to warn as to termination of questioning); *Wofford v. Arkansas*, 952 S.W.2d 646 (Ark. 1997)(same); *In the Interest of M.R.J.*, 633 P.2d 474 (Col. 1981)(same); *Gray v. Delaware*, 441 A.2d 209, 217 (Del. 1981)(same); *Louisiana v. Nelson*, 822 So. 2d 796, 799 (La.App. 5 Cir. 2002)(same); *Massachusetts v. Rui Novo*, 812 N.E.2d 1169, 1176 (Mass. 2004)(no requirement defendant be informed of the so-called 'fifth' *Miranda* warning) referring to *Massachusetts v. Silanskas*, 746 N.E.2d 445 (Mass. 2001); *Smith v. Mississippi*, 394 So. 2d 1367, 1369 (Ms. 1981)(four-fold *Miranda* warning comprehends and includes the right of a suspect to terminate questioning at any time); *Missouri v. Harper*, 465 S.W.2d 547 (Mo. 1971)(no requirement to warn as to right to terminate questioning); *New Hampshire v. Fecteau*, 568 A.2d 1187, 1188 (N.H. 1990)("Neither the United States Supreme Court nor this court has ever required that police inform a suspect that he has the right to terminate questioning at any time, and we expressly decline so to hold today."); *New Jersey v. Sherwood*, 353 A.2d 137 (N.J. Sup. Ct. App. Div. 1976)(same); *Ohio v. Brown*, 2000 Ohio App. LEXIS 1430, *8 (Ohio Ct. App. 2000)("Petitioner could have chosen to terminate the interrogation at any time; however, no law exists requiring the police to tell a suspect he has the option to stop talking to them once he has waived his right to remain silent."); *Oregon v. Olson*, 731 P.2d 1072 (Or. Ct. App. 1987)(Oregon Constitution does not require warnings, including right to terminate questioning at any time, which exceed

longer wishes to speak, the questioning may either not begin or must cease if it already began. *Id*., 596 So. 2d at 966. In *Brown*, this Court observed this is an implicit, not an explicit, right. Thus, the right to remain silent by not answering police questions is inferred throughout the process. The Third District below properly recognized the implicit nature of this right.

The court in *State of Wisconsin v. Mitchell*, 482 N.W.2d 364 (Wis. 1992), addressed this question and closely examined the *Miranda* decision and declared, "We conclude the Supreme Court did not simply neglect to specify that the warnings include the right to terminate questioning because that right was identified in the same paragraph that specified the requisite warnings." *Id*., 482 N.W.2d at 692-93. "By employing the right to stop answering questions at the post-warning stage, *Miranda* protects a defendant's rights by placing a continuous burden on the police." *Id*. Ultimately, that court held that any prior statements it might have made which required the "fifth" warning was dicta and withdrew them.

Miranda); *Rhode Island v. Gianoulos*, 404 A.2d 81, 84 n.2 (R.I. 1979)(no federal or state requirement requiring advising of a right to terminate questioning); *Rhode Island v. Crowhurst*, 470 A.2d 1138, 1142 (R.I. 1984)(same); *United States v. Brown*, 100 Fed. Appx. 769 (10th Cir. 2004)(no requirement to warn of right to terminate questioning); *United States v. Bramley*, 1987 U.S. Dist. LEXIS 10776 (N.D. Ill. 1987)(same); *United States v. Hoke*, 648 F. Supp. 1425, 1432 (E.D. N.Y. 1986)("While *Miranda* requires the police to cease questioning at the request of the detainee, this is not one of the rights that has to be enumerated in the *Miranda* warnings. Failure to advise a suspect of his right to terminate questioning is an important factor to be considered in determining the voluntariness of any statements made, but this warning is not expressly required.").

Petitioner was warned: "You have a right to remain silent and you do not have to talk to me if you do not wish to do so. You do not have to answer ***any*** of my questions." (R: 330)(emphasis added). This warning is unlimited, i.e., the MDPD form explicitly informs a defendant s/he does not have to answer ***any*** questions posed by the officer. Nowhere is the ability to refuse to answer ***any*** MDPD questions limited to either before or during questioning. The ability to refuse to answer any question means exactly what it says. Petitioner gave his statement which was transcribed by a court reporter. Nowhere in his transcribed statement did he invoke his right to remain silent. Nowhere in his initial brief does he declare that he gave any indication of his wish to remain silent. Had he done so, the MDPD would have been required to cease any questioning which it may have already started. *Traylor*. The MDPD form as given meets the requirements set forth in Art. I, § 9, Fla. Const., *Traylor*, *Brown*, and *Miranda*.

In *Ripley*, the Fourth District Court of Appeal concluded the BSO *Miranda* form was additionally defective for failing to inform a suspect he could stop the interrogation at any time during questioning on the basis of its decisions in *Franklin*, *West*, and *Roberts*. Neither *Franklin* nor *Roberts*, however, mentioned this issue.

In *West*, the district court noted the defendant was not informed of the right to terminate questioning at any time, but provided no authority for concluding the

form was so deficient. The *Ripley* decision provides no other authority for its conclusion. These decisions of the Fourth District were contrary to *Brown*. The trial court properly denied the motion to suppress which the Third District properly affirmed and which was in accord with *Brown*.

3. Harmless Error

Should this Court, however, disagree with the State's position, then the admission of Petitioner's confession is subjected to a harmless error analysis. *Brown*, 565 So. 2d at 307. At the trial, aside from the confession, the jury had the following evidence of guilt to consider: Yuinigo's compelling and unwavering eyewitness testimony; Thomas' unwavering eyewitness testimony; Kline's testimony as to the gunshot residue swabs taken from Petitioner (consistent with the firing of a firearm) and Martin (indicative of a defensive, rather than aggressive, position at the time of shooting); and, Medical Examiner Hyme's testimony specifically describing the effects of being shot in the manner in which Martin was shot (falling to the ground, foaming at the mouth, and gasping for breath) which was consistent with Yuinigo's testimony that Martin fell to the ground, foaming at the mouth, and gasping for breath. Given this overwhelming evidence, the admission of Petitioner's confession, if error, was harmless beyond a reasonable doubt.

B. THE THIRD DISTRCT COURT PROPERLY HELD THAT WHILE THE USE OF A SINGLE PHOTOGRAPH WAS UNDULY SUGGESTIVE, THERE WAS NO SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION.[13]

An appellate court enjoys a mixed standard of review when considering a trial court's ruling on a motion to suppress. "The trial court's determination of historical facts enjoys a presumption of correctness and is subject to reversal only if not supported by competent, substantial evidence in the record. However, the trial court's determinations on mixed questions of law and fact and its legal conclusions are subject to de novo review." *Gordon v. State*, 901 So. 2d 399, 401 (Fla. 2d DCA 2005); *Fitzpatrick v. State*, 900 So. 2d 495, 513 (Fla. 2005)("A trial judge's ruling on a motion to suppress is clothed with a presumption of correctness with regard to determinations of historical fact. However, appellate courts must independently review mixed questions of law and fact.").

[13] Issues B, C, and D are beyond the scope of conflict. Petitioner has not alleged, nor does there exist, any conflict with the Third District's opinion as to these issues with the opinion of any other state district court of appeal nor of this Court. *Asbell v. State*, 715 So. 2d 258 (Fla. 1998); *Williams v. State*, 863 So. 2d 1189 (Fla. 2003). The State acknowledges the ancillary jurisdiction of this Court. "Once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process, as though the case had originally come to this Court on appeal." *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982); *see also Feller v. State*, 637 So. 2d 911 (Fla. 1994). This jurisdiction, however, is discretionary and should only be exercised when the issue is dispositive of the matter. *Savoie*, 422 So. 2d at 312. Therefore, just as this Court did in the case of *State v. Barton*, 523 So. 2d 152, 153 n.2 (Fla. 1988), this Court should decline to reach issues B, C, and D as these are not dispositive of the matter under review.

In *Fitzpatrick*, this Court restated its two-part test for the suppression of an out-of-court identification as consisting of the following: "'(1) whether the police used an unnecessarily suggestive procedure to obtain the out-of-court identification; and (2) if so, considering all the circumstances, whether the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification." *Id.*, 900 So. 2d at 517, quoting *Rimmer v. State*, 825 So. 2d 304, 316 (Fla. 2002); *Chamberlain v. State*, 881 So. 2d 1087, 1099 (Fla. 2004); *Dennis v. State*, 817 So. 2d 741, 760 (Fla. 2002); *State v. Jones*, 849 So. 2d 438, 442-43 (Fla. 3d DCA 2003).

In *Fitzpatrick*, the witness was first shown the defendant's photograph and then shown an array of six photographs including the defendant's. The witness, saw the defendant for about 15-20 minutes, without any obstruction from a distance of 5-10 feet. As the witness paid the defendant a sufficient degree of attention and closely observed him that was an independent basis for the identification, uninfluenced by the suggestive procedure. *Dennis* (photo line-up of a vehicle was not unduly suggestive where the witness' description of the vehicle was fairly accurate); *Washington v. State*, 653 So. 2d 362 (Fla. 1994)(showing a single photo to obtain an identification was unduly suggestive but the identification was admissible as the witness was familiar with the defendant, a former co-worker). In *Rimmer*, along with other factors, the witness clearly saw the

defendant and watched him and another load stereo equipment into a car; the witness provided a sketch artist with an accurate description which helped identify the defendant; the witness' degree of attention was greater than that of the other witnesses as she was not forced to lie face down and so could see defendant during the entire 20-minute episode. Thus, the witness had an independent basis for the identification.

Yuinigo testified at the suppression hearing she: saw Petitioner 7-10 times within a two-month period prior to the murder; last saw him two to three days before the murder; saw him for about 10-15 minutes at a time during each sighting; knew him by sight, but not by name. On the day of the murder: she stood about three feet away from Petitioner, during regular daytime hours, when he shot Martin; nothing obscured his face from her view; she spotted Petitioner about five minutes after the moped had been stopped; less than a minute passed from the time she saw Petitioner to the time he murdered Martin; she knew instantly she had seen him before, even though she did not know him by name as she had seen him regularly in the area commonly known as "the triangle" in Opa Locka; Petitioner had a gun in his hand which caused Yuinigo to pay very close attention to what was happening; when the police showed her his photograph, they did not tell her or give her the impression that was the person they wanted her to identify regardless of whether he was the shooter; she had no doubt the person pictured in the

photograph was the shooter; the fact the photograph was a mugshot had no influence on her ability to identify the person pictured within it, Petitioner, as the shooter; and, there were no other people around them when all this took place.

As to Thomas, he testified at the suppression hearing and during the trial that he: was certain the person pictured in the photo was the shooter; gave the police Petitioner's first name ***prior*** to being shown his photo; was familiar by name and sight with Petitioner as he had seem him in the area, coming to the gasoline station where Thomas worked; saw Petitioner in passing, exchanging pleasantries about once a week for about a year; recognized his voice; saw him outside and inside the store on the day of the murder; heard loud voices and recognized Petitioner's voice demanding Martin's keys and then heard one gunshot; paid no attention to the writing on the photograph; focused his attention instead on the person pictured within the photograph; and, was not influenced by the fact that he was shown his mugshot.

Based on all this testimony, which Yuinigo and Thomas repeated during the trial, there can be no doubt both Yuinigo and Thomas had an independent basis upon which to base each of their identifications of Petitioner, uninfluenced by the suggestive procedure. The trial court properly denied Petitioner's motion to suppress Yuinigo's and Thomas' out-of-court identification of Petitioner.

The district court considered all these factors, and on the basis of

Fitzpatrick, *Rimmer*, and *Biggers* concluded the procedure was unnecessarily suggestive, but there was no substantial likelihood of irreparable misidentification and so affirmed. This was not error. This issue is beyond the scope of the conflict issue. *Asbell*, *Williams*, *supra*.

C. THE THIRD DISTRICT COURT AFFIRMED AS TO THE SEIZURE OF THE RED SNEAKERS WHERE PETITIONER HAD NO REASONABLE EXPECTATION OF PRIVACY IN JAIL AND THE STATE WAS ENTITLED TO TAKE, EXAMINE, AND PRESERVE THE SHOES WITHOUT A WARRANT WHEN IT BECAME APPARENT THE SHOES WERE EVIDENCE OF THE MURDER.

A public jail does not share the privacy attributes of a home, a car, an office, or a hotel room and an inmate may expect official surveillance. *Lanza v. New York*, 370 U.S. 139 (1962); *State v. Smith*, 641 So. 2d 849 (Fla. 1994).[14] *McCoy v. State*, 639 So. 2d 163 (Fla. 1994), is distinguishable from this case. In *McCoy*, the State essentially went on a fishing expedition and conceded it had no probable cause for the search and its sole purpose was the hope of finding incriminating, written statements. The State found various depositions relating to the defendant's case which were not documents which he directly brought into the cell upon his arrest, they were not direct evidence of his crime, but were more akin to his mental impressions of his upcoming trial. The *McCoy* facts are similar to those in *Rogers*

[14] The right against unreasonable searches and seizures is construed in conformity with the Fourth Amendment to the U.S. Constitution as interpreted by the U.S. Supreme Court. *See* Art. I, § 12, Fla. Const., *Smith*, 641 So. 2d at 851 n. 3.

v. State, 783 So. 2d 980 (Fla. 2001)(inappropriate to seize case-related documents through a warrantless search of defendant's jail cell), but inapposite here.

In *Kight v. State*, 512 So. 2d 922 (Fla. 1987),[15] the Court addressed a case where a pretrial detainee objected to the seizure of his clothing for the purpose of testing it for the murder victim's blood and stated:

> Kight claims that the warrantless seizure of his clothing violated his rights under the fourth amendment of the United States Constitution and under article I, section 12 of The Florida Constitution. We reject this argument because we find that at the time of the seizure Kight has no reasonable expectation of privacy in the clothing on his person. It is recognized that a pretrial detainee such as Kight, has a diminished expectation of privacy with respect to his room or cell. *Bell v. Wolfish*, 441 U.S. 520, 557, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979). It is also recognized that once a person is lawfully arrested, he has a reduced expectation of privacy in the effects on his person. *United States v. Chadwick*, 433 U.S. 1, 14 n.10 (1977); *United States v. Edwards*, 415 U.S. 800, 39 L. Ed. 2d 771, 94 S. Ct. 1234 (1974); *United States v. Monclavo-Cruz*, 662 F.2d 1285, 1290 (9th Cir. 1981). In this case, although Kight's clothing was seized solely for the purpose of testing it for the murder victim's blood, his clothing could have been seized for legitimate health or security purposes at any time during his detention. The fact that while in jail Kight could not have reasonably expected to have exclusive control over the clothing on his person removed any reasonable expectation of privacy which he may have otherwise had. Having no reasonable expectation of privacy in the clothing seized, neither the Fourth Amendment to the United States Constitution nor article I, section 12 of the Florida Constitution offers Kight the protection claimed. *See Wolfish*, 441 U.S. at 557.

Kight, 512 So. 2d at 927.

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[15] *Disapproved in part on other grounds*, *Owen v. State*, 596 So. 2d 985 (Fla. 1992); *overruled on other grounds*, *Davis v. State*, 698 So. 2d 1182 (Fla. 1997).

In *United States v. Edwards*, 415 U.S. 800 (1974), the Supreme Court examined a situation where a defendant's clothing were seized while he was in pretrial custody at the city jail. The Court held, "When it became apparent that the articles of clothing were evidence of the crime for which Edwards was being held, the police were entitled to take, examine, and preserve them for use as evidence, just as they are normally permitted to seize evidence of crime when it is lawfully encountered." *Id.*, 415 U.S. at 806. *State v. Mejia*, 579 So. 2d 766, 767 (Fla. 3d DCA 1991)("Once a person is in custody, the items that were on his person at the time of his arrest may lawfully be searched and seized without a warrant..." (Quoting the above-quoted *Edwards* passage)). Additionally, under the circumstances of this case, the State had probable cause to search Petitioner's cell for the red footwear. *Schmitt v. State*, 590 So. 2d 404, 409 (Fla. 1990)("In the past, we have defined 'probable cause' as a reasonable ground of suspicion supported by circumstances sufficiently strong to warrant a cautious person in the belief that the person is guilty of the offense charged.") *cert. denied*, 503 U.S. 964 (1992).

In this case, after interviewing Thomas, the State got a description of the clothes worn by Petitioner during the murder, i.e., Petitioner wore a pair of red shoes/sneakers that were too big for his feet. The SAO called the DOC and asked for confirmation of the presence of such red shoes/sneakers. A DOC officer entered Petitioner's jail cell and confirmed such a pair of red shoes/sneakers were

sitting under his bunk. The property room supervisor for the Miami-Dade Jail, Staci Rollins, confirmed Petitioner neither received nor released any footwear to anyone since his booking. As such, the red shoes/sneakers were in his possession from the time he was taken into custody to the time of the search and subsequent seizure. Given these facts, Petitioner had no reasonable expectation of privacy as the shoes were linked to the murder. The State was entitled to take, examine, and preserve the shoes and confirm their presence without a warrant when it became apparent the shoes were evidence of the crime for which Petitioner was being held, just as the State would have been entitled to seize the shoes when it first encountered him. Finally, the State submits that any error in the admission of the subject shoes into evidence was harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt in this case as set forth on p. 37, *supra*.

The trial court properly denied Petitioner's motion to suppress the introduction of the red shoes. The district court considered all these factors, and on the basis of *Lanza*, *Smith*, *Chadwick*, *Edwards*, *Caruso*, and *Mejia* concluded a jail does not have the same privacy as an individual's home, car, office, or motel room—especially as to the clothes worn by an arrestee at the time of arrest. The effects in the arrestee's possession may be lawfully searched and seized without a warrant. The trial court committed no error as to this issue and the district court properly affirmed. This issue is beyond the scope of the conflict issue. *Asbell*,

Williams, supra.

D. ALTHOUGH RAISED BELOW, THE DISTRICT COURT DID NOT ADDRESS THIS ISSUE WITHIN ITS OPINION. THE TRIAL COURT PROPERLY RULED ON THE ISSUES OF ADMISSIBILITY OF THE HAT, T-SHIRT, AND AUTOPSY PHOTOGRAPHS.

Here, Petitioner seeks review of its fourth issue on direct appeal, the trial court's requirement that Petitioner establish a predicate for the admission of a Dolphins' hat and a T-shirt found at the scene and the admission of autopsy photographs of Martin's wounded heart. Petitioner failed to establish a predicate and so the items were not admitted into evidence. *See Thomas v. State*, 439 So. 2d 245, 246 (Fla. 5th DCA 1983); *see e.g., State v. Strong*, 504 So. 2d 758 (Fla. 1987). The trial court's ruling on this issue was proper.

As to the autopsy photographs, the photos showed the entrance and exit wounds caused by the bullet. Dr. Hyme testified to the effect this mortal wound to the heart had on Martin (falling to the ground, foaming at the mouth, gasping for air). The trial court properly admitted these photographs into evidence. *See Pope v. State*, 679 So. 2d 710, 713-14 (Fla. 1996)("The autopsy photographs were relevant to illustrate the medical examiner's testimony and the injuries he noted on [the victim]. Relevant evidence which is not so shocking as to outweigh its probative value is admissible."). The trial court properly admitted this evidence.

Within the four corners of its opinion, however, the Third District Court did

not address the admissibility of the hat, T-shirt, or the autopsy photographs. This issue is beyond the scope of the conflict issue. *Asbell*, *Williams, supra*.

CONCLUSION

Based upon the arguments and authorities cited herein, Appellee respectfully requests this Court affirm the opinion of the Third District Court of Appeal, 3D04-2340.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was mailed to Dorothy F. Easley, Esq., Special Assistant Public Defender, P.O. Box 144389, Coral Gables, Florida 33114, this 16th day of January, 2007.

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Assistant Attorney General

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief was written using 14-point Times New Roman in compliance with Fla. R. App. P. 9.210(a)(2).

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