IN THE SUPREME COURT OF FLORIDA
CASE NO. SC06-1207

Third District Court of Appeal, State of Florida Case No. 3D04-2340

NICKULIS GILLIS,
Petitioner,

vs.

THE STATE OF FLORIDA,
Respondent.

ON DISCRETIONARY REVIEW

PETITIONER'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION[1]

Petitioner filed a brief on jurisdiction that requested that this Honorable Court grant discretionary review, pursuant to Rule 9.030(a)(2)(A)(iv), Fla. R. App. P., to review the decision of the Third District Court of Appeal, rendered May 31, 2006, based on an express and direct conflict between that decision and the decisions of other Florida Courts of Appeal, notably the Fourth District Court of Appeal, concerning this same question of law: whether a *Miranda*[2] warning that law enforcement administers to an accused while in custody that does not advise that citizen of (A) his/her constitutional right to terminate questioning at any time and (B) his/her constitutional right to consult with an attorney *before* questioning is legally sufficient to inform that person of his/her constitutional rights?

This is a case about a defendant, Nickulis Gillis ("Gillis"), who was convicted of second degree murder in Miami-Dade County, with possession and

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[1] All references are to the Appendix (App.) with this brief, the Record on Appeal (R. __), the Trial Transcript (T. __), and the Initial Brief (I.B. at __). The parties will be referred to as they appeared in the proceedings below. All emphasis is added unless otherwise noted.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

discharge of a firearm causing death, and of attempted armed robbery, and sentenced pursuant to the ten-twenty-life statute, § 775.087(2), Fla. Stat. (2004), to life in prison with a minimum mandatory of life. V4-R.443-58; T. 848-70. Mr. Gillis appealed his convictions, alleging he was entitled to a new trial because of the trial court's cumulative errors in: (A) denying as impermissibly suggestive his motions to suppress the identification evidence against him–in particular, the identification through a single photograph that was clearly identifiable as a "mug shot"; (B) denying his motions to suppress a pair of red hightop sneakers seized from his jail cell after a correctional officer searched the defendant's cell upon the State's request to do so, wherein the correctional officer observed a red pair of sneakers sitting under the defendant's bunk, with the State, thereafter, obtaining a search warrant;[3] (C) and the trial court's error in denying Mr. Gillis' request to admit certain exculpatory evidence, including clothing found at the scene of this incident containing the DNA of another individual who lived some seven blocks away.[4] Most pertinent to the question now before the Court, Mr. Gillis also

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[3] App. "A" at *4.

[4] App. "A" at *1; *Gillis v. State*, 930 So. 2d 802, 31 Fla. L. Weekly D1520, 2006 WL 1479371 (Fla. 3d DCA 2006); Third District Court of Appeal I.B. at 16-21.

appealed as error the trial court's denial of his motion to suppress his statement because of at least two features of the Miami-Dade County Police Department *Miranda*[5] form that was used to advise him of his rights:[6]

> (a) You have the 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?
> (b) Should you talk to me, anything which you might say may be introduced into evidence in court against you. Do you understand?
> (c) If you want a lawyer to be present during questioning, at this time or anytime hereafter, you are entitled to have a lawyer present. Do you understand that right?
> (d) 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 willing to answer my questions without having a lawyer present?

Mr. Gilli's statement was later introduced at trial.[7]

Mr. Gillis challenged the above warning as defective, in part, because the warning did not advise him of several custodial constitutional rights that those in the general public do not know that they have, and have a basic right to be told:

$ the right to consult with an attorney *before* questioning and

$ the right to terminate questioning at any time.[8]

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5 *Miranda v. Arizona,* 384 U.S. 436 (1966).

6 App. "A" at *2-3.

7 App. "A" at *3.

On May 31, 2006, the Third District Court of Appeal affirmed on all points.[9] Mr. Gillis timely invoked the jurisdiction of this Honorable Court on June 14, 2006, and this Court, thereafter, granted discretionary review based on conflict jurisdiction.

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[8] App. "A" at *3.

[9] App. "A".

STATEMENT OF THE CASE AND FACTS[10]

A. Statement of the Case

On August 15, 2002, Nickulis Gillis was charged by Information with the July 25, 2002 murder of Martin Daniel (the "Decedent") at an Opa Locka Exxon Gas Station: (1) Second Degree Murder, with a firearm, §§ 782.04(2) & 775.087, Fla. Stat. (2002) (Count I) and (2) Armed Robbery §§ 812.13(2)(A) & 775.087, Fla. Stat. (2002) (Count II), and on September 4, 2002, by Indictment of First Degree Murder §§ 782.04(1) & 775.087, Fla. Stat. (2002) (Count I),[11] Armed Robbery §§ 812.13(2)(A) & & 775.087, Fla. Stat. (2002) (Count II) and Resisting Officer Without Violence § 843.02 (later withdrawn). V1-R.26-28 On August 13, 2004, Nickulis Gillis was convicted of Second Degree Murder, with possession and discharge of a firearm causing death, and of Attempted Armed Robbery, and sentenced pursuant to the ten-twenty-life statute, § 775.087(2), Fla. Stat. (2004), to life in prison with a minimum mandatory of life. V4-R.443-58; T. 848-70.

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[10] V. __-R. __ refers to the volume number and record on appeal page number. T. __ refers to the trial transcript. The parties will be referred to as they were below.

[11] Though not particularly clear in the record, the death penalty was waived during trial, apparently during voir dire.

B. Pretrial Motions and Rulings

On June 26, 2003, the State filed a Notice of Intent to Rely on Evidence of Other Crimes, Wrongs or Acts (V1-R.37-38), and a Motion to Order the Defendant to Submit to Blood and Oral Swab Samples, which Motion was denied. V1-R.39-41.

A T-shirt was found on the side of the Exxon Gas Station where the shooting occurred. T. 102-05. On October 10, 2003, a DNA Analysis Report was presented of that T-shirt. V1-R.110, T. 102-05. The T-shirt could not be linked to either Mr. Gillis or the Decedent. V1-R.110, T. 102-05. A cap was found around the corner. T. 102-05. On August 9, 2004, Mr. Gillis and the State entered into a formal stipulation that:

$ the DNA of a cap found at the site of the incident did "not match the [DNA] of the defendant Nickulis Gillis";

$ the DNA found on the cap found at the site of the incident matched the "DNA profile of <u>*Samuel Bryant*</u>, Social Security No. [*Redacted from Brief for Privacy Protections*], Date of Birth [*Redacted from Brief for Privacy Protections*], given pursuant to a volunteer swab of his mouth"; <u>*Mr. Bryant lived 7 blocks from the site of this incident*</u> (T. 12); and

$ the DNA found on the T-shirt found at the site of the incident had "no matching results". V2-R.269.

The State moved in limine to exclude defense argument or any testimony during any stage of the case about the cap and T-shirt collected from the site of the incident. T. 11-13. The court granted the State's Motion in Limine to preclude the

defense from introducing any evidence regarding the T-shirt and the cap, pending the establishment of relevance. T. 105, 110-15.

On May 27, 2004, Mr. Gillis unsuccessfully Moved to Suppress His Confession. V1-111-14. On June 30, 2004, Mr. Gillis renewed his Motion to Suppress Statement because the *Miranda* notification to the accused:

$ did not inform Mr. Gillis of his right to consult with counsel during questioning, and

$ further failed to advise of the right to stop questioning at any time (V1-141-45),

$ which the State opposed on the basis of *Cooper v. State*, 739 So. 2d 82, 85 (Fla. 1999), and *Johnson v. State*, 750 So. 2d 22, 25 (Fla. 1999). V2-146-268.

The lower court denied the Motion to Suppress Confession on August 9, 2004, after hearing argument. V1-111-14; T. 97-101. During the course of trial, the defense renewed its standing objection to the admissibility of the statement and waiver form. T. 389-91.

On June 22, 2004, Mr. Gillis Moved to Suppress the Identification Testimony, which testimony was based on a single, mugshot of Mr. Gillis presented to the eyewitnesses, which was denied August 9, 2004. V1-R.117-19, 125-26; V3-R.354-58.; T. 4, 67-73, 74.[12] During the hearing on the Motion to

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[12] The State had also stipulated to suppression of the testimony of an eyewitness, Tequila Sharp, because of her mental health records. T. 3.

Suppress Identification Testimony, the State presented testimony from Ashley Yuinigo, Miami-Dade Detective Chivarey and Herman Thomas. T. 16-67.

Ms. Yuinigo testified she was the person riding on the back of the Decedent's moped on the morning of July 25, 2002, at about 9:00 a.m.; she stood about 2-3 feet from the shooter, and she had later identified a person in a mugshot for the police, whom she believed to be the shooter, which mugshot she signed. T. 17-21. Ms. Yuinigo did not know the shooter by name; she knew she had seen the shooter before, about 7-10 times over a two-month period, in the area of Opa Locka (called "the triangle"); and she had last seen the shooter about 2-3 days before the July 2002 shooting incident. T. 19-23. She had never spoken to Mr. Gillis. T. 26-27. She could not be any more specific about the shooter's dress than: he was wearing a shirt and pants. T. 24.

When Ms. Yuinigo identified Mr. Gillis as the shooter:

$ the police showed her one photograph, of one person;

$ she knew it was a mugshot at the time it was presented to her for identification;

$ the photograph had a "Miami Dade Police Department" heading across it;

$ she "actually knew this individual was labeled by the police as a criminal" because "they had a mugshot of him already";

$ she was not shown any other photograph for identification; and

$ she was “pretty sure” of her identification. T. 23-25, 27-29.

As part of the hearing on the Motion to Suppress Identification Testimony, Miami-Dade Police Detective Chivarey testified that he showed Ms. Yuinigo a mugshot of Mr. Gillis after he interviewed her, but before a sworn statement was taken, and that Ms. Yuinigo identified Mr. Gillis, without hesitation, as the shooter. T. 33-38. Ms. Yuinigo was unable to identify Mr. Gillis as the shooter by name; Detective Chivarey elected to present this mugshot of Mr. Gillis based on information he had received from another detective who named Mr. Gillis as a possible suspect. T. 35. Detective Chivarey elect to not show Ms. Yuinigo a six-person photographic lineup, because Ms. Yuinigo said she knew the shooter from the area by his appearance. T. 37-38. Detective Chivarey made no attempt to hide the fact that he was displaying a mugshot of Mr. Gillis. T. 43. The mugshot of Mr. Gillis said “one hit, one mugshot”. T. 37.

On July 20, 2004, the lower court issued a rule to show cause against one of the State’s key witnesses, Herman Thomas, whom his grandmother later revealed was incarcerated at the D.C.F. V3-R.352. At the August 9, 2004 hearing on the Motion to Suppress the Identification testimony, Herman Thomas testified that:

$ Mr. Thomas was working the morning of the shooting incident at the subject Exxon Gas Station. T. 46-52.

- $ He identified Mr. Gillis by the first name "Nick" as the shooter during a police interview. T. 46-52.

- $ Mr. Thomas had not been shown a photograph at or near the time of the shooting incident, and he had given the police the first name of "Nick" the day of the shooting. T. 58-60.[13]

- $ He identified Mr. Gillis about one month later at the shooter from a single mugshot that Detective Chivarey showed him. T. 46-52.

- $ The mugshot was clearly labeled as a mugshot at the bottom. T. 57.

- $ Mr. Thomas knew that the person in the mugshot was a criminal and this was a police mugshot. T. 57.

Mr. Thomas had previously seen Mr. Gillis around the Opa Locka neighborhood once a week, briefly speaking, over a period of one year. T. 49-53, 59. He saw Mr. Gillis briefly inside the store the morning of the shooting incident, and then later outside the gas station a few minutes before the shooting incident, both times at a distance of about 20 feet. T. 49-53, 59. He merely heard loud voices and "give me the keys"; he did not actually see the shooting and could not say that Mr. Gillis was the shooter. T. 56.

On August 9, 2004, the lower court granted (1) a stipulated Motion in Limine excluding the testimony of Opa Locka Police Officer James Smith about

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[13] The mugshot label on the photograph of Mr. Gillis that the witnesses were shown was removed before being introduced into evidence. T. 395-97, 400.

several persons' statements identifying "Nick" as the shooter in this case on hearsay grounds (V2-R.272-73) and (2) a stipulated Motion in Limine excluding evidence of, contents of or testimony on a "911" tape transmission. V2-R.274-77; T.4-9.

On August 9, 2004, the court denied a Motion to Suppress Physical Evidence concerning red hightop shoes found after Mr. Gillis' arrest, in a cell he shared with others incarcerated, under a bunk, where Mr. Gillis was previously sitting. V2-R.278-81, 286-88; T.9-10, 74-96, 106-08. As part of the hearing on the Motion to Suppress Physical Evidence concerning red hightop shoes, Miami-Dade County Detective Chivarey testified that, pursuant to a search warrant, he executed a search of Mr. Gillis' cell, where he was housed with other inmates, and located red hightop sneakers, which were the only red sneakers in the cell. T. 39-40, 42. *Before the search warrant was executed, a corrections officer had gone into the cell where Mr. Gillis was housed to see if the cell contained red sneakers*. T. 43-44. Red sneakers were found next to flip flop sandals that had the name of "Nick" on the sandal soles. T. 39-40. Detective Chivarey showed the red sneakers to Herman Thomas, who identified them as the sneakers the shooter was wearing at the time of the shooting incident. T. 40-41.

Also as part of the hearing on the Motion to Suppress Physical Evidence concerning red hightop shoes, Herman Thomas testified that he saw the person that

morning, before the shooting incident, when he came into the Exxon Gas Station. T. 61-63. The shooter was wearing a blue printed shirt with leaf prints, and long blue pants. T. 61-63. Mr. Thomas only saw the person's upper body when he came into the Exxon Gas Station, and saw the person again from a distance, about five or ten minutes later, close to the time of the shooting incident, wearing red hightop, laced sneakers. T. 63-65. Mr. Thomas identified during the hearing the red sneakers that Detective Chivarey obtained from the cell housing Mr. Gillis, as the sneakers Mr. Gillis was wearing the morning of the shooting incident. T. 62-63, 65-66. The defense renewed its standing objection to the admissibility of the shoes during the course of trial. T. 389.

Before trial, the State and defense stipulated that one of the State's eyewitness', Mr. Herman Thomas, had 8 prior felony convictions. T. 115.

The lower court allowed the State, over repeated objection that the cause of death was not in dispute, which the lower court overruled, to introduce into evidence and publish to the jury two graphic photographs of the Decedent's heart extracted from his body during autopsy and of the heart entrance wound. V3-R.305-09; T. 381-84, T. 473-74.

C. The Trial

1. Opening Statements

The State stated the evidence would show that Mr. Gillis was the shooter

who killed, without justification, the Decedent. T. 402-07. The defense stated that the case turned upon the jury deciding witness credibility and the accuracy of their perceptions, the evidence the prosecution would/would not present, and the circumstances under which Mr. Gillis gave his 8 minute statement to the police. T. 407-15.

2. The Testimony

Ashley Yuinigo testified at trial that, on the day of the shooting incident–July 25, 2002 at roughly 9 a.m.-she accompanied a friend, the Decedent, on his moped to the triangle area of Opa Locka to purchase gasoline and, after they refueled and were preparing to remount the moped, a person approached the Decedent, waived his gun, and demanded everything, while Ms. Yuinigo remained close beside the moped. T. 416-20, 422-25. The Decedent responded that he did not have anything, started to empty his pockets and offered the keys to the moped, to which the shooter responded that he wanted the moped keys. T. 418-19. The Decedent threw the moped keys to the ground; the shooter tried to pick up the keys; the Decedent went for the shooter; they started fighting over the gun; the gun discharged once; the shooter ran from the Exxon Gas Station in Opa Locka in the direction of an apartment complex; and the Decedent died several minutes later. T. 419-33.

Ms. Yuinigo's testimony about having seen the shooter previously and

about her identification of Mr. Gillis were the same as her testimony during the Motion to Suppress Identification hearing, except: she further testified (1) she was sixteen years old at the time of the shooting incident; (2) the shooter seemed very nervous, jumpy, shaking and appeared to be trashed as if "strung out on drugs"; (3) there were other people at the Exxon Gas Station that morning; (4) the entire incident took less than 2 minutes; (5) the gun was a small black firearm, which she thought was a .380; (6) she had no memory of what the shooter was wearing; (7) she was hysterical, in shock and had to be calmed down; and (8) she was shown only a single photograph to identify. T. 424-52. Over objection, which the lower court overruled, the photograph of Mr. Gillis was introduced into evidence. T. 437-38. Mr. Gillis was identified in court. T. 438-39.

Herman Thomas testified at trial that he was convicted of a felony 8 times, of which one was a drug conviction, that he had a cocaine addiction problem from 1991 to 1998, and on the date of the July 25, 2002 shooting incident, by 9 a.m., he had consumed three beers. T. 455-58, 477. On the day of the shooting incident, he was working part-time at the particular Exxon Gas Station in Opa Locka. T. 455-58. Mr. Thomas' trial testimony was similar to his testimony during the Motion to Suppress Identification and Motion to Suppress Physical Evidence concerning the red shoes, except: he further testified that (1) he remembered seeing the red hightop shoes when the shooter entered the gas station (previously testifying at the

Motion to Suppress hearing that he could only see the upper body when the shooter entered the store); (2) the shooter was wearing a bluish gray shirt with print on it, blue trousers and red laced hightop shoes, both times that Mr. Thomas saw him that morning of the shooting incident; (3) Mr. Thomas heard the shooter' voice, which he was familiar with from earlier exchanges, about 3 minutes after Mr. Thomas saw him a second time; (4) the shooter was outside, out of view, demanding money; (5) Mr. Thomas could not see what was happening outside because a building obstructed his view; (6) Mr. Thomas heard a shot and ran to the location of the shot; (7) Mr. Thomas only saw the Decedent and Ms. Yuinigo when he arrived at that location; and (8) Mr. Thomas did not see the shooting. T. 459-81. At the police station, Mr. Thomas identified the shooter as "Nick"; he was not able to give a last name; he was shown only one photograph thereafter to identify. T. 471-72. Over objection, overruled, the mugshot photograph of Mr. Gillis was introduced into evidence. T. 472-73. Over objection, overruled, the red hightop shoes were introduced into evidence. T. 474-75.

Miami-Dade Police Officer James Calliger testified that he was the first to interview Herman Thomas about the shooting of the Decedent; Mr. Thomas did not appear to be under the influence of any drugs; Mr. Thomas stated he knew the shooter by name and by face; and, upon being shown one photograph, he identified Mr. Gillis as the shooter. T. 494-97.

City of Opa Locka Chief James Smitty testified that, in less than one minute after being dispatched, he was the first officer on the scene at the Exxon Gas Station on the day of the shooting; he saw the victim lying face down; a young lady was nearby screaming hysterically; there were several people on the scene; and based upon his investigation he went to a rooming house at 2137 Washington Avenue in Opa Locka, where he saw Nickulis Gillis, whom Chief Smitty identified in court, sitting in an open upstairs window looking down. T. 505-12. Chief Smitty advised Mr. Gillis that he wanted to talk with him, to which Mr. Gillis asked why and did not respond further; Chief Smitty later returned to 2137 Washington Avenue, where Mr. Gillis had been taken into custody. T. 511-17.

Miami-Dade Police Office Louis Major Battle, commander of the special patrol bureau, testified that Mr. Gillis came out of the rooming house at around 1:15 p.m. that same day. T. 517-23. Chief Smitty had no recollection of what shirt Mr. Gillis was wearing that day, except that the shirt was dark.[14] T. 512. Chief Smitty also had no recollection of what shoes Mr. Gillis was wearing that day. T. 514.

Miami-Dade Police Detective Charles Maculley (not the lead investigator)

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[14] Mr. Thomas had testified the shooter was wearing a bluish gray shirt.

testified that on the date of the shooting incident he was present when Mr. Gillis exited the rooming house. T. 524-26. Mr. Gillis executed a consent to search the premises; the rooming house was filthy and in complete disarray; and nothing (no weapon either) was seized from the house upon searching it. T. 524-32.

Miami-Dade Officer Jennifer Lee Lopez testified that on the date of the shooting incident she was present when the consent to search was obtained from Mr. Gillis. T. 554-55. Officer Lopez testified that she obtained custody of Mr. Gillis at the rooming house, executed a pat down search upon his arrest, and found no weapons. T. 548-57. Officer Lopez transported Mr. Gillis to the Metro Dade Police Headquarters homicide bureau. T. 545-55.

Former Crime Scene Technician Jorge Garry testified that on the date of the shooting incident he collected a casing and dusted the moped for fingerprints; he thereafter took a gunshot residue swab from the Decedent and responded to the rooming house at 2137 Washington Avenue; he took a gunshot residue swab from Mr. Gillis. T. 533-45.

Miami-Dade Crime Scene Technician Taffe testified that on the date of the shooting incident he responded to the Exxon Gas Station, where he worked with Miami-Dade Crime Scene Borroto; he impounded a casing retrieved from that Station; he assigned the dusting of the moped for fingerprints; assigned the collection of gun shot residue from the Decedent; and was also at the 2137

Washington Avenue location where he and at least four other officers conducted the search of the premises for a firearm that would match a 40 caliber casing found at the scene of the shooting. T. 564-70. There was no search for clothing. T. 569-70. No firearm was found. T. 570.

Miami-Dade Police Firearm and Tool Mark Examiner George William Hurtail Jr. testified that the fired casing matched a 40 caliber Smith & Wesson. T. 571-75. No firearm was submitted to Officer Hurtail for examination. T. 575-76. The casing could not be matched to the projectile removed from the Decedent; the casing and projectile could have been consistent with a 40 caliber Smith & Wesson. T. 575-77.

Miami-Dade Police Fingerprint Technician Robert Williams testified that he evaluated the latent fingerprints taken off the Decedent's moped; and the fingerprints could only be matched to the Decedent; two fingerprints could not be identified. T. 583-96. No fingerprints were recovered from the casing. T. 592-93.

Miami-Dade Detective John Parmenter testified that he was lead homicide detective to investigate the shooting of the Decedent at the Exxon Gas Station in Opa Locka on July 25, 2002; he arrived on the crime scene at 10:40 a.m. after it had been secured; he requested that Ashley Yuinigo be taken down to the station for a formal interview; he was aware that Detective Galliger was interviewing

Herman Thomas at the station. T. 598-608. Detective Parmenter supplied Detective Galliger with a name of a suspect for Ms. Yuinigo's photograph identification. T. 605-10. No one told Detective Parmenter what the shooter was wearing, including no mention of clothing or shoes. T. 606-08.

Detective Parmenter met with Mr. Gillis at the police station the day following Mr. Gillis being taken into custody and transported to the station for questioning. T. 608-10. As to advising Mr. Gillis of his *Miranda* rights, Detective Parmenter reviewed the Miami-Dade County Miranda form with Mr. Gillis for a pre-interview, which Mr. Gillis consented to and signed. T. 611-17, 621. Over continued standing objection, overruled, Detective Parmenter testified to the contents of Mr. Gillis' statement. T. 617-20. Mr. Gillis stated he was at the Exxon Gas Station to do a robbery for money; he saw the Decedent, approached the Decedent and asked for money, the Decedent threw the keys to the ground; a fight between Mr. Gillis and the Decedent ensued; Mr. Gillis possessed a firearm and shot the Decedent immediately; Mr. Gillis ran to an awaiting car driven by someone Mr. Gillis called "Jarvis" in the pre-interview and "James" in his formal interview; he thereafter threw the firearm in a canal on 22d Avenue south of the shooting location and Jarvis thereafter took Mr. Gillis to Mr. Gillis' home. T. 617-19, 661-62. Detective Parmenter asked Mr. Gillis to make a formal statement, which Mr. Gillis agreed to do; the Miami-Dade Miranda form was again read to

Mr. Gillis; that formal statement was recorded. T. 621, 625-66, 630. Over continued objection, which the court overruled, the formal statement was introduced into evidence. T. 626-39.

Without a firearm, Detective Parmenter could not identify who fired the gun that killed the Decedent. T. 662. "James"/"Jarvis" was not further investigated. T. 645-49. No firearm was retrieved from Mr. Gillis' premises. T. 645-49. A search of the canal uncovered no firearm. T. 645-49. Mr. Gillis' relatives also lived in the rooming house; their rooms were not searched. T. 656. Detective Parmenter was aware that Mr. Gillis voluntarily submitted to a gun shot residue swab and the search of his home. T. 623. He was only recently aware that the gunshot residue swab came back positive as to Mr. Gillis, and learned for the first time at trial the residue came back positive as to the Decedent. T. 650-51. The Exxon Gas Station had no surveillance cameras. T. 642.

Miami-Dade Department of Corrections Police Officer Rollins testified, over renewed defense objection, which the lower court overruled, that he received two pairs of pants, one jacket, underwear and one shirt from Mr. Gillis. T. 664-66. Officer Rollins records did not reflect any exchange of clothing or footing among inmates. T. 666-67.

Miami-Dade Detective Andrew Chivarey testified he was part of Detective Carpenter's team investigating a homicide at the Exxon Gas Station in

Opa Locka. T. 667-71. His testimony was, over defense objection, overruled, similar to his testimony as part of the hearing on the Motion to Suppress Identification Testimony and the Motion to Suppress Physical Evidence concerning the red shoes. T. 667-75.

Miami-Dade Criminalist Alan Kline testified that the gunshot residue found on Mr. Gillis' hands were consistent with firing a weapon, and that both Mr. Gillis and the Decedent tested positive for gunshot residue. T. 675-85.

Miami-Dade Chief Medical Examiner, Bruce Allan Hyme, M.D., testified that an autopsy performed on the Decedent reflected that the Decedent died of a gunshot wound to the chest. T. 685-90. The lower court allowed the State, over renewed objection that cause of death was not in dispute, overruled, to introduce into evidence and publish to the jury two graphic photographs of the Decedent's heart extracted from his body during autopsy and of the heart entrance wound. T. 694-96. The angle of the gunshot entry was consistent with some type of struggle. T. 698-99.

3. Motions for Judgment of Acquittal, Renewed Motions and Objections, Closing Argument, Jury Instructions, Conviction and Sentence

Upon confirmation that Mr. Gillis consulted with his counsel and that his decision was voluntary and fully informed, the defense did not call witnesses and Mr. Gillis did not testify. T. 701-07. The State, thereafter, rested (T. 708); the

defense moved for judgment of acquittal based on the evidence and testimony submitted (T. 709); and the court adhered to its prior rulings and denied the defense motion for judgment of acquittal, motions and all objections, which motions and objections the defense renewed at the close of trial. T. 709-10, 738. The State agreed with the observation that it should withdraw from premeditated murder, as it was not properly charged; the State proceeded on felony murder and lesser included offenses. T. 710-12. After closing arguments (T. 739-84), the lower court instructed the jury, without objection, on Homicide, Justifiable Homicide, Excusable Homicide, First Degree Felony Murder, Robbery, Attempt to Commit a Crime, Lesser Included Crimes or Attempts, Second Degree Murder, Manslaughter, Justifiable Use of Deadly Force, Attempted Robbery, Aggravated Assault, the Defendant Not Testifying, the Defendant's Statements, as well as the standard instructions including Reasonable Doubt, Burden of Proof and Weighing the Evidence. V3-R.411-42; T. 817.

The jury began deliberating at 1:55 p.m.; the jury reached a verdict late the following morning. T. 836-37, 841-44. On August 13, 2004, Nickulis Gillis was convicted of Second Degree Murder, with possession and discharge of a firearm causing death, and of Attempted Armed Robbery, and sentenced pursuant to the ten-twenty-life statute, § 775.087(2), Fla. Stat. (2004), to life in prison with a minimum mandatory of life. V4-R.443-58; T. 848-70.

STANDARDS OF REVIEW

The harmless error rule applies in cases involving the violation of a criminal defendant's constitutional right to remain silent. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). A determination under this standard of review requires a twofold inquiry into the effect of the erroneously admitted statement upon the other evidence introduced at trial and its effect upon the conduct of the defense; the court must then determine whether, absent the illegal statement, the remaining evidence is not only sufficient to support the conviction but so overwhelming as to establish the defendant's guilt beyond a reasonable doubt. *State v. DiGuilio*, 491 So. 2d at 1129. Appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues. *State v. Barmeier*, 878 So. 2d 411 (Fla. 3d DCA), *reh'g denied* (Aug. 4, 2004), *rev. denied*, *Barmeier v. State*, 891 So. 2d 549 (Fla. 2004). The standard of review for evidentiary rulings is abuse of discretion.[15] The test for suppression of an out-of-court identification is two-fold: (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. *Rimmer v. State*, 825 So. 2d 304 (Fla.

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[15] *Sexton v. State*, 697 So. 2d 833 (Fla. 1997).

2002).

ARGUMENTS SUMMARY

Because of cumulative errors in the lower court's denial of suppression of evidence and in the denial of the defense request to admit certain evidence, Nickulis Gillis was denied his due process rights to a fair trial. He is entitled to a new, fair trial. Mr. Gillis' Statements to the Miami-Dade County Police should have been suppressed and the statements and testimony thereon should have been excluded because the Miami-Dade County *Miranda* Form failed to advise the accused of his constitutional right, though recognized as part of in the Fifth Amendment and Florida's Self-Incrimination Clause, Article I, Section 9, Florida Constitution, to consult with an attorney prior to questioning and to terminate

B. With respect, Petitioner does not see to alter *Miranda* or *Traylor*, but only affirmance of their "teeth". The Third District Court of Appeal's decision here, by its affirmance, rests on two presumptions both of which defeat *Miranda* and *Traylor*: that an accused *ipso facto* appreciates his/her right to consult with counsel before police questioning, though never informed by any authority of his/her right to do so, and the right to terminate questioning at any time and, further, is, further, presumed to freely exercise his/her rights, even if never informed, in the face of dominant authority.

The Fourth District Court of Appeals has correctly and pragmatically decided that a *Miranda* warning that law enforcement administers to a citizen while in custody, must advise that person of his/her constitutional right to consult with an attorney before question and of the constitutional right to terminate questioning at any time. The Fourth District's decisions should be approved because (1) they breath life into specific citizens' rights that no one–not even the State–has ever disputed the accused possess; (2) they finally put to rest the continuing ambiguity over how an accused is to be fully advised of his/her *Miranda* rights and, by so doing, articulate a specific standard for law enforcement to uniformly follow without need for individual police interpretation; and (3) by so doing, they further remove turmoil in the lower courts through a concrete standard (that a written *Miranda* form must be utilized, and articulate all *Miranda* rights)

that they can uniformly apply with predictability. The Fourth District's decisions pose no prejudice to the administration of criminal justice.

It was also error to deny Mr. Gillis' motion to suppress identification testimony where, as here, the identification was based on a single mugshot of the accused, the identification was highly suggestive and it presented the danger of misidentification where there was only one eye witness to the shooting–an hysterical 16 year old with less than two minutes to observe the shooter, with no recollection of what the shooter was wearing and full appreciation for the fact that she was identifying someone in a mugshot who was already accused of crimes. It was error for the court to deny the motion to suppress physical evidence concerning red hightop shoes because the shoes were obtained pursuant to a search in violation of the Fourth Amendment. It was error for the lower court to exclude evidence of and testimony on a white T-shirt and a cap where, as here, these items were relevant and went to a material issue–the shooter's identify–were found on the scene of the shooting, the T-shirt was linked to another individual who resided about 7 blocks from this location, and the eyewitness to the shooting had less than two minutes to observe the shooting, was hysterical and identity was still in question. On remand, the inflammatory photographs of the Decedent's extracted heart should be excluded as unfairly prejudicial under § 90.403.

ARGUMENTS

The Court should approve the decisions holding that a *Miranda* warning that law enforcement administers to a citizen while in custody must advise that person of his/her constitutional rights to consult with an attorney and to terminate questioning at any time.

1.*Miranda* and this Court's Decisions Long Before *Miranda* Show That the Fourth District Court of Appeal *Miranda* Consent/Waiver Form Decisions Here Are Consistent with Historical Precedent and Intent.

Throughout the first third of the twentieth century, police "'routinely threatened, beat, and tortured suspects"' to illicit confessions.[16] The U.S. Supreme Court, when confronted with the initial confession cases, focused, as a result, on protecting suspects from "cruel and abusive police tactics" by setting the standard that the admissibility of a suspect's confession turned on the confession being made

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[16] Joshua Dressler, Understanding Criminal Procedure § 22.02 (3d ed. 2002) (quoting Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 Stud. L. Pol. & Soc'y 189, 189 (1997); *see also* Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 Am. J. Crim. L. 309, 336 (1998) (discussing the abusive practices that police used including "beating[s] with fists, blackjacks, rubber hoses, and telephone books; the use of hot lights; confinement[s] in airless and fetid rooms; and hanging[s] from windows").

voluntarily.[17]

The U.S. Supreme Court, in *Bram v. United States* and *Brown v. Mississippi* identified two different constitutional bases for suppressing

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[17] *See* Timothy Brennan, *Silencing Miranda: Exploring Potential Reform to the Law of Confessions in the Wake of* Dickerson v. United States, 27 New Eng. J. on Crim. & Civ. Confinement 253, 257 (2001) (explaining that "the Supreme Court endeavored to protect individual rights from cruel and abusive police tactics and prevent false confessions"). After adopting the voluntariness standard as the test for admissibility, the Supreme Court later expanded this test. *See* Edwin D. Driver, *Confessions and the Social Psychology of Coercion*, 82 Harv L. Rev. 42, 42-44 (1968). The voluntariness test evolved into the "totality of the circumstances" test. *See* Driver, 82 Harv L. Rev. at 42-44; *see also Haynes v. Washington*, 373 U.S. 503, 514 (1963) ("whether the confession was obtained by coercion or improper inducement can be determined only by an examination of all of the attendant circumstances"). Although the voluntariness standard adopted that the Supreme Court adopted was originally considered as a common law rule of evidence, *see generally Hopt v. Utah*, 110 U.S. 574, 587 (1884), the rule was later established to have constitutional bases for the suppression of an involuntary confession. *Brown v. Mississippi*, 297 U.S. 278 (1936).

confessions. In 1897, in *Bram v. United States*,[18] the Supreme Court concluded that the Fifth Amendment self-incrimination clause[19] provided a constitutional

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[18] *Bram v. United States*, 168 U.S. 532 (1897). In *Bram*, the defendant, a sailor aboard a ship, was suspected by the crew of murdering the ship's captain. *Id*. at 561. The crew decided to arrest and restrain Bram while he was onboard the ship. When the ship reached land, the crew turned over the defendant to the police. A police detective then brought Bram to his private office, stripped him of his clothes, interrogated him alone in his office, and elicited a confession. *Id*. at 561-62. To encourage the confession, the detective told Bram that a witness named Brown, who was actually a co-suspect, was standing at the wheel of the ship and saw Bram commit the murder. *Id*. at 562-64. The Court concluded that Bram's incriminating statements, which were offered into evidence as a confession, were not voluntarily made because they were made under compulsion. *Id*.

[19] *See* Adam M. Stewart, *The Silent Domino: Allowing Pre-Arrest Silence as Evidence of Guilt and the Possible Effect on Miranda*, 37 Suffolk U. L. Rev. 189, 191-94 (2004) (explaining that the framers of the Constitution created the privilege against self-incrimination to prevent the type of physically abusive tactics that the English courts employed).

basis for the suppression of an involuntary confession.[20] In 1936, the U.S. Supreme Court in *Brown v. Mississippi*[21] concluded that the Due Process Clause of the Fourteenth Amendment provided a constitutional basis for excluding physically coerced confessions in a state criminal trial.[22]

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[20] *See Bram*, 168 U.S. at 542 (quoting U.S. Const. amend. V) (explaining Fifth Amendment self-incrimination clause governs issues concerning confession's voluntariness).

[21] 297 U.S. 278 (1936). In *Brown*, the defendants were indicted for murder. *Id*. at 279. A group of white men, accompanied by the sheriff, beat, whipped, and hung the African-American defendants. *Id.* at 281-82. The sheriff made clear to these accused that this torture would continue unless and until they confessed to committing the crime. *Id*. The Court held that the manner in which the confessions were obtained violated the Fourteenth Amendment's Due Process Clause and that, because the confessions were not made voluntarily, they should have been excluded from evidence. *Id*. at 283, 286.

[22] The Court stated that "[i]t would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions. . .and the use of the confessions thus obtained as the basis for

Harmless error was irrelevant to the *Bram* or *Brown* analysis. What compelled the outcome in both of those decisions was that the methodologies employed for the confessions in both cases were a shameful indictment of American standards of criminal justice, and courts simply could not allow those methodologies to stand.

While the U.S. Supreme Court's holding in *Brown* made clear that confessions obtained through physical coercion violated due process,[23] it did not specifically prohibit confessions obtained through psychological coercion.[24] So, when the U.S. Supreme Court began to suppress confessions obtained by violence and torture, police began to secure confessions from suspects in other, yet-to-be-

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conviction and sentence was a clear denial of due process." *Brown*, 297 U.S. at 286; *see Missouri v. Seibert*, 542 U.S. 600, 607 (2004) (plurality opinion).

[23] *See* Brennan, 27 New Eng. J. on Crim. & Civ. Confinement at 256-57.

[24] Brennan, 27 New Eng. J. on Crim. & Civ. Confinement at 253, 256-57 (Although "[t]he Due Process Clause of the Fourteenth Amendment effectively excluded confessions extracted with physical force ... it was less effective at excluding confessions obtained by psychologically coercive methods.").

explicitly proscribed ways: by employing psychologically coercive interrogation techniques.[25] Thereafter, in *Ashcraft v. Tennessee*, the U.S. Supreme Court held that psychologically coerced confessions also violated due process and were inadmissible at trial.[26]

Originally, a confession was considered psychologically coerced if

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[25] Dressler, Understanding Criminal Procedure at § 23.03.

[26] *Ashcraft v. Tennessee*, 322 U.S. 143, 154-55, 154 n.9 (1944) (recognizing that Supreme Court case law holds that "a coerced or compelled confession cannot be used to convict a defendant in any state or federal court"); *see also* Michael J. Zydney Mannheimer, *Coerced Confessions and the Fourth Amendment*, 30 Hastings Const. L.Q. 57, 64 (2002) (explaining that the Court "extended" the Brown rule to confessions "extracted through psychological rather than physical coercion"). The "focus" of the Supreme Court "shifted in later cases to determining whether psychological coercion occurred." *Id*. at 65. "[C]oercion can be mental as well as physical, and...the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960).

obtained by "'improper police methods.'"[27] Lower courts, however, struggled with what constituted "'improper police methods.'"[28] The Court, in response, refined the inquiry to focus on "'whether a defendant's will was overborne.'"[29]

But even before and then continuing beyond the U.S. Supreme Court decisions proscribing confessions secured by improper police methods, this Court recognized in *Traylor v. State*, 596 So. 2d 957 (Fla. 1992), that states had long been leaders, not followers, in establishing standards for protecting individual rights triggered when an individual was the subject of the government's accusation of committing a crime:

> *We have since reaffirmed both the constitutional status of Florida confession law under our Declaration of Rights* [Citations omitted] *and the broad scope of the constitutional privilege* [Citations omitted] *on many occasions.*[30]

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[27] *Ashcraft*, 322 U.S. at 154 (describing the coercive police conduct at issue and calling it "irreconcilable with the possession of mental freedom").

[28] Brennan, 27 New Eng. J. on Crim. & Civ. Confinement at 257.

[29] Brennan, 27 New Eng. J. on Crim. & Civ. Confinement at 257 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)).

[30] *Traylor v. State*, 596 So.2d at 962-65 *citing Bizzell v. State,* 71 So. 2d 735, 738 (Fla. 1954) (setting forth a thoughtful, detailed analysis of this

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> 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. We are similarly bound under our Declaration of Rights to construe each provision freely in order to achieve the primary goal of individual freedom and autonomy.
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> *Special vigilance is required where the fundamental rights of Florida citizens suspected of wrongdoing are concerned, for here society has a strong natural inclination to relinquish incrementally the hard-won and stoutly defended freedoms enumerated in our Declaration in its effort to preserve public order. Each law-abiding member of society is inclined to strike out at crime reflexively by constricting the constitutional rights of all citizens in order to limit those of the suspect-each is inclined to give up a degree of his or her own protection from government intrusion in order to permit greater intrusion into the life of the suspect*. The framers of our Constitution, however, deliberately rejected the short-term solution in favor of a fairer, more structured system of criminal justice:
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> These rights [enumerated in the Declaration of Rights] curtail and restrain the power of the State. It is more important to preserve them, even though at times a guilty man may go free, than it is to obtain a conviction by ignoring or violating them. *The end does not justify the means. Might is not always right. Under our system of constitutional government, the State should not set the example of violating fundamental rights guaranteed by the Constitution to all citizens in order to obtain a conviction*.

Meanwhile, the U.S. Supreme Court's "totality of the circumstances" standards were increasingly considered too subjective, "unpredictable," and

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country's jurisprudential base for having a broad, robust privilege against self-incrimination).

"burdensome."[31] Because of the "totality of the circumstances" approach's general lack of guidance,[32] police continued to employ psychologically coercive interrogation techniques.[33] And because the "totality of the circumstances" test did

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[31] Brennan, 27 New Eng. J. on Crim. & Civ. Confinement at 256-58 ("[T]he test is fact specific and relies heavily on the discretion of judges."); Welsh S. White, *What Is an Involuntary Confession Now?*, 50 Rutgers L. Rev. 2001, 2010 (1998) (positing that "the question of whether an interrogation practice violates civilized standards of decency depends on normative judgments relating to the legitimacy of particular police practices").

[32] Dressler, Understanding Criminal Procedure at § 23.03 ("[T]he totality-of-the-circumstances test makes 'everything relevant but nothing determinative.'") (quoting Joseph D. Grano, *Miranda v. Arizona and the Legal Mind: Formalism's Triumph Over Substance and Reason*, 24 Am. Crim. L. Rev. 243, 243 (1986)).

[33] Mandy DeFilippo, *You Have the Right to Better Safeguards: Looking Beyond Miranda in the New Millennium*, 34 J. Marshall L. Rev. 637, 688-89 (2001) (asserting that lack of guidance under the due process standard increases the likelihood that police will employ psychologically coercive interrogation

not adequately protect suspects,[34] the U.S. Supreme Court attempted to replace that test with a clear "bright-line" rule to ensure better, more predictable protections.[35]

In *Miranda v. Arizona*,[36] the U.S. Supreme Court rejected the "totality of the circumstances" test as an unnecessary inquiry into the voluntariness and resulting admissibility of a confession because "compulsion inheres in custodial interrogation to such an extent that any confession, in any case of custodial

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techniques).

[34] Penney, 25 Am. J. Crim. L. at 362 (explaining that the totality of the circumstances test often forced courts to confront "conflicts in testimony between police and defendants," the outcome of which was almost invariably "resolved in the police's favor").

[35] Brennan, 27 New Eng. J. on Crim. & Civ. Confinement at 259 (observing that the Miranda Court sought to "simplify confession law"); Dressler, Understanding Criminal Procedure at § 24.02 ("[B]y the early 1960s the Court had become thoroughly dissatisfied with the imprecise 'voluntariness' test....Based upon thirty years of struggle with the doctrine...the Court concluded that the test resulted in 'intolerable uncertainty,' and that a bright-line rule was needed.").

[36] 384 U.S. 436 (1966).

interrogation, is compelled."[37] Instead, the Court concluded that: any confession obtained during a custodial interrogation would necessarily constitute unconstitutional compulsion, unless procedural safeguards were established.[38]

As such, the Court sought to implement a bright-line "warning and waiver system" designed to protect suspects.[39] The *Miranda* Supreme Court required the following procedures to secure confessions predicated on an informed and voluntary "warning and waiver system":

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as

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[37] *Miranda*, 384 U.S. at 455 (declaring that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals"); Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 Ohio St. L.J. 733, 735 (1987).

[38] *Miranda*, 384 U.S. at 467 ("[W]ithout proper safeguards[,] the process of in-custody interrogation...contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.").

[39] Penney, 25 Am. J. Crim. L. at 366.

> evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.[40]

The *Miranda* "bright line" doctrine was intended to be easier for courts to apply and for courts, therefore, to be able to reach consistent results that served to regulate police interrogation practices.[41] The bright-line *Miranda* rule was also intended to protect suspects, by informing them, before interrogation, of their interrogation rights, providing police with a clear standard of conduct to follow, and facilitating judicial review.[42]

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[40] 384 U.S. at 444-45.

[41] DeFilippo, 34 J. Marshall L. Rev. at 689-90.

[42] DeFilippo, 34 J. Marshall L. Rev. at 687-90; Benjamin D. Cunningham, Comment, *A Deep Breath Before the Plunge: Undoing Miranda's Failure Before It's Too Late*, 55 Mercer L. Rev. 1375, 1379 (2004) (explaining that unless the bright- line *Miranda* rule is followed, courts must bar the government

Consistent with *Miranda*, and also on independent Florida Constitution grounds, this Court also reaffirmed the rule against self-incrimination in *Traylor v. State*, pursuant to Florida's Self-Incrimination Clause of Article I, Section 9, Florida Constitution:

> Based on the foregoing analysis of our Florida law and the experience under *Miranda* and its progeny,[43] 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, and that if they cannot pay for a lawyer one will be appointed to help them.[44]
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> This means that the suspect has the right to consult with a lawyer before being interrogated and to have the lawyer present during

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from introducing, "in its case-in-chief, statements of a defendant obtained from a custodial interrogation").

[43] *Traylor v. State*, 596 So.2d at 965-66 n.12 (also discussing *Miranda* and extensively citing the numerous exceptions and limitations written into that decision).

[44] *Traylor v. State*, 596 So.2d at 965-66 n.12 (also discussing *Miranda* and extensively citing the numerous exceptions and limitations written into that decision).

interrogation.[45]

Despite these procedures to protect fundamental, individual rights, the post-*Miranda* cases have become riddled with exceptions that undercut practical application of *Miranda*'s warning/waiver requirements and promote the very conflicts in the courts' ability to regulate police interrogation practices (e.g. this petition based on conflict between the Third and Fourth District Courts of Appeal illustrates) that the seminal self-incrimination decisions were intended to end.[46]

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[45] *Traylor v. State*, 596 So.2d at 966 n.13.

[46] *See* Cunningham, 55 Mercer L. Rev. at 1387 (stating that "the Miranda decision was substantially undercut by gaping exceptions"); DeFilippo, 34 J. Marshall L. Rev. at 639; *see, e.g.*, *Harris v. New York*, 401 U.S. 222, 226 (1971) ("impeachment exception" to Miranda; holding that the defendant's credibility "was appropriately impeached by the use of his [admissible] earlier conflicting statements"); *Oregon v. Hass*, 420 U.S. 714, 723-24 (1975) (expanding this exception and reversing the lower court ruling that an officer's testimony for impeachment purposes was inadmissible on constitutional grounds because the officer did not acknowledge the suspect's request for an attorney); *New York v. Quarles*, 467 U.S. 649 (1984) (characterization of *Miranda* rights as a non-constitutional "prophylactic" rule permitted Court to fashion a "public safety"

Overall, the post-Miranda cases have served to undermine *Miranda*'s bright-line rule.[47] Consequently, it has become increasingly difficult for lower courts to determine whether or not a particular confession is admissible, and must conduct an "agoniz[ing] case-by-case review process" with little to guide them.[48] And

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exception to Miranda's warning requirement; held that police officers are not required to recite the *Miranda* warnings when questioning a suspect in connection with a reasonable public safety concern.); *Oregon v. Elstad*, 470 U.S. 298, 305 (1985) (Court relied on characterization of *Miranda* warnings as "prophylactic;" held that if an initial confession is obtained in violation of *Miranda*, police officer may then recite the Miranda warnings and obtain a second, admissible confession).

[47] Charles D. Weisselberg, *In the Stationhouse After* Dickerson, 99 Mich L. Rev. 1121, 1162 (2001) (*Dickerson v. United States* left *Miranda* standing, but with all of its exceptions and modifications crafted during the last 35 years).

[48] *See* Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. Rev. 69, 92-93 (1989) (showing the recitation of Miranda warnings in a Spiderman comic); Paul Marcus, *A Return to the "Bright Line Rule" of* Miranda, 35 Wm. & Mary L. Rev 93, 94, 112 (1993) (indicating that it is "unfortunate that so many aspects of

because some courts no longer strictly enforce the warning and waiver rules, police frequently violate *Miranda*, leaving suspects without the same level of protection that *Bizzell*, *Traylor* and *Miranda* were intended to establish.[49]

In response to the turmoil in the post-*Miranda* decisions, police officers are now taught, through training manuals and courses, how to convince suspects to waive their *Miranda* rights and confess.[50] This development reflects two key

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Miranda have become riddled by exceptions").

[49] *See* Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 Minn. L. Rev. 397, 413-14 (1999) ("[p]ost-*Miranda* cases have diluted the *Miranda* court's waiver requirements [and diminished] the legal barriers that might restrict interrogators from using tactics designed to induce *Miranda* waivers"); Rosenberg & Rosenberg, 68 N.C. L. Rev. at 93 (as a result of the post-*Miranda* decisions, police are now encouraged to violate *Miranda* in certain instances).

[50] Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 Mich L. Rev. 1000, 1016 (2001) (explaining police have developed techniques to circumvent *Miranda* while adhering to the letter of the law); George C. Thomas III & Richard A. Leo, *The Effects of* Miranda v. Arizona*:*

points: Police are continuing to use "the same psychological methods of persuasion, manipulation, and deception" that *Miranda* sought to end[51] And despite *Traylor*'s and *Miranda*'s goal to prevent coercive interrogation techniques,[52] later decisions eroding the self-incrimination "bright line" rules and the proliferation of exceptions have triggered an increase in such techniques.[53]

2. The Fourth District's Decisions Promote Consistency in Florida's *Miranda* Warning Standards for Right to Counsel Prior to Questioning and Right to Terminate Questioning.

It was established below that the Miami-Dade Police advised this

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"Embedded" in Our National Culture?, in 29 Crime & Justice: A Review of Research 203, 249-52 (Michael Tonry ed., 2002).

[51] Leo, 99 Mich L. Rev. at 1019-21; *see* Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 Or. L. Rev. 775, 785 (1997) (despite the *Miranda* Court's criticism of "deceptive interrogation techniques," police manuals continue to instruct officers to employ them).

[52] Leo, 99 Mich L. Rev. at 1019-21.

[53] Leo, 99 Mich L. Rev. at 1021-22. Police have learned to "'work Miranda' to their advantage" through the use of strategic psychological interrogation techniques. Leo, 99 Mich L. Rev. at 1016.

defendant of his *Miranda* rights by the following *Miranda* form:

> a) You have the 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?
> b) Should you talk to me, anything which you might say may be introduced into evidence in court against you. Do you understand?
> ***c) If you want a lawyer to be present during questioning, at this time or anytime hereafter, you are entitled to have a lawyer present. Do you understand that right?***
> d) 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 willing to answer my questions without having a lawyer present?

V1-R. 142, V2-R.149, V3-330 (Emphasis added).

It is respectfully submitted that *Cooper v. State*, 739 So. 2d 82, 85 (Fla. 1999), and *Johnson v. State*, 750 So. 2d 22, 25 (Fla. 1999), did address the first issue– the right to consult with counsel prior to questioning–[54]but did not address

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[54]

Without abandoning both constitutional challenges to the deficiencies in the Miami-Dade Miranda form, the undersigned recognizes that the Third District Court of Appeal found "no deficiency in the standard Miranda rights form utilized by the Metro-Dade Police Department." *Cooper v. State*, 638 So. 2d 200, 201 (Fla. 3d DCA 1994). This issue was also raised in a federal habeas corpus petition, and the district court denied his petition. *See Johnson v. Singletary*, No. 95-2646-CIV-UNGARO-BENAGES (S.D. Fla. June 25, 1996), *aff'd*, 162 F.3d 97 (11th

the second issues presented here: the right to terminate questioning at any time.

In *Cooper v. State*, 739 So. 2d 82, 84 n. 8 (Fla. 1999), which the State relied on below, this Court approved 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." Cooper had argued that the third 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. Do you understand?"–was insufficient. This Court concluded that the warning was not defective because it tracked the language of *Miranda*. *Id*.

Cir.1998), *cert. den*., 526 U.S. 1056 (1999). This issue is raised also for federal preservation reasons; most federal courts of appeals "have recognized the importance of informing suspects that they have the right to have a lawyer present prior to and during interrogation." *Brown v. Crosby*, 249 F. Supp.2d 1285, 1306 (S.D. Fla. 2003) (cases cited); *see also United States v. Noti*, 731 F.2d 610, 614-15 (9th Cir. 1984); Martin J. McMahon, Annotation, *Necessity that Miranda Warnings Include Express Reference to Right to Have Attorney Present During Interrogation*, 77 A.L.R. FED. 123, 131-35 (1986). It is respectfully submitted that the *Miranda* form fails to adequately advise someone from the general public with an average reading level of eighth grade, these rights should be explicitly articulated to all accused of a crime.).

In *Johnson v. State* 750 So. 2d 22, 25 (Fla. 1999), which the State also relied on below, Johnson claimed that his confessions should have been suppressed because the Metropolitan Dade County Miranda warning form did not adequately apprise Johnson of his right to consult with counsel prior to questioning as well as during questioning. This Court held that the language of the warning form "track[ed] the language of Miranda," so the trial court properly admitted the confessions. *Id.*

The Appellant recognizes and respects those decisions. This petition presents an opportunity for the Court to close a gap that *Miranda* and *Traylor* failed to close. Meaning, Florida and Federal self-incrimination law and jurisprudence, notably *Miranda* and *Traylor*, explicitly recognize certain rights: that an accused has the right to consult with counsel prior to questioning and that an accused has the right to terminate questioning. In light of current developments in custodial interrogations, as set forth above, these decisions warrant revisiting to breath life into the rights that *Miranda* and *Traylor* recognized but left open regarding how those rights were to be enforced.

In *Traylor v. State*, pursuant to Florida's Self-Incrimination Clause of Article I, Section 9, Florida Constitution, this Court set forth a clear rule that recognized the right to consult with an attorney before questioning:

> Based on the foregoing analysis of our Florida law and the experience

> under *Miranda* and its progeny,[55] 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, and that if they cannot pay for a lawyer one will be appointed to help them. [56]
>
> * * *
>
> **<u>This means that the suspect has the right to consult with a lawyer before being interrogated</u>** and to have the lawyer present during interrogation.[57]

As to the second defect in the Miranda Waiver form at issue here–advising the accused of the right to terminate questioning--the Fourth District Court of Appeal in *West v. State*, 876 So. 2d 614 (Fla. 4th DCA 2004), *reh'g den*. (July 30, 2004), recognized the requirement to advise the accused of the right to terminate

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[55] *Traylor v. State*, 596 So.2d at 965-66 n.12 (also discussing *Miranda* and extensively citing the numerous exceptions and limitations written into that decision).

[56] *Traylor v. State*, 596 So.2d at 965-66 n.12 (also discussing *Miranda* and extensively citing the numerous exceptions and limitations written into that decision).

[57] *Traylor v. State*, 596 So.2d at 966 n.13.

questioning, and reversed and remanded for a new trial a conviction tainted by a statement that, as here, was obtained without advising the accused of the right to terminate questioning:

> ***The problem with the trial court's finding is that it overlooks that appellant was not informed*** that she was entitled to have counsel present during interrogation ***or that she could stop the interrogation at any time***. Nor did the state produce evidence that appellant knew this and knowingly waived these rights. ***Her confession should accordingly have been suppressed. We therefore reverse for a new trial***.

The Fourth District Court of Appeal in *Ripley v. State*, 898 So. 2d 1078, 1079-81 (Fla. 4th DCA 2005), likewise, recognized the requirement to advise the accused of the right to have an attorney prior to questioning and the right to terminate questioning, and reversed and remanded as the *Miranda* form used in that case was defective because:

> the *Miranda* warnings given to Ripley were legally insufficient. At the suppression hearing, the detective testified that he read the *Miranda* warning from what was then the standard Broward County Sheriff's Office card used for that purpose. ***The warning then in use did not advise Ripley that he was entitled to have counsel present during questioning or that he could stop the interrogation at any time during questioning***. We have previously held that this form is legally inadequate to comply with the requirements of *Miranda. Franklin v. State,* 876 So. 2d 607, 608 (Fla. 4th DCA 2004); *West v. State,* 876 So. 2d 614, 616 (Fla. 4th DCA 2004); *Roberts v. State,* 874 So. 2d 1225, 1229 (Fla. 4th DCA 2004).

In the instant case, the Third District Court of Appeal expressly recognized that its decision was in conflict with the Fourth District Court of

Appeal:

> [Mr. Gillis] also claims that, because he was not advised that he could terminate the questioning at any time, his statement should be suppressed. In support of this position, [Nickulis Gillis] relies on *Ripley v. State*, 898 So. 2d 1078, 1079 (Fla. 4th DCA 2005); *West v. State*, 876 So.2d 614 (Fla. 4th DCA 2004), *rev[.] denied*, 892 So. 2d 1014 (Fla. 2005); *Franklin v. State*, 876 So. 2d 607 (Fla. 4th DCA 2004), *cert. denied*, 543 U.S. 1081[ ] (2005); and *Roberts v. State*, 874 So. 2d 1225 (Fla. 4th DCA 2004), *rev[.] denied*, 892 So. 2d 1014 (Fla. 2005). *We note that in* Ripley *and* West, *the Fourth District concluded that the* Miranda *form used by the Broward Sheriff's Office was defective for failing to inform a suspect that he could stop questioning at any time, but that the Fourth District did not specifically address this issue in* Franklin *and* Roberts. *We, however, take a very different view than does the Fourth District, and we conclude that, because the* Miranda *form used informs the accused that he/she does not have to answer any questions posed by the officer,* ***implicit*** *in this warning is the fact that the accused may invoke his right to remain silent at any time during the interrogation or to terminate further questioning during the interrogation.* Thus, we reject the defendant's argument to the contrary, and conclude that the *Miranda* form used properly advised the defendant of his rights, and that when he gave his statement to law enforcement, he did so after a clear understanding and waiver of his Fifth Amendment rights. App. "A" at *3.

The Fourth District Court of Appeal on this question of law is correct: a *Miranda* warning that law enforcement administers to a citizen while in custody, should advise that person of their constitutional right to consult with an attorney before questioning and to terminate questioning at any time, and the failure to do that renders the Miranda waiver legally insufficient to inform him/her of his/her constitutional rights. While the Fourth District's *West*, *Ripley* and *Riley* decisions

require that law enforcement communicate to the general citizenry *Miranda*'s constitutional rights expressly, the Third District's decision in the instant petition is satisfied that law enforcement communicate *Miranda*'s constitutional rights by "implication". With respect, that only adds greater uncertainty and added turmoil to *Miranda* law.

As the Fourth District's concurring opinion in the *West* decision observed, there are many, many *Miranda* constitutional issues that have evolved over the last decade that have only heightened the need for judicial certainty that sets for, with specificity, each of the rights and how those are to be enforced prior to and during, custodial interrogation:

> Thomas and Leo observed that there appears to be relatively little dispute among second-generation researchers on several aspects of *Miranda*'s real-world effects. First, police appear to issue and document *Miranda* warnings in virtually all cases. Second, police appear to have successfully "adapted" to the *Miranda* requirements. In practice, this means that police have developed strategies that are intended to induce *Miranda* waivers. Third, police appear to elicit waivers from suspects in 78-96 percent of their interrogations, though suspects with criminal records appear disproportionately likely to invoke their rights and terminate interrogation. Fourth, in some jurisdictions police are systematically trained to violate *Miranda* by questioning "outside *Miranda*"-that is, by continuing to question suspects who have invoked the right to counsel or the right to remain silent. Finally, some researchers have argued that *Miranda* eradicated the last vestiges of third-degree interrogation present in the mid-1960s, increased the level of professionalism among

interrogators, and raised public awareness of constitutional rights.[58]

While there may be some play in the words of the *Miranda* warning or the timing of the warning, it could not be clearer–from every one of these decisions–that an arrestee has the right to consult with counsel before custodial interrogation and that an arrestee has the right to insist to the police that questioning cease and that police must cease that questioning once an arrestee invokes these rights. If these aspects of the *Miranda* rule are to have meaning and predictability, the courts should have a clear rule that an accused (the average layperson having a sixth to eighth grade reading level) must be apprised, by way of a form that the accused is read and then signs, of all of these rights. Without that, the risks remain that these rights may be disregarded without consequence or enforced contingent upon the specifics of the case, the accused and the officer advising of those rights. Without a clear statement from this Court, the *Miranda* and *Traylor* rules are of absolutely no avail where police are not required to inform Florida citizens of all of them in a meaningful way. With respect, there is no prejudice to require explicit notice to Florida's accused of these rights, and every prejudice and continued turmoil to

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[58] *West v. State*, 876 So. 2d at 617 *quoting* George C. Thomas III & Richard A. Leo, *The Effects of* Miranda v. Arizona: *"Embedded" in Our National Culture?* 29 Crime & Just. 203, 244-45 (2002) (internal citations omitted).

decline the opportunity to close this gap.

B. It was error to deny Mr. Gillis' motion to suppress identification testimony where, as here, the identification was based on a single, obvious mugshot of the accused, the identification was highly suggestive and it presented the danger of misidentification.

Use of a single photograph is one of the most suggestive methods of identification possible and is impermissibly suggestive under most circumstances.[59] A photographic lineup that contains only one photograph that matches the description of the accused is impermissibly suggestive.[60]

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[59] *Way v. State*, 502 So. 2d 1321 (Fla. 1st DCA 1987); *see also Roberts v. State*, 778 So. 2d 512 (Fla. 4th DCA 2001); *Neil v. Biggers*, 409 U.S. 188 (1972); *Foster v. California*, 394 U.S. 440, 443 (1969).

[60] *Id.*; *see* V3-R.354, 358; *see, e.g., Judd v. State*, 402 So.2d 1279 (Fla. 4th DCA 1981) (Pretrial photographic array was impermissibly suggestive in its singular depiction of defendant as only person who was both bare-chested and had braided hair, as described by witness, and suggestiveness of array was not vitiated by other circumstances reducing substantial likelihood of misidentification where witness' observations of assailant were short-lived and made in moment of fear and uncertainty in dimly lit tavern, witness had been working for 12 hours and had consumed at least two beers earlier in the afternoon, witness' description of

As such, the police procedure employed here was patently improper and the out-of-court and in-court identification testimony of Ashley Yuinigo and Herman Thomas should have been excluded. It cannot be concluded beyond a reasonable doubt that the highly suggestive identification based on a single, labeled mugshot did not present a substantial risk of misidentification, given Ms. Yuinigo's hysteria, the very brief lapse of time of the shooting incident (less than 2 minutes), Mr. Thomas' admitted consumption of 3 beers before the incident, Ms. Yuinigo's inability to recall what the shooter was wearing, Mr. Thomas not seeing the actual shooting, and the DNA evidence linking a T-shirt found on the premises that linked to another person who lived 7 blocks away.

C. It was error for the court to deny the motion to suppress physical evidence concerning red hightop shoes obtained in violation of the Fourth Amendment.

On August 9, 2004, the lower court denied a Motion to Suppress Physical Evidence concerning red hightop shoes found after his arrest, in his cell under the bunk where Mr. Gillis was previously sitting. V2-R.278-81, 286-88; T.9-10, 74-96, 106-08. Before the search warrant was executed, a corrections officer had gone into the cell where Mr. Gillis was housed for the purpose of seeing if red

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assailant was very general, and prosecutor made no attempt to have witness make in-court identification.); *Castles v. State*, 438 So. 2d 981 (Fla. 3d DCA 1983) (same).

sneakers were there. T. 43-44. The sneakers were found next to flip flop sandals that had the name of "Nick" on the sandal soles. T. 39-40. The Search Warrant of Mr. Gillis' jail cell, which he shared with others incarcerated, specifically stated "[Officers from the Department of Corrections assigned to the Pretrial Detention center where the defendant. . .is housed have been able to verify today, July 29, 2004, that the defendant has red shoes/sneakers in his cell. . . ." No prior search warrant was mentioned. V2-R.278-79. There is no suggestion here, nor could there be, that the search in question was for anything other than the singular purpose of bolstering the State's case–this specific case.

In *Hudson v. Palmer*, 468 U.S. 517 (1984), the Supreme Court held that a prison inmate did not have a reasonable expectation of privacy in his prison cell entitling him to the protection of the Fourth Amendment against unreasonable search and seizures. *Hudson*, 468 U.S. at 536. But in *McCoy v. State*, 639 So. 2d 163 (Fla. 1st DCA 1994), the First District held a search like the kind here to be a Fourth Amendment violation.

In *McCoy*, the assistant state attorney assigned to the case directed the police to perform a search of McCoy's cell at a local pretrial detention facility for the sole purpose of finding any writings by McCoy which would be incriminating. McCoy moved to suppress some writings based on his right to be free of unreasonable searches and seizures and his right to the assistance of counsel. The

State responded that he was not entitled to the protections of the Fourth Amendment based on *Hudson v. Palmer*, 468 U.S. 517 (1984). Further, the State argued that McCoy failed to carry his burden of showing that the documents contained any privileged attorney-client information. The First District agreed that McCoy failed to carry his burden as to his Sixth Amendment right to assistance of counsel; however, the court found that *Hudson* did not apply because the search was not done in furtherance of any concern for institutional security and that the search was done solely to bolster the state's case. *McCoy*, 639 So.2d at 167.

While the First District in *McCoy* did not believe that the *Hudson* rule applied to pretrial detainees, *State v. Blin*, 693 So. 2d 583 (Fla. 2d DCA 1997), concluded:

> there is nothing in *Hudson* that would support the First District's determination that Hudson does not apply to pretrial detainees. *See Bell v. Wolfish*, 441 U.S. 520 [ ] (1979) (court upheld a room search rule against a Fourth Amendment challenge by pretrial detainees). Florida case law supports the fact that a reasonable person in custody would not have an expectation of privacy. *See State v. Smith*, 641 So.2d 849, 851 (Fla.1994).

However, in *Rogers v. State*, 783 So. 2d 980, 991-92 (Fla. 2001), the Court stated:

> [T]he conduct of the prosecutors of the Hillsborough County State Attorney's Office who ordered investigators of that office ***to engage in a search of Rogers' cell and seize his personal papers was clearly improper***.
> ***We emphasize that neither the United States Supreme Court's opinion in Hudson, nor the Second District's opinion in Blin would***

> ***have authorized such a search.*** *See Hudson*, 468 U.S. at 519[ ]; *Blin*, 693 So. 2d at 584-85. In *Hudson*, an officer with a state correctional center conducted a 'shakedown' search of a prisoner's locker and cell solely for the purpose of finding contraband. 468 U.S. at 519 [ ]. In *Blin*, prison officers entered Blin's cell for the purpose of investigating an attempted suicide by *Blin*. *See id.* at 585. The Second District emphasized that the officer 'did not come to the cell simply to find evidence that would bolster its case.' *Id*.
>
> In contrast to *Hudson* and *Blin*, in this case, it was an investigator with the State Attorney's Office who conducted the search and seized the documents in order to investigate an alleged conspiracy to pin the blame for the victim's murder on another person. ***Thus, the search was directly related to the case being prosecuted***. As in *McCoy v. State*, 639 So.2d 163, 166-67 (Fla. 1st DCA 1994), there was no 'legitimate' need to search Rogers' jail cell for institutional security and the search was directly related to the case being prosecuted. Similar to McCoy, it was the prosecutors assigned to Rogers' case who directed investigators to perform a search of Rogers' cell, which included a search for any writings by Rogers that would be incriminating. *See id.* at 164.

Florida has well established procedures for conducting searches appropriately and in conformity with the Fourth Amendment. The search of Mr. Gillis' cell was improper. There was no legitimate need to search Mr. Gillis' jail cell for institutional security; the search was directly related to the case being prosecuted. The fruits of this search–the red hightop shoes–should have been suppressed.

D. It was error for the lower court to exclude evidence of and testimony on a white T-shirt and a cap where, as here, these items were found on the scene of the shooting, the T-shirt was linked to another individual about 7 blocks from this location, and the eyewitness to the shooting had less than two minutes to observe the shooting, was hysterical and identity was still in dispute. (*See*

also Sections B & C).

On October 10, 2003, a DNA Analysis Report was presented of a T-shirt the police found at the site and submitted for analysis; the T-shirt was found on the same side of the Exxon Gas Station where the shooting occurred; the T-shirt could not be linked to either Mr. Gillis or the Decedent. V1-R.110, T. 102-05. A white T-shirt was found on the side of the Exxon Gas Station where the shooting occurred, while the cap was found around the corner. T. 102-05. On August 9, 2004, Mr. Gillis and the State entered into a formal stipulation that:

$ the DNA of a cap found at the site of the incident did "not match the [DNA] of the defendant Nickulis Gillis";

$ the DNA found on the cap found at the sit of the incident matched the "DNA profile of Samuel Bryant, Social Security No. [*Redacted from Brief for Privacy Protections*], Date of Birth [*Redacted from Brief for Privacy Protections*], given pursuant to a volunteer swab of his mouth"; Mr. Bryant lived seven blocks from the site of this incident (T. 12); and

$ the DNA found on the T-shirt found at the site of the incident had "no matching results". V2-R.269.

The State moved in limine to exclude argument or testimony by the defense about the cap and shirt that were collected from the site of the incident until such time that the defense made that evidence relevant. T. 11-13. The court granted the State's Motion in Limine to preclude the defense from introducing any evidence regarding the T-shirt and the cap. T. 105, 110-15. This was error.

Section 90.401, Fla. Stat., turns on "relevancy" and "materiality." The

concept of "relevancy" only concerns whether the evidence has any logical tendency to prove or disprove a material fact. If the evidence is logically probative, it is relevant and admissible unless there is a reason for not allowing the jury to consider it.[61]

Here, the evidence of the T-shirt and cap were relevant to the issue of the shooter's identity, as the only eyewitness to the actual shooting was one hysterical, 16-year-old witness, with less than two minutes to observe the entire incident, who did not even notice the apparel that the shooter was wearing. Ms. Yuinigo–the only eyewitness to the shooting--further testified that there were other people at the Exxon Gas Station that morning, the entire incident took less than 2 minutes, she was in shock and she had no memory of what the shooter was wearing.

CONCLUSION

For the reasons and legal authorities set forth herein, it is respectfully submitted that the decision of the Third District Court of Appeal should be quashed, and remanded with instructions consistent with the relief requested herein.

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[61] *See Vannier v. State*, 714 So. 2d 470, 472 (Fla. 4th DCA 1998) (In murder prosecution when defense was suicide, reversible error to exclude as irrelevant letters written by decedent).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was **mailed**/faxed/hand-delivered this 18th day of November, 2006 to: OFFICE OF THE ATTORNEY GENERAL, Criminal Division, Assistant Attorney General Maria T. Armas, Esquire, 444 Brickell Avenue, Suite 950, Miami, Florida 33131.

BY:
Dorothy F. Easley, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the typeface and font size, Times Roman 14 point proportionately spaced, as set forth in Rule 9.210, Fla. R. App. P.

BY:

Dorothy F. Easley, Esq.

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC06-1207

Third District Court of Appeal, State of Florida Case No. 3D04-2340

NICKULIS GILLIS,
Petitioner,

vs.

THE STATE OF FLORIDA,
Respondent.

DISCRETIONARY REVIEW

APPENDIX TO PETITIONER'S INITIAL BRIEF ON THE MERITS

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OPINION OF THE DISTRICT COURT OF APPEAL,
THIRD DISTRICT ....App. A