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 APPLICATION FOR DISCRETIONARY REVIEW

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

INTRODUCTION[1]

Petitioner's brief on jurisdiction requests 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, in particular the Fourth District Court of Appeal, concerning this same question of law: whether a *Miranda* 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?

STATEMENT OF THE CASE AND FACTS

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

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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.

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;[2] (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.[3]

Most pertinent now to this jurisdictional question, Mr. Gillis also 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*[4] form

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

[3] App. "A" at *1; *Gillis v. State*, ___ So.2d ___, 31 Fla. L. Weekly D1520, 2006 WL 1479371 (Fla. 3d DCA May 31, 2006); I.B. at 16-21.

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

that was used to advise him of his rights:[5]

> (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.[6]

Mr. Gillis challenged the above form as defective, in part, because the form did not advise him of several custodial constitutional rights that those in the general public do not appreciate 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.[7]

On May 31, 2006, the Third District Court of Appeal affirmed on all points.[8] Mr. Gillis timely invoked the jurisdiction of this Honorable Court on June 14, 2006.

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[5] App. "A" at *2-3.

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

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

QUESTION PRESENTED

Does the Decision of the Third District Court of Appeal directly and expressly conflict with decisions of other District Courts of Appeal concerning whether a *Miranda* warning that law enforcement administers to an accused while in custody, which 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?

SUMMARY OF THE ARGUMENT

With respect, by its affirmance, the Third District Court of Appeal's decision in the instant case turns on two presumptions, both of which defeat *Miranda* and are fundamentally wrong: that an accused *ipso facto* appreciates the right to consult with counsel before questioning and the right to terminate questioning at any time and, further, will exercise those rights in the face of irrefutably superior authority, though never informed by that authority of his/her right to do so.

Third District Court of Appeals' decision conflicts with the Fourth District Court of Appeals' decisions on whether 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.

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[8] App. "A".

ARGUMENT

The Decision of the Third District Court of Appeal directly and expressly conflicts with decisions of this Court and/or District Courts of Appeal concerning whether a *Miranda* warning that law enforcement administers to a citizen while in custody, which does not advise that person of their constitutional rights to consult with an attorney and to terminate questioning at any time, is legally sufficient to inform him/her of these constitutional rights.

This Court has discretionary jurisdiction to review a district court decision that expressly and directly conflicts with the decision of another district court or of the supreme court on the same question of law.[9] "Expressly" requires a written representation or expression of the legal grounds supporting the decision under review.[10] "Express" as set out in the *Jenkins* opinion is: "to represent in words" or "to give expression to."[11] In *Florida Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988), this Court explained that "in the broadest sense [it] has subject matter jurisdiction under article V, section 3(b)(3), of the Florida Constitution over any decision of a district court that expressly addresses a question of law within the four corners of the opinion itself."

Pertinent here, the Fourth District Court of Appeal in *West v. State*, 876

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[9] Art. V, § 3(b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(iv).

[10] *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980).

[11] *See also Times Publishing Company v. Russell*, 615 So. 2d 158 (Fla. 1993).

So. 2d 614 (Fla. 4th DCA 2004), *reh'g den*. (July 30, 2004), 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, held that 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 on the same question of law:

> [Nickulis 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), *review denied*, 892 So.2d 1014 (Fla. 2005); *Franklin v. State*, 876 So. 2d 607 (Fla. 4th DCA 2004), *cert. denied*, 543 U.S. 1081, 125 S.Ct. 890, 160 L.Ed.2d 825 (2005); and *Roberts v. State*, 874 So. 2d 1225 (Fla. 4th DCA 2004), *review 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.

As such, there is express and direct conflict between the Third and the Fourth District Courts of Appeal on this same question of law: is a *Miranda* warning that law enforcement administers to a citizen while in custody, which does not advise that person of their constitutional right to consult with an attorney before question and to terminate questioning at any time, is legally sufficient to inform him/her of his/her constitutional rights?

Moreover, even if the Court concludes the conflict is not explicitly presented in the decision as to all other decisions on this same question of law, jurisdiction lies, nevertheless, based on conflict. This is because it is not necessary

that the district court of appeal explicitly identify the operative conflicting appellate opinion in its order; it is enough that the district court addresses the legal principles applied as a basis for the decision.[12] A "discussion of the legal principles which the [district] court applied supplies a sufficient basis for a petition for conflict review."[13] This Court has held that it has jurisdiction based on a conflict in a panel decision, even if the panel decision is later rejected in an en banc decision of the district court of appeal.[14] The language of the instant decision satisfies this requirement. While the Fourth District's *West* 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 cannot and must not be the law.

This question of law is an important issue on which this Court should speak to remove further turmoil among the courts and to provide much-needed guidance to citizens across Florida. 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

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12 *Ford Motor Company v. Kikis*, 401 So. 2d 1341 (Fla. 1981).

13 *Kikis*, 401 So. 2d at 1341.

14 *Robertson v. Robertson*, 593 So. 2d 491 (Fla. 1991).

judicial guidance:

> 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.[15]

In this time, judicial guidance on *Miranda*'s contours and requirements is vital.

CONCLUSION

For the reasons and legal authorities set forth herein, it is respectfully submitted that the decision of the Third District Court of Appeal presents in its decision and in its analysis express and direct conflict jurisdiction. Petitioner, therefore, respectfully requests that this Court accept discretionary review jurisdiction based on this conflict.

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[15] *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*

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 24th day of June, 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.

Culture? 29 Crime & Just. 203, 244-45 (2002) (internal citations omitted).

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.

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INDEX