**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.

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ON DISCRETIONARY REVIEW

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# PETITIONER'S REPLY BRIEF ON THE MERITS

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**A. 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.**

The State's position is really based on a provincial reading of *Miranda* and federal law, which do not require a separate reading of all of the self-incrimination rights, and, therefore, so the State's position goes, because federal law does not require it, this Court cannot require it under our Florida Constitution. Under principles of federalism and this Court's long history of granting more rights under the Florida Constitution than under the U.S Constitution, however, this Court *can* require a separate reading of all of *Miranda*'s rights. It is axiomatic that states may provide greater rights than those provided in the U.S. Constitution or federal law.[1] Florida has done that on a number of occasions.[2] Worth particular note, the State

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[1] All emphasis is added unless otherwise noted. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943); *see also Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980); *Traylor v. State*, 596 So. 2d 957, 961 (Fla. 1992) (explaining that courts must first evaluate whether the admission of the defendant's confession as evidence violated the state constitution before evaluating whether it violated the federal Constitution).

[2] *See Pruneyard*, 447 U.S. at 81; *Traylor*, 596 So. 2d at 961; William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977); Rachel E. Fugate, *Comment, The Florida Constitution: Still Champion of Citizens' Rights?*, 25 Fla. St. U. L. Rev. 87 (1997). This Court explained in *In re T.W.*, 551 So. 2d 1186 (Fla. 1989):

never addresses the overwhelming authority urging a a fully informed citizenry during custodial interrogation through a reading of all of *Miranda*'s rights. Nor does the State posit *any* prejudice from having a *Miranda* form that fully informs our citizens.

As to the right against self-incrimination, Florida's protections are embedded in the Declaration of Rights provisions of our Constitution, along with our right to privacy.[3] In contrast, our search and seizure protections are expressly linked to the Fourth Amendment of the U.S. Constitution and federal law standards (Article I, section 12 provides that we must follow the law, as interpreted by the U.S. Supreme Court). The significance of this difference must not be overlooked. While Florida is, in a sense, bound by federal search and seizure law, we are not so limited when it comes to the right against self-incrimination. Florida, like many states, has interpreted its Constitution, in particular those rights in Florida's Declaration of Rights, to provide citizens with greater rights than those conferred

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> The . . .states, not the federal government, are the final guarantors of personal privacy: 'But the protection of a person's general right to privacy-his right to be let alone by other people-is, like the protection of his property and of his very life, left largely to the law of the individual States.'

[3] *See* Art. I, Fla. Const.; Florida Supreme Court Florida Cybercourt, *February Case of the Month: State v. Deck* (1997). Website address: http://www. floridasupremecourt. org/education/cybercourt/1997/feb/feb2.html.

under the Federal Constitution.[4] The U.S. Supreme Court's interpretation of the extent to which a state is prohibited from interfering with or infringing on or violating a similar federal constitutional right is merely a bottom floor or base line.[5]

So, while the State posits that our self-incrimination law must be circumscribed by the U.S. Supreme Court's decisions in *Miranda* and its progeny, unlike the search and seizure context, this is simply incorrect. And the fundamental basis for that distinction is that the text of the Florida Constitution begins with a Declaration of Rights[6] that embody a series of rights that the framers of our Constitution regarded as so basic that they be accorded a place of special privilege. Those include Florida's self-incrimination clause.[7] That is why, for example, article I, section 23 of the Florida Constitution, the "privacy amendment," extends more protection to individual privacy interests than the U.S.

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[4] *See Traylor*, 596 So. 2d at 957; Florida Supreme Court Florida Cybercourt, *February Case of the Month: State v. Deck* (1997). Website address: http://www.floridasupremecourt. org/education/cybercourt/1997/feb/feb2.html.

[5] *See Traylor*, 596 So. 2d at 962 ("In any given state, the federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling.") (citation omitted).

[6] Art. I, §§ 1 to 25, Fla. Const.

[7] *Traylor,* 596 So. 2d at 957; *see also Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000), *reh'g denied*, (Dec. 5, 2000), *cert. denied*, 532 U.S. 958 (2001); *State v. City of Stuart*, 97 Fla. 69, 120 So. 335 (1929).

Constitution does.[8] Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the U.S. Constitution, it can only be concluded that the right is much broader in scope than that of the U.S. Constitution.[9] That is why, thirty years ago, before *Roe*, in a case successfully challenging the Florida legislature's efforts to legislate a felony for doctors to perform abortions except where necessary to protect the pregnant woman's life,[10] this Court noted that: "State courts are not bound to follow a decision of a federal court, even the United States Supreme Court, dealing with state law. Thus a state court is not bound to follow a decision of a federal court, even the United States Supreme Court, construing the constitution or a statute of that state."[11]

What these cases show is that this Court has long rejected restricting the

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[8] *See In re T.W.* at 1191.

[9] *In re T.W.*, at 1191-92 (quoting *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985)).

[10] *See* § 390.001(4)(a), Fla. Stat. (Supp. 1988), repealed by Act effective May 30, 1991, Ch. 91-223, § 6, 1991 Fla. Laws 2166. Despite the clear message that Florida's constitutional protection of privacy rights related to abortion is even stronger than the protection provided by the federal Constitution, the Florida Legislature attempted to restrict these rights by enacting a new law in 1988 requiring parental consent or a court order for minors' abortions. *See* Act effective Oct. 1, 1988, Ch. 88-97, § 6, 1988 Fla. Laws 460, 462-63 (amending Fla. Stat. § 390.001(4)(a) (1987)).

[11] *State v. Barquet*, 262 So. 2d 431, 435 (Fla. 1972) (quoting 20 Am. Jur.

protection of individuals' state constitutional rights to merely the same degree of protection provided by their federal counterparts.[12] Florida's self-incrimination clause was placed in Florida's Declaration of Rights, while the Fifth Amendment of the U.S. Constitution was not similarly placed, evincing the framers' intent to keep Florida's privilege against self-incrimination as robust as Florida's privacy privilege and pursuant to Florida standards where higher. By contrast, Florida's search and seizure clause does not,[13] reflecting the framers' express intent to apply federal standards in cases concerning this particular provision and the intent to also apply Florida standards for the remaining Declaration of Rights provisions, including the self-incrimination provision.[14]

The State's position overlooks this vital difference between state and federal protections of rights. But this difference shows the impropriety of the State heralding solely U.S. Supreme Court, federal cases and the decisions of other jurisdictions, interpreting laws other than Florida, as the ultimate, binding authority deciding whether Florida decisions meet Florida constitutional requirements. As such, the State's reliance on *Brown v. State*, 565 So. 2d 304 (Fla. 1990), *cert.*

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2d Courts § 225 (1964)).

[12] *See State v. Barquet*, 262 So. 2d at 435. *But see State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997) (holding Florida Constitution does not impose greater restrictions on law enforcement than those of U.S. Constitution).

[13] *See* Art. I, § 12, Fla. Const.

*denied*, 498 U.S. 992 (1990), Answer Brief [A.B.] at 34-37, to dispose of the right to terminate questioning at any time is misplaced. *Brown* was decided on federal law grounds, and was decided two years before *Traylor*, which would be the later, and, therefore, controlling precedent here.

As to the right to consult with an attorney prior to questioning, Mr. Gillis has already acknowledged throughout this appeal that *Cooper v. State*, 739 So. 2d 82 (Fla. 1999), and *Johnson v. State*, 750 So. 2d 22 (Fla. 1999), appear to have addressed the first issue–the right to consult with counsel before questioning–but not the second issue presented here: the right to terminate questioning at any time. And as to the right to consult with counsel before questioning, *"Traylor v. State*, 596 So. 2d 957, 957 n. 13 (Fla.1992) (observing that "the suspect has the right to consult with a lawyer before being interrogated and to have the lawyer present during the interrogation")" was explicitly referenced in *Chavez v. State*, 832 So. 2d 730 (Fla. 2002); yet the *Chavez* Court did not recede from *Traylor*, though it could have done so were *Traylor* no longer good law.

In the final analysis, *Traylor*, pursuant to Florida's Self-Incrimination Clause of Article I, Section 9, Florida Constitution, sets forth a clear rule that recognizes the right to consult with an attorney before questioning:

[W]e hold that to ensure the voluntariness of confessions, the Self-

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[14] *See generally* Traylor, 596 So. 2d at 962.

> 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.
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> * * *
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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 interrogation.[15]

This case presents an important opportunity to reconcile *Traylor* and *Bizzell v. State*, 71 So. 2d 735 (Fla. 1954), with *Cooper*, *Johnson* and *Chavez* and to apply *Traylor* and *Bizell* for the reasons set forth in Mr. Gillis' initial brief and the Fourth District Court of Appeal *West v. State*, 876 So. 2d 614 (Fla. 4th DCA 2004), *reh'g den*. (July 30, 2004), and *Ripley v. State*, 898 So. 2d 1078, 1079-81 (Fla. 4th DCA 2005), decisions.

The Fourth District in *West v. State*, 876 So. 2d at 614, recognized the requirement to advise the accused of the right to terminate 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

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[15] *Traylor*, 596 So. 2d at 966 n.13.

> 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 at 1079-81, 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*.

With respect, the Fourth District Court of Appeal decisions on the *Miranda* form to be applied in Florida are eminently correct and good policy. Even the State's paraphrasing and clarifying of the *Miranda* warnings in the beginning of

their brief, *see* A.B. at 1-2, admits the lack of clarity and completeness of these warnings. Even today, a growing body of researchers and scholars are applauding more modern, comprehensive *Miranda* forms to protect juveniles, juveniles being tried as adults, and the under-educated:

> Oberlander and Goldstein (2001) described a typical version of a modern [*Miranda*] warning. The version of the warning uses simplified language and includes [*Miranda*'s] fifth prong:
> 1. You have the right to remain silent.
> 2. Anything you say can be used against you in court.
> 3. You have the right to talk to a lawyer before we ask you any questions and to have him with you during questioning.
> 4. If you cannot afford a lawyer, one will be appointed for you before questioning.
> 5. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time until you talk to a lawyer.[16]

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[16] *See* Douglas A. Osman, RELATIONSHIP BETWEEN ACADEMIC ACHIEVEMENT AND *MIRANDA* RIGHTS COMPREHENSION AND FALSE CONFESSIONS (June 2005) (Ph.D. thesis, Drexel University). Website address: http://dspace.library.drexel.edu/handle /1860/ 490?mode=full&submit_simple=Show+full+item+record (studying *Miranda* comprehension and self-reported likelihood of offering a false confession, particularly in juveniles); *see also* Mark A. Godsey, *Reformulating the* Miranda *Warnings in Light of Contemporary Law and Understandings*, 90 Minn. L. Rev. 781 (2006) (proposes that the substance of the *Miranda* warnings should be reconsidered and updated as the rules of law underlying the warnings substantially evolve, and as courts gain new insights into their effectiveness (or lack thereof). In light of the significant legal changes of the last four decades, and the real world experience gained with the warnings during this time, if the warnings were redesigned today by a Court as mindful of properly balancing the competing interests as was the *Miranda* Court, the warnings would be updated.); Amy Vatner, *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis. L. Rev. 479 (2006) (evaluating research regarding the "Central Park Jogger" case and how five Central Park Jogger

Even as the State adduced from its own lead investigator, Miami-Dade Detective Parmeter, "the purposes of reading [*Miranda* rights] to somebody. . .before [an officer] speak[s] with them" is "[b]ecause *the courts mandate* that the person must be aware of what their rights are under the law before they are questioned and that is the reason why it is given." T. 612. Further, Mr. Gillis had only finished ninth grade. R.330; T.612. In view of the current research findings on false confessions and increasingly improper police interrogation techniques to elicit confessions,[17] the State of Florida should be concerned with eliciting the

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defendants were erroneously convicted--in two separate jury trials-- almost entirely on the basis of their confessions; Barry C. Feld, *Juveniles' Competence to Exercise* Miranda *Rights: An Empirical Study of Policy and Practice*, 91 Minn. L. Rev. 26 (2006); Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their* Miranda *Rights: The Power of Innocence*, 28 Law and Hum. Behav. 211 (2004). Website address: www.innocenceproject.org/docs/Why_People_Waive_Miranda.pdf (Kassin and Norwick conducted a controlled experiment in which 72 introductory psychology students at Williams College were instructed to either take or fail to take a 100 dollar bill from a closed drawer. A person claiming to be a police detective later interviewed each of the students about the "theft." The "detective" read them their *Miranda* rights and asked them to sign a waiver form and agree to make a statement. Innocent, college students were still overwhelmingly more likely to waive their rights, believing in the power of innocence and that waiver would obviate interrogation, resulting in false confessions.); Mathew Iverson, *Where the Right to Silence Went Wrong*, 86 Mass. L. Rev. 105 (2002) (discussing deceptive police interrogation techniques despite Miranda form warnings); Richard P. Conti, *The Psychology of False Confessions*, 2 J. Credibility Assess. & Witness Psychol. 14 (1999). Website address: truth.boisestate.edu/jcaawp/ 9901/9901.pdf (evaluating coercive police interrogation techniques despite *Miranda* form warnings).

[17] Elwood Earl Sanders, Jr., *Willful Violations of* Miranda*: Not a Speculative Possibility But an Established Fact*, 4 Fla. Coastal L.J. 29 (2002)

truth, rather than the ease of securing confessions to otherwise render the other aspects of trial superfluous and a virtually certain conviction.[18] Updated forms are entirely consistent with what this Court reasoned in *Traylor* and *Bizell* and what the Fourth District held in *Ripley* and *West.* And updated *Miranda* forms present no legitimate prejudice to the State.

As such, *Cooper* and *Johnson* should be revisited, our *Miranda* forms

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(citing to twenty-six cases in which courts stated facts or found willful/intentional violations of *Miranda*. *Swint v. State*, 409 So. 2d 992 (Ala. Crim. App. 1982); *Zeigler v. State*, 435 So. 2d 156 (Ala. Crim. App. 1983); *Fike v. State*, 447 So. 2d 850 (Ala. Crim. App. 1983); *Fortier v. State*, 515 So. 2d 101 (Ala. Crim. App. 1987); *Carroll v. State*, 599 So. 2d 1253 (Ala. Crim. App. 1992); *Simpson v. United States*, 632 A.2d 374 (D.C. 1993); *In the interest of A.T.S*, 451 N.W.2d 37 (Iowa Ct. App. 1989); *State v. Martin*, 580 A.2d 678 (Me. 1990); *State v. Brown*, 317 N.W.2d 714 (Minn. 1982); *State v. Raj*, 368 N.W.2d 14 (Minn. Ct. App. 1985); *Forcier v. State*, 415 N.W.2d 912 (Minn. Ct. App. 1987); *Koza v. State*, 718 P.2d 674 (Nev. 1986); *State v. Dominguez*, 642 P.2d 195 (N.M. App. 1982); *State v. Showalter*, 615 P.2d 278 (N.M. App. 1980); *State v. Post*, 783 P.2d 487 (N.M. App. 1989); *State v. Williams*, 452 N.E.2d 1323 (Ohio 1983); *State v. Booher*, 560 N.E.2d 786 (Ohio Ct. App. 1988); *State v. Rowe*, 589 N.E.2d 394 (Ohio Ct. App. 1990); *State v. Knuckles*, 605 N.E.2d 54 (Ohio 1992); *State v. Henderson*, 334 S.E.2d 519 (S.C. Ct. App. 1985); *Mundy v. Commonwealth*, 390 S.E.2d 525 (Va. Ct. App. 1990); *Napper v. Commonwealth*, 260 S.E.2d 216 (Va. 1979); *Hines v. Commonwealth*, 450 S.E.2d 403 (Va. Ct. App. 1994); *Pearson v. Commonwealth*, 275 S.E.2d 893 (Va. 1981); *McFadden v. Commonwealth*, 300 S.E.2d 924 (Va. 1983). Several of these cases hint of willfulness as a regular policy by law enforcement to violate *Miranda* or *Edwards. See also* Osman, RELATIONSHIP BETWEEN ACADEMIC ACHIEVEMENT AND MIRANDA RIGHTS COMPREHENSION AND FALSE CONFESSIONS; *see also* Godsey, 90 Minn. L. Rev. at 781; Vatner, 2006 Wis. L. Rev. at 479; Feld, 91 Minn. L. Rev. at 26; Kassin & Norwick, 28 Law and Hum. Behav. at 211; Iverson, 86 Mass. L. Rev. at 105; Conti, 2 J. Credibility Assess. & Witness Psychol. at 14-26.

[18] Conti, 2 J. Credibility Assess. & Witness Psychol. 14-16.

should be revisited and the judicial system should pay close attention to the contouring of Florida's *Miranda* forms in a contemporary context. If the reasons for the *Miranda* rule are to have meaning today, 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 is read to the accused who then signs, of all of these rights. The risks otherwise 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. There is no prejudice to require explicit notice to Florida's accused of these fundamental rights. There is every prejudice and continued turmoil to decline the opportunity to close this gap.

As to **Issues B, C and D**, Mr. Gillis relies on his initial brief for all remaining points except to state: the State incorrectly posits that the Court is limited in its grant of jurisdiction to reviewing only the single issue deemed to satisfy conflict jurisdiction. A.B. at 47. The Court, on grant of discretionary jurisdiction, has the authority to decide the case on any issue, including one not

originally serving to establish jurisdiction.[19]

Mr. Gillis corrects some of the State's assertions of facts, which are not born out by the record, and, because of page constraints, he relies on his initial brief and the record for all remaining corrections and points. The State incorrectly urges affirmance because the evidence of guilt, even without Mr. Gillis' statement, was overwhelming since Ashley Yuinigo and Herman Thomas were "unwavering" "eyewitnesses" to the shooting. A.B. at 37. First, Herman Thomas "didn't actually see [the shooter] shooting [Mr. Martin]" and "can not say [Mr. Gillis] was the shooter". T. 48, 56.[20] When Mr. Thomas, the State's purported unwavering "eyewitness", was further asked "[w]as there any doubt in your mind that the person in the photograph is the one who did the shooting?", he answered "***yes***." T. 52.[21] As to Ms. Yuinigo's "unwavering" eyewitness attributes, she was an hysterical sixteen-year old. T. 424-52; 505-12.

The State incompletely recites the facts leading to the search of Mr. Gillis'

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[19] *See Hall v. State*, 752 So. 2d 575 (Fla. 2000); *Savoie v. State*, 422 So. 2d 308 (Fla. 1982).

[20] After Mr. Thomas heard a "bang" noise, he "ran through to where [he] heard the noise", saw "a young lady kneeling over [a young man lying on the ground], she was like shaking". . .and Mr. Thomas did not "see the person in this photograph on the scene." T. 52.

[21] Mr. Thomas saw no one with a gun and no one running from the scene. T. 57, 59. "[B]y nine o'clock in the morning[, Mr. Thomas had] already consumed three beers." T. 477, 458.

cell. A.B. at 13-15. There was no evidence at the motion to suppress hearing that Ms. Yuinigo nor Mr. Thomas nor was there evidence, thereafter, that any of the investigating or booking officers actually saw Mr. Gillis wearing red top tennis shoes at the time of or shortly after this incident or wearing those shoes when he was arrested and booked. T. 63, 94-95, 424-52, 606-08.[22]

In reply to the State's suggestion that the red sneakers in the cell were in "plain view", A.B. at 13, the trial court did not even come close to accepting that argument or the argument that the Department of Corrections officer entered the cell for a security reason or any reason other than acting under direction of the State Attorney's office; the State admitted below that the officer's entry was not for "a security reason" and that the red sneakers were "not in plain view from outside of the cell." T. 79-82, 85-87.[23]

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[22] Mr. Thomas saw Mr. Gillis wear red top tennis shoes before and based his recollection of red top tennis shoes on that. T. 63-66, 445. He only saw the person's upper body when the person 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. 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, and no mention of clothing or shoes. *Compare* A.B. at 6 *with* T. 606-08. When Detective Chavarey was asked "[w]ere the[se] the only red sneakers in the cell [housing Mr. Gillis and others]?", he responded "***No.***" T.39.

[23] What is also more correct is that, *before a search warrant was executed, a corrections officer had gone into the cell where Mr. Gillis was housed*

The State's recitation of facts as to Mr. Gillis' mugshot identification is also incorrect and incomplete. A.B. at 8-11, 19-20. The State asserts "the police did not say anything to her to make her believe this was the person they wanted Yuinigo to identify" when they showed her the single mugshot of Mr. Gillis. A.B. at 19. Not so. The police "asked [Yuinigo] if this was the individual", Yuinigo knew she was being shown "some kind of mugshot" and the mugshot had "Miami Dade Police Department" right across it. T. 24.[24] The police question and comments concurrent with the showing of a single mugshot with criminal indicia splashed across the front were inescapably suggestive.[25]

In reply to the State's assertion that publication to the jury of two graphic

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*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, but Detective Chavarrey was not positive of that. *Compare* A.B. at 24 *with* T. 39-40.

[24] *See also* R.353-54 (in large font across the top of Mr. Gillis' mugshot was: "Miami-Dade Police Department Investigative System 2001. Serving the Florida Criminal Justice Community and its Partner Members").

[25] *See also, e.g., State v. Gomez*, 937 So. 2d 828 (Fla. 4th DCA 2006) (officers' conduct of providing defendant's name to victims before identification was unduly suggestive, requiring exclusion of subsequent in-court and out-of-court identifications). As to the State's assertion of "another witness nam[ing Mr. Gillis] as Martin's killer" and "[b]ased on that information, [Detective Chavarry] produced [Mr. Gillis'] photograph for Ms. Yuinigo to identify, A.B. at 9, Mr. Thomas did not see the shooting. T. 46-52, 48, 58-60, 469-71, 481. Ms. Yuinigo was unable to identify the shooter by name. T. 35. Further, the police did not show Mr. Thomas a photograph of Mr. Gillis and Mr. Thomas did not make an identification of Mr. Gillis until "a month" later. *Compare* A.B. at 21 *with* T. 57-58, 497. In Mr. Thomas' mind, by virtue of looking at the single mugshot of Mr.

photographs of the Decedent's heart extracted from his body during autopsy and of the heart entrance wound was vital to establish cause of death, A.B. at 16, cause of death was not in dispute. V3-R.305-09; T. 381-84, T. 473-74. These were highly inflammatory photographs to prove an issue not in dispute, of which the probative value was, at best, negligible.[26]

## 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.

Respectfully submitted,

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Gillis, he "knew this was a criminal and a police mugshot". T. 57-58.

[26] *See* 90.403, Fla. Stat.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was **mailed**/faxed/hand-delivered this 8th day of February, 2007 to: OFFICE OF THE ATTORNEY GENERAL, Criminal Division, Assistant Attorney General Richard Polen, Esquire and 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.

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