IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC16-1195
L.T. CASE NOS.: 4D14-1910; 312011CF001538A

LESHANNON JEROME SHELLY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL,
STATE OF FLORIDA

ANSWER BRIEF ON MERITS

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

CELIA A. TERENZIO
Chief Assistant Attorney General
CYNTHIA L. COMRAS
Assistant Attorney General
LUKE R. NAPODANO
Assistant Attorney General
Fla. Bar No. 0028180
1515 North Flagler Drive, 9th Floor
West Palm Beach, Florida 33401
Telephone: (561) 837-5016
CrimAppWPB@myfloridalegal.com
Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Indian River County, Florida. In this brief, the Petitioner shall be referred to as the "Petitioner" and the Prosecution shall be referred to as the "State."

References to the record on appeal, which consists of Volumes I, II, and III, will be designated as follows: ("R." page number). References to the transcripts on appeal, which consists of Volumes VII, VIII, VIV, X, XI, will be designated as follows: ("T." page number). References to the exhibits on appeal, which consists of Volumes IV and V, will be designated as follows: ("Ex." exhibit number).

The transcript of Exhibit 1, Petitioner's taped statement, which is located in Volume IV (and also Volume VI) and made up of 2 transcripts, will be designated as follows: ("Ex. 1," "First" or "Second" "Transcript," "T." page number).[1] The video of Petitioner's taped statement, which is made up of 2 CDs, and was admitted

[1] It is important to note that the transcripts of Petitioner's taped statement, which are located in Volumes IV and VI, are inaccurate and incomplete in certain material locations. Thus, the State respectfully requests that this Court view the actual recording, which was admitted into evidence at the motion to suppress hearing, as State's Exhibit 2, and admitted into evidence at trial, as State's Exhibit 42. For ease of reference, however, the State will refer to State's Exhibit 2, when referring to Petitioner's recorded statement, and will refer to State's Exhibit 1, the transcript of Petitioner's statement, in Volume IV of the record in its brief.

into evidence at Petitioner's motion to suppress hearing, as State's Exhibit 2, will be designated as follows: ("Ex. 2").

STATEMENT OF THE CASE AND FACTS

The facts giving rise to the Motion to Suppress
(*taken verbatim from November 12, 2013 order*)

On December 14, 2011, around 11:15 p.m., law enforcement received a call of shots fired at the Orangewood Apartments, in Indian River County, Florida. Upon arrival they found two victims, one of which was deceased. The ensuing investigation indicated that Petitioner was present at the scene and was present immediately prior to the shooting. Petitioner was considered the prime suspect in the shootings. All efforts to locate Petitioner failed.

The next day at approximately 5:15 a.m., Petitioner turned himself in at the Indian River County Jail. An interrogation of Petitioner followed. The interview began at about 6:15 a.m. by Detective Kevin Heinig. Petitioner was advised of his right to counsel pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). The interview was conducted in two parts, both of which were recorded on video. [*See* State's Exhibit 2, which was admitted into evidence at the motion to suppress hearing, and State's Exhibit 42, which was admitted into evidence at trial.]

At some point during the interview, Petitioner wanted the detectives to speak with his mother. She in fact called the detectives and spoke to them. During the conversation, she became upset and could not continue. She gave the phone to her

mother, Petitioner's grandmother. Petitioner became upset at this turn of events and stopped talking and requested legal counsel. The detectives informed Petitioner to stand up in preparation of being transported to another location.

Petitioner continues to engage in conversation with Detective Heinig without any questions being propounded to him. Petitioner again requests the detective to listen to him, and to contact his mother. This continues for several minutes. Eventually, Petitioner insists on reinitiating the conversation. (p. 53). (All page numbers refer to the transcribed statement made by Petitioner on December 15, 2011). Again, Petitioner is advised of his "Miranda" rights. (p. 71). Very soon thereafter, Petitioner makes certain incriminating statements regarding his involvement in the alleged crimes.

At some time between Petitioner's insistence on reinitiating contact with the detectives, and a re-reading of his "Miranda" rights, Detective Consalo informs Petitioner about the possibility of a "needle in the arm" and cooperation that could result in a life sentence or the possibility of "getting out." The detective indicates that an attitude of remorse could be an important factor. No specific promises or representations about any sentence were conveyed to Petitioner.

(R. 139-40).

Petitioner's recorded statement to the police.

Importantly, for the first half of the interview, Petitioner claimed in his taped

statement that he was not in Gifford at the time of the shootings, but was heading south to Boynton Beach for a house warming party with his cousin, Ayesha, and her boyfriend, Loudy. (Ex. 1, First Transcript, T. 4-5, 23-24; Ex. 2). He also claimed that he had spoke to the victims on the phone, around 6:45 p.m., to confirm that Brittany was going to spend the night with him that night and to let her know she could come over after 1 a.m. (Ex. 1, First Transcript, T. 6-7, 22, 30-31; Ex. 2). He further claimed that he left for the party around 10:35/10:40 p.m., stopped at a convenience store around 10:40/10:45 p.m., bought gas near I-95 around 11/11:10 p.m., and was on I-95 at Palm City, when a friend called him around 11:40/11:45 p.m. and told him about the shooting and that people were saying he shot the girls. (Ex. 1, First Transcript, T. 8, 11, 14-15, 17, 19, 20, 26, 27, 30, 40-41; Ex. 1, Second Transcript, T. 9; Ex. 2). [Using Petitioner's timeline, if he had stayed an hour or two at the party, he would not have returned home until around 5 or 6 a.m. – long after the time he told Brittany to come over to his house.]

Petitioner claimed that in response, he did not turn around to check on Brittany, even though she was going to spend the night with him that night, or attempt to clear his name, even though two witnesses were allegedly in the car with him and could confirm his alibi, because he was not driving the car and he was not supposed to be around Brittany because of the pending battery charge. (Ex. 1, First Transcript, T. 7, 45-46, 47, 50; Ex. 1, Second Transcript, T. 37-38; Ex. 2). He also

claimed that his mother and his cousin, Adam, met him in Ft. Pierce at a Greyhound bus station the following morning, before Petitioner voluntarily turned himself in at the jail, and that his mother would confirm he was with his cousin, Ayesha, and her boyfriend at the time. (Ex. 1, Second Transcript, T. 6, 12, 14; Ex. 2). Thereafter, he repeatedly asserted he was not there, he did not shoot the girls, and his alibi could be confirmed by his mother, if the police would call her. (Ex. 1, Second Transcript, T. 6, 11, 42, 53; Ex. 2).

Interestingly, the record shows that the police explained to Petitioner from the beginning that they found no evidence to back up his alibi. (Ex. 1, Second Transcript, T. 5-6, 8, 9; Ex. 2). In fact, they told Petitioner that they spoke to his mother that morning at the police station and she did not confirm that she met him at Ft. Pierce. (Ex. 1, Second Transcript, T. 7, 11, 36-37, 47-49, 54, 61, 69; Ex. 2). Instead, it was established by a call that was recorded later that morning between the detective and Petitioner's grandmother, while Petitioner's mother was sitting beside her, that Petitioner's mother did not meet Petitioner in Ft. Pierce, but had met him in the parking lot of the police station. (Ex. 1, Second Transcript, T. 6, 11, 47-49; Ex. 2).

Furthermore, the police also refuted Petitioner's claim that he went to Palm Beach County with his cousin and her boyfriend, noting that they spoke to both of them that morning and confirmed that they had picked up Petitioner around

9:30/9:40 p.m., taken him to a convenience store, and then returned him back to his home around 9:45 p.m., where they dropped him off. (Ex. 1, Second Transcript, T. 2-5, 9, 23-24, 64-65; Ex. 2). After dropping him off, both asserted that they went to their joint apartment and stayed there for the rest of the night. (Ex. 1, Second Transcript, T. 2-4, 23-24; Ex. 2).

Later, after being "Mirandized" for a second time, Petitioner admitted that he needed "a lot of counseling" and he had a "really, really, bad anger problem." (Ex. 1, Second Transcript, T. 74; Ex. 2). He further admitted that he was in Gifford and at the park with girls before they were shot. (Ex. 1, Second Transcript, T. 77, 86-87; Ex. 2). He claimed that at the time, he was joking around with Shanice, who started pushing him, which caused him to push her back. (Ex. 1, Second Transcript, T. 77-78, 86; Ex. 2). Then, it escalated and he pushed her hard. (Ex. 1, Second Transcript, T.77-78, 87; Ex. 2). Thereafter, he pulled his gun, not aiming it at her, but it went off, accidentally shooting Shanice. (Ex. 1, Second Transcript, T. 77-78, 87; Ex. 2). After she dropped to the ground, he claimed that he and Brittany went to the ground to check on her and then Brittany got really angry at him, pushing him away. (Ex. 1, Second Transcript, T. 78, 88; Ex. 2). Then Petitioner held his gun out and fired, hitting Brittany. (Ex. 1, Second Transcript, T. 78, 88; Ex. 2). He claimed that he did not intend to leave the scene, but ultimately did, knowing that he did

something wrong, and later threw his gun in the river. (Ex. 1, Second Transcript, T. 88, 93; Ex. 2).

Subsequent to giving this statement, Petitioner was arrested and indicted for First Degree Murder with a Firearm of Shanice Smith and Attempted First Degree Murder with a Firearm of Brittany Jackson. (R. 13).

In response, Petitioner filed a motion to suppress his taped statements. (R. 34-40). The State filed a memorandum in support of a denial. (R. 45-137). The trial court conducted an evidentiary hearing on Petitioner's motion. (T. 1-182).

The evidence presented at the motion to suppress hearing and the trial court's ruling on Petitioner's motion to suppress.

At the motion to suppress hearing, Detective Consalo was the only witness to testify. He asserted that he received a call around 11:15 p.m. on December 14, 2011, that shots had been fired at the Orangewood Apartments. (T. 12). When he arrived on scene, he found two female victims. Shanice Smith was deceased and Brittany Jackson had suffered severe trauma. (T. 12-13). He confirmed that he spoke to Shanice's father, who stated that shortly before Shanice was shot, he had been on the phone with her and she had stated that Petitioner would not leave them alone. (T. 13-14). In addition, the detective mentioned that there were a couple of witnesses that saw Petitioner running from the scene. (T. 14).

The morning following the shootings, the detective explained that Petitioner turned himself in at the Indian River Jail. (T. 14-15). At around 6:15/6:30 a.m.,

Petitioner was read his rights. (T. 15). The entire interview was videotaped. (See Ex. 1 – the transcript; Ex. 2 – the video).

According to the detective, Petitioner claimed that he was in Palm Beach County the night before, providing the names of the people he rode with, describing the vehicle they went in, providing specific times, claiming he stopped at a convenience store, and then giving a background of his relationship with the victims. (T. 18). However, the detective noted that the police had located the people that Petitioner allegedly went to Palm Beach County with and took their statements while Petitioner was being interviewed. (T. 19). Neither of them confirmed Petitioner's story. (T. 19).

The detective also explained that Petitioner wanted the police to talk to his mother because allegedly she could confirm that she picked him up in Ft. Pierce at a Greyhound bus station the night before. (T. 20). However, the mother actually called the station later that morning and the police recorded the conversation. (T. 20). According to the detective, the mother got really upset and passed the phone to her mother, Petitioner's grandmother. (T. 20).

The detective confirmed that this recording was played for Petitioner during the interview. (T. 21). When Petitioner heard it, however, he got upset, claiming that his grandmother was not there and wouldn't know anything about it. (T. 21). At which point, at page 50 in the transcript, Petitioner said that he was done talking

and invoked his right to an attorney. (T. 22-23). The detective confirmed that, as a result, questioning ceased, and he started the process of having Petitioner transported to jail. (T. 24). However, the detective noted that Petitioner continued to talk to him, even while he was talking to other detectives about what do about Petitioner's clothing. (T. 25-26).

Then, later, when the detective came back to the room to tell Petitioner that they would transport him in a few minutes, Petitioner asked the detective to do something for him. (T. 27). In response, the detective asked Petitioner if he wanted to talk or reinitiate contact. (T. 28). Then, at page 57 of the transcript, Petitioner stated he would talk. (T. 31). The detective left the room again for a few minutes. (T. 31). When the detective returned, they rehashed everything on pages 57 to 60 of the transcript. (T. 31). The detective also explained that multiple times during the interview he reminded Petitioner of his rights. (T. 48).

Then, at page 70, the detective noted that he re-read Petitioner his rights because he wanted to make sure that Petitioner wanted to talk. (T. 32, 47-48). After this, Petitioner gave incriminating statements. (T. 32).

The detective also explained that when he mentioned the needle in the arm during the interview, he was merely relaying what potential penalties Petitioner could face, because, at that point in time, the detective did not know the facts of the case. (T. 33-34).

At the close of this evidence and after hearing argument from counsel, the trial court denied Petitioner's motion to suppress his taped statements, specifically finding that when Petitioner had invoked his right to counsel, "the detectives did not continue to interrogate" him. (R. 140-41). The trial court further found that Petitioner clearly reinitiated contact with the police and that the police "made every effort possible to be certain that he understood what he was doing and what rights he was waiving." (R. 141). The trial court concluded that Petitioner "knowingly, intelligently, and voluntarily changed his mind about invoking his right to counsel and [then] made certain statements to law enforcement." (R. 141).

The trial court found, based on the totality of circumstances, that the statement to Petitioner – "there is a difference between getting a needle put in your arm for what happened tonight and having a life sentence. Okay? Or maybe even a possibility of getting out. And that's remorse." – was a statement simply informing Petitioner of the potential penalty he could face if convicted. (R. 142). The trial court emphasized that "[t]here was no evidence that any promise or inducement was made to [Petitioner] in exchange for his statement(s);" "the reference to lethal injection was made only once;" and "[t]he actual incriminating statements were made some time later." (R. 142). Hence, the trial court concluded that statement "did not render any subsequent statements made by [Petitioner] involuntary." (R. 142).

Material evidence against Petitioner at trial.

Kenyetta Brunson, a resident of Orangewood Apartments, testified that she heard three gunshots that night – two right after each other, and then a pause before she heard the third. (T. 209-10). Afterward, she testified that she walked outside, heard people screaming, and she saw two girls lying down on the ground at the park. (T. 211).

Kiandra Flowers, also a resident of Orangewood Apartments, testified that she heard arguing, girls screaming, and then two or three gun shots, while she stood in front of her apartment around 11 or 11:10 p.m. on December 14, 2011. (T. 209, 218-19, 220-23). She claims that after she heard these shots, she saw someone in black run and then come back, aim at the ground, and then shoot some more – for a total of four or five shots. (T. 223, 226, 240, 241).

Rosheka Helms, another resident of Orangewood Apartments, testified that she was walking from the store with her sister when she heard three gunshots. (T. 264). She testified that a couple of minutes later, she saw Petitioner, *who she personally knew*, walk out of the Orangewood Apartments towards them. (T. 268-70). According to Ms. Helms, *Petitioner walked right past her* on the sidewalk and then crossed street, where he started to run, after a police car came down the street. (T. 270-72).

Detective Sposato, the first officer on the scene, testified that about 11:10

p.m., he was in the parking lot of the police station, which was less than a mile from the Orangewood Apartments, when he heard three gunshots – two consecutive, and then a third. (T. 245-47). When he got a call from dispatch about the location of the shooting, he found two females, lying on the ground in the park with shots to their heads – Shanice Smith was dead and Brittany Jackson was still breathing. (T. 249, 253-54, 260).

Rickey Odell Smith, Sr., testified that his deceased daughter, Shanice Smith, called him on the night of the murder around 11:08 or 11:09 p.m. upset, asking him to come get her and Brittany because Petitioner was bothering them and would not let them leave. (T. 274, 279, 280). During a subsequent call, he testified that he heard his daughter say, "put that thing down" and "get that thing out of my face." (T. 282, 283, 285). At which point, he heard a scream and the phone went dead. (T. 282, 283-84). He also confirmed that he heard Petitioner's voice, who he had known forever, in the background asking his daughter who she was calling – "the mother fucking police" – and his daughter had responded that she wasn't; she was calling her daddy. (T. 282-83).

Brittany Jackson, the only surviving victim, testified that she had previously dated Petitioner, but had broken it off a year prior to the shooting. (T. 644). She had a pending battery charge against him, and as a result, had obtained a "no contact

order," meaning she had no subsequent contact with him. (T. 644-45). The victim also described Petitioner as a "stalker." (T. 649).

Brittany explained that on the night of the shooting, she was staying with her grandmother, who lived next door to the Orangewood Apartments. (T. 646). She claims that on that night, Petitioner was calling everybody's phone, presumably looking for her, but she did not pick up. (T. 647).

She further explained that she and her cousin, Shanice, were walking over to her friend's house, when she saw Petitioner near the playground of the apartments. (T. 650, 652, 653). Brittany claimed that Petitioner walked up to them and asked Brittany to come with him. (T. 654). She told him she wouldn't and he mentioned something about dropping some charges. (T. 654-55). Then, the two girls tried to leave, but Petitioner wouldn't let them go, blocking their path. (T. 655-56). According to Brittany, her cousin then asked Petitioner why he was stalking Brittany and Petitioner slapped and pushed her in response. (T. 656). After Brittany helped her cousin up off the ground, she stated that she told Petitioner to leave them alone. (T. 657). Shanice then called her dad and told him that Petitioner was bothering them, he wouldn't let them leave, and he had a gun. (T. 657, 672).

Next thing Brittany remembers, she said she was on the ground, lying on her back, when she saw Petitioner pointing his gun down at her, as he was standing over her. (T. 658-59, 669, 669). Because of Petitioner's location to her, Brittany was

able to describe the clothes and the shoes Petitioner was wearing at the time. (T. 660). According to Brittany, she then looked straight into Petitioner's eyes and saw the flash/fire from the gun. (T. 658, 660, 669, 670). She claimed that she heard the gun go off three or four times and that he only fired once at her – for a total of four or five shots. (T. 660, 670).

Detective Consalo testified that the police had obtained cell phone records for Petitioner's phone and established that he was in the Gifford area between 11 and 11:20 p.m., which was around the time of the shooting. (T. 583-86, 628; Ex. 31). Looking at the cell phone towers his calls had bounced off of, it was also established that after the shooting, Petitioner went south into Palm Beach County before returning around 5:10 a.m. to Stuart. (T. 586-87, 618-20, 621-25, 626-27). Thereafter, Petitioner turned himself in at the jail. (T. 591; T. 610).

It was also established that Petitioner called Shanice's phone at 6:45 p.m. for four seconds, 6:45 p.m. for zero seconds, and at 8:18 p.m. for zero seconds. (T. 587-88). In addition, Petitioner also called Brittany's grandmother, who Brittany was staying with that night, at 10:43 p.m. for zero seconds. (T. 588-89).

Moreover, it was further established that Petitioner's mother and his cousin, Adam, did not pick Petitioner up the following morning from Fort Pierce before he turned himself in at the jail. (T. 590).

Furthermore, three spent casings and one live cartridge were found near the deceased victim. (T. 290-91, 304). All three casings were found to have been fired from the same gun. (T. 410).

Shanice's phone was also recovered next to her feet. (T. 291). The police were able to confirm that Shanice had called her father on December 14, 2011 around 11:09 p.m. for 38 seconds. (T. 300-01; Ex. 34). Also, the last call that was made or received on the phone was with Shanice's father. (T. 301-03). It was made at 11:10 p.m. and lasted for one minute and 18 seconds. (T. 301-02).

In addition, a text message from Petitioner's phone to Shanice, around 6:49 p.m., asked, "Why you hanging the phone up?" (T. 297-98; Ex. 41). Moreover, it was further established that Petitioner texted Shanice from another phone at 6:52 p.m. saying, "What's up? Tee around Brit." (T. 336).

Ultimately, the State established that Shanice had been shot three times in the head and her cause of death was due to multiple gunshot wounds. (T. 350). The manner of death was classified as a homicide. (T. 350). Specifically, two bullets were recovered from Shanice's head and a third was lodged by her ear. (T. 339-40). It was believed that the first shot, which was fatal, was to her temple area. (T. 327-29, 344, 357, 365). The following two shots – one, which was also classified as fatal, and a second one, which was classified as a grazing wound – were also to Shanice's head, but only after she had been incapacitated and had fallen to the

ground. (T. 344, 357-58, 361, 365). Also, all three bullets were found to have been fired from the same gun. (T. 394-95, Ex. 38).

Brittany had been shot twice to the head and both bullets entered and exited her body. (T. 340, 634, 638). Brittany testified that as a result of the shooting, she sometimes starts shaking, she has memory loss, and is 100% blind in her right eye. (T. 635, 663).

Petitioner's testimony at trial

Petitioner, a two-time convicted felon, claimed that even though there was a pending criminal charge against him for battery, Brittany continued to see him in secret and actually spent the night with him the night before the shooting. (T. 682, 687-88). Petitioner further claimed that when Brittany left his house the following morning, she accidentally grabbed a gun from his house along with her things. (T. 683-84, 686-87). Because he wanted the gun back, he continued to call her the following day. (T. 687).

Petitioner testified that after he got a hold of Brittany, she and Shanice agreed to meet him in the park. (T. 684). He admitted that he met both girls around 11 p.m. and that he and Brittany got in an argument about the gun. (T. 685-86). Finally, when Brittany produced it, Shanice called her dad to come get them. (T. 687). Petitioner claimed that at one point he picked up a stick, not a gun, and this was what Shanice was referring to when she said, "get that thing out of my face." (T. 688).

Afterward, he testified that he tried to grab the gun from Brittany, but when Brittany pulled it out of her pocket, she had her finger on the trigger and it accidentally fired twice, hitting Shanice. (T. 688-89). After this, Petitioner testified that he took the gun from Brittany, ejected a bullet, and threw it on the ground, believing it was empty. (T. 690). However, when the gun hit the ground, it fired off another shot at Brittany – Petitioner claimed that the gun was modified and able to fire multiple shots at one time. (T. 689, 690, 693).

Petitioner also claimed that he left the girls lying there and went to Boynton Beach because he was not in his right state of mind and was scared and afraid. (T. 690-91, 726). He further claimed that he did not tell the police this story, when he turned himself in the following morning, because he loved Brittany and didn't want to implicate her, especially when she had just lost her cousin. (T. 692, 696, 713). However, he was hoping that Brittany would have told the truth about what really happened when she testified. (T. 692). Petitioner then asserted that his current testimony was true and his taped statement to the police was full of lies. (T. 697-712, 728-29).

Procedural Posture of the Case.

After a jury trial, Petitioner was found guilty of first degree murder with a firearm of Shanice Smith (Count 1) and attempted first degree murder with a firearm of Brittany Jackson (Count 2). (T. 847-48, 854-55; R. 220-22). In both instances,

the jury found that Petitioner actually possessed a gun, discharged it, and inflicted death or great bodily harm on the victims. *Id.* As a result, he was adjudicated guilty and sentenced to a consecutive life sentences – on Count 2, he was sentenced as a prison releasee reoffender to life in prison; on Count 1 he was sentenced to life in prison. (T. 878-79; R. 240-50).

On appeal to the Fourth District Court of Appeal ("Fourth District"), Petitioner challenged only the denial of his motion to suppress his taped statements, asserting that the police did not scrupulously honor his right to an attorney or his right to remain silent and his statements were the product of improper influences. The Fourth District affirmed the trial court's denial of Petitioner's motion to suppress his taped statement, concluding, as the trial court had found, that it was Petitioner who reinitiated communications with the officers after he had invoked his right to attorney, and thus, was the catalyst for further conversation, which eventually led to his confession. *See Shelly v. State*, 199 So. 3d 973, 974 (Fla. 4th DCA 2016). Also, as to Petitioner's claim that his confession was involuntary, based on the investigator's discussions with him regarding the death penalty, the Fourth District affirmed without discussion, "satisfied that the discussion was a proper interrogation tactic, '[m]erely informing a suspect of realistic penalties and encouraging him to tell the truth.'" *See id.*

Based on the Fourth District's written decision, Petitioner sought discretionary review with this Court, contending that the Fourth District applied the wrong standard of review on a motion to suppress and arrived at a decision that expressly and directly conflict's with this Court's decision in *Welch v. State*, 992 So. 2d 206 (Fla. 2008), and the United States Supreme Court's decisions in *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). (See Docket for Case No. SC16-1195). After considering the State's response in opposition, this Court accepted jurisdiction review and Petitioner filed his Initial Brief, challenging again, the trial court's denial of his motion to suppress his taped statement to the police. *See id.* This response now follows.

SUMMARY OF THE ARGUMENT

The trial court did not clearly error when it denied Petitioner's motion to suppress his taped statements on the theory that police did scrupulously honor his invocation of his right to an attorney and his right to remain silent. Not only did questioning cease once Petitioner unequivocally invoked his right to an attorney, Petitioner waived his invocation of this right by voluntarily re-initiating contact. In fact, Petitioner continued to talk to the detective and ask him questions while the police tried to get him ready for transport to the jail. And after the detective reminded Petitioner that he had already invoked his right to counsel, preventing the officer from questioning him further, Petitioner explicitly waived that right, stating

that he wanted to talk to the police. Then, prior to Petitioner's admission of guilt, the police re-read Petitioner his *Miranda* rights and he knowingly and voluntarily waived those rights, rendering his subsequent confession admissible.

Accordingly, this Court should uphold the Fourth District's June 1, 2016 written opinion and affirm the denial of Petitioner's motion to suppress his taped statement and affirm Petitioner's convictions and sentences for first degree murder and attempted first degree murder.

STANDARD OF REVIEW

"The standard of review applicable to a motion to suppress evidence requires that this Court defer to the trial court's factual findings but review legal conclusions de novo." *Backus v. State,* 864 So. 2d 1158, 1159 (Fla. 4th DCA 2003) (citing *Batson v. State*, 847 So. 2d 1149, 1150 (Fla. 4th DCA 2003)). "[A] trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness, and the reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling." *Pagan v. State*, 830 So. 2d 792, 806 (Fla. 2002). The trial court's ruling should not be disturbed unless it is clearly erroneous. *See Davis v. State*, 594 So. 2d 264, 266 (Fla. 1992).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR WHEN IT DENIED PETITIONER'S MOTION TO SUPPRESS HIS TAPED STATEMENTS.

Petitioner contends that the trial court reversibly erred when it denied his motion to suppress his taped statements because the police did not scrupulously honor his invocation of his right to an attorney or his right to remain silent. Contrary to Petitioner's assertion, however, questioning ceased once Petitioner invoked his right to an attorney. Thereafter, Petitioner waived his right to counsel by voluntarily re-initiating contact with the police. In fact, he continued to talk to the police and ask them questions while the police attempted to get him ready for transport. After the officer reminded Petitioner that he had invoked his right to counsel, preventing the police from questioning him further, Petitioner explicitly waived that right, stating that he wanted to talk to the police. Accordingly, this Court should affirm the denial of the motion to suppress on appeal.

In the trial court's order denying Petitioner's motion to suppress, the trial court made the following findings of fact:

> In this case, the defendant clearly and unequivocally invoked his right to counsel. (p. 50). The detectives acknowledged this invocation of rights and prepared the defendant to be transported. However, instead of remaining silent, the defendant initiated further contact. While, no questions were propounded to him, he asked many questions of the detectives.

(R. 140). The trial court added:

> In this case, the detectives did not continue to interrogate the defendant. It was the defendant who continued the conversation by asking more questions and making more statements…. Here, the defendant clearly reinitiated the dialogue….
>
> As the finder of fact, I am of the opinion that the defendant knowingly, intelligently, and voluntarily changed his mind about invoking his right to counsel and made certain statements to law enforcement. The detectives made every effort possible to be certain that he understood what he was doing and what rights he was waiving.

(R. 141). These findings are supported by competent, substantial evidence in the record, and thus, must be upheld on appeal. (R. 138-43).

Specifically, the record shows that before the interview began, after Petitioner was offered some water and given a blanket, the police explained to Petitioner that while he was not under arrest, the officer was going to read him his *Miranda* rights. (Ex. 1, First Transcript, T. 2-4; Ex. 2). After acknowledging each right, Petitioner waived those rights and agreed to speak to the police about his involvement in the case. (Ex. 1, First Transcript, T. 4; Ex. 2). Then, for over three hours, the two men talked in a calm and relaxed tone about Petitioner's involvement in the case, which was interrupted periodically by the officer leaving the room to investigate Petitioner's statements. (Ex. 2).

At one point, Petitioner mentions an attorney, but he does so while he was alone in the room, after he had specifically requested that the officer leave and call his mother, so that the officer could allegedly hear directly from her that she had picked him up in Ft. Pierce that night and Loudy and Ayesha were with Petitioner at

the time. (Ex. 1, Second Transcript, T. 46; Ex. 2). During this dialogue that Petitioner had with himself, Petitioner discussed the issue in general terms – never saying unequivocally that "he" was requesting an attorney. Specifically, Petitioner begins to talk out loud to himself, stating:

> Y'all doing all this questioning talking about I wasn't there and this and that. Man, these people ain't tell y'all that, man, y'all got bent. Y'all better watch the First 48. I ain't done it. I ain't do it. *When the man say he ain't do it let 'em talk to his lawyer, y'all got to let 'em go man.* Y'all don't have no evidence on me, dog. Cause a man say he think he heard me on the phone. That ain't – that's bogus man. Y'all ain't fixing to get me like that, dog. I ain't do nothing. I wasn't even there, dog. Anything you say will be used against you in a court of law. Well can be used against you in a court of law. (Unintelligible). Long shorts, pants. Man, get the fuck out of here. Man, these ain't no pants on me, dog.

(Ex. 1, Second Transcript, T. 46-47; Ex. 2) (emphasis added).

Shortly after this discussion with himself, Detective Heinig returns to tell Petitioner that his mother and grandmother had just called the station. (Ex. 1, Second Transcript, T. 47; Ex. 2). Petitioner responds that the detective should "*ask my grandma* where I was at man." *Id.* (emphasis added). At which point, the detective does not question Petitioner further, but states to him: "It'll get clearer here in a minute." *Id.* And then the detective proceeds to play for Petitioner the conversation he had with Petitioner's grandmother on the phone, while his mother was sitting next to her, which established that Petitioner's mother did not pick him up in Ft. Pierce

that night. (Ex. 1, Second Transcript, T. 47-49; Ex. 2). Instead, Petitioner's grandmother confirmed that Petitioner's mother met him in the parking lot of the police station. *Id.*

After the recording was stopped, Petitioner continued to claim that his grandmother was not there when his mother picked him up and his mother, along with his cousin, did in fact pick him up at the Greyhound bus station. (Ex. 1, Second Transcript, T. 49-50; Ex. 2). Petitioner then states:

> --call the 501 number on the top, that's Adam [his cousin]. Man, the man picked me up man. Y'all asking my grandma. I ain't asked you to ask my grandma. My grandma wasn't there man. Y'all tripping dude. Y'all going all out the boundaries bro. *Man, let me talk to my lawyer now, dog. Let me talk to my lawyer now man, since y'all want to play crazy*. Shit, man, y'all tripping, dog. *I ain't doing nothing else without my lawyer, dog.* Lock me up, whatever you got to do. *I ain't doing no more talking, now y'all tripping, dog.* Y'all asking my grandma, a person wasn't even there. My grandma ain't had nothing to do with me picking up. My grandma don't know what's going on man.

(Ex. 1, Second Transcript, T. 50; Ex. 2) (emphasis added).

At which point, the officer ceased all conversation and had Petitioner stand so that he could be arrested and handcuffed. (Ex. 1, Second Transcript, T. 50; Ex. 20).

> **Petitioner responds**, "Yea. Yea man. *Doing no more talking without the lawyer.* Y'all asking my grandma. My grandma at the house man. I say call my mom, not my grandma. Y'all call the last number – ."

(Ex. 1, Second Transcript, T. 50; Ex. 2) (emphasis added).

The following dialogue then occurred:

Detective: (*Unintelligible*) mom talked to first –

Petitioner: -- (*Unintelligible*), man, call Adam –

Detective: (*Unintelligible*).

Petitioner: -- the number that's on there last. The man that was with my mom in Ft. Pierce that picked me up from the Greyhound Station man.

Detective: [*Talking to other detectives outside the door about transporting Petitioner to the jail*] Who we got to transport? There's no more runaround.

Petitioner: Ain't no more runaround?

Detective: (*Unintelligible*). [*Still talking about transporting Petitioner*.] They're gonna have to do the header first.

Petitioner: [*Continuing to talk to the detective*.] Y'all gonna ask my grandma. The shooter had – y'all said the shooter had on pants, I got shorts on and flip flops.

Detective: (*Unintelligible*) and have a seat. [*Telling Petitioner they are not ready to transport him*.]

Petitioner: Huh?

Detective: Have a seat.

Petitioner: I'm straight man.

(Detective Heinig is standing outside of the room and is having a conversation with other deputies/detectives as follows.) [They are trying to determine how to handle the clothes that Petitioner is wearing.]

(Ex. 1, Second Transcript, T. 50-51; Ex. 2).

The Detective continues: You want to take his ah – shirt (*unintelligible*) clothing there?

Petitioner: Y'all taking about my grandma. My grandma? [*Asking the detective a question and continuing to talk to him*.]

Detective: [*Still talking to the detectives outside the room about Petitioner's clothes*.] Do you want to call somebody down to get 'em, or –

Unidentified Detective: (*Unintelligible*).

(Ex. 1, Second Transcript, T. 51; Ex. 21).

The detective continues to talk to other detectives outside the room about Petitioner's clothes and the chain of custody for a period of time. (Ex. 1, Second Transcript, T. 51-52; Ex. 2). Petitioner finally states: "Y'all ready?" (Ex. 1, Second Transcript, T. 52; Ex. 2). The detective responds, "No. . . . Just relax." *Id.*

Petitioner then states: "Alright, I said, call my mom, you called my grandma."

Detective. (Unintelligble).

Petitioner: Excuse me sir. My grandma don't have anything to do with – my grandma was home.

Detective: I know they – when they talked to her –

Petitioner: Man you can't talk to my grandma. My momma is aggravated right now cause she feel like y'all trying to hinder me right now. Talk to my mom, dog. Ta – sir, not dog, but sir.

Detective: Alright.

(*Detective Heinig [steps outside and] closes the door*).

(Ex. 1, Second Transcript, T. 52-53; Ex. 2).

Petitioner: [*Talking to himself again*.] Y'all are tripping man. Y'all want to ask my grandma. I ain't say ask my grandma. My grandma wasn't even there. Man y'all, man y'all are – y'all are calling all the wrong people, dog. Y'all are calling – y'all ain't call Adam, my mom, or nothing. *Yea, bring my lawyer and we can talk then, dog.* Book me, whatever you got to do. Ain't nothing

on me, dog. Yea, transport me over there, lock me up. (Unintelligible) do. Long short pants, man y'all crazy man. Man. Whatever, let's do it. I ain't tripping. Talking about he heard somebody voice, man you (Unintelligible) man. All them niggers them girl talk to, heard my voice.

(Ex. 1, Second Transcript, T. 53; Ex. 2) (emphasis added).

(Detective Consalo [a different detective] enters the room).

Detective: [*Telling him the status of the transport*.] We'll be taking you next door in just a few minutes.

Petitioner: Yes sir, I understand that. Hey sir – excuse me man, sir. All I ask can you do one thing. [*Asking the detective another question*.]

Detective: What is that.

Appelllant: Just call my mom, man. At – listen, sir –

Detective: Shannon ---

Petitioner: -- I'm trying to tell you ---

Detective: -- listen, I just talked to your mom. Your mom called here.

Petitioner: Yea.

Detective: Okay, I –

Petitioner: Didn't she pick me up from here Ft. Pierce, sir?

Detective: Listen to me. Okay, you, you already – you asked for an attorney, okay you didn't want to talk anymore.

Petitioner: Yea.

Detective: Do you – so I'm not gonna ask you any questions.

Petitioner: Alright.

Detective: Okay? If you want me to answer that question then you need to tell me that you want to reinitiate conversation with us. Alright, cause I was the one that talked to your mom.

Petitioner: I know my mom picked me up from Fort Pierce sir.

Detective: Okay.

Petitioner: We met there, dog. Sir. Not dog, but sir. I know we did. I know we did. I know we did. We was there man. She was there sitting in a green Honda, right in the um – the Greyhound Station in Fort Pierce, that station, the Greyhound –

Detective: Listen –

Petitioner: -- (*Untintelligible*).

Detective: You, you know your rights, you know you might not want to say – if you want to talk to us a little bit longer then you need to say I want to talk to you a little bit longer –

Petitioner: No.

Detective: -- and I'll sit there and talk to you. Okay?

Petitioner: Y'all fixing to book me for nothing. What y'all booking me ah – like for? Okay, no more talk.

Detective: Ah – that's up to you. You said, you, you –

Petitioner: (*Unintelligible*)

Detective: (*Unintelligible*).

Petitioner: No, I'm alright. I'm alright.

Detective: You, you said that you –

Petitioner: No more talking.

Detective: -- wanted your attorney, so no more talking.

Petitioner: Yea.

Detective: If you want to talk I will be more than happy and I'm gonna shoot straight with you. I've known your family for a long time. I've played softball with your, your, your uncle a many, many times, great –

Petitioner: Sir, and –

Detective: -- softball player.

Petitioner: -- guess what? That's who picked me up man.

Detective: I—I'm –

Petitioner: Alright, you want – I'll tal—I'll talk to you.

Detective: You want to talk?

Petitioner: I'll talk to you. I'll talk to you.

Detective: And you are reinitiating contact with us, correct –

Petitioner: I'll talk to you.

Detective: -- at your request?

Petitioner: (*Unintelligble*).

Detective: Okay.

Petitioner: I don't want to talk man.

Detective: Yes, or no?

Petitioner: If you gonna lock me up, lock me up.

Detective: Alright, so –

Petitioner: I know I ain't do it.

Detective: -- yes or no? You tell me if you want to talk. That's up to you.

Petitioner: Cause it ain't getting nowhere I told y'all who picked me up.

Detective: I, I will tell you what your momma said, and I'll tell you what your grandma said. Okay? If you want to talk to me, but I ---

Petitioner: Well why – I got a question. I got one more question. Why is y'all asking my grandma when grandma don't – [Asking another question.]

Detective: We didn't ask you grandma.

Petitioner: He did. He had it on tape recorder.

Detective: You did – you gonna let me tell you –

Petitioner: Okay.

Detective: That's what I was going to say, but I'm telling you right now you need to say – I – I'm – do you want me to sit here and talk to you for a few minutes? You asked for an attorney, alright, I'm not gonna ask you any questions, or talk any further this about it, unless you want to and you have to say I want to, I want to reinitiate contact with you. Is that what you want to do?

Petitioner: Well I ain't getting nowhere with it. Y'all –

Detective: Well, you didn't get anywhere with those guys. Alright?

Petitioner: But I'm trying -- all I need man is you to call my mom --

Detective: I'm telling you I've talked to your mom Shannon.

Petitioner: But I –

Detective: That's what I'm telling you brother. That's –

Petitioner: (Unintelligible).

Detective: You tell me, if you want to, if you want me to sit down for a few minutes and talk, I'll just talk. I won't even ask you qu –

Petitioner: I'll talk, come on man.

Detective: You want to –

Petitioner: Reinitiate, come on let's do it.

Detective: You're reinitiating conversation?

Petitioner: I'll talk to you man.

Detective: Alright, give me two seconds, alright? Give me two seconds.

Petitioner: Only – listen sir –

Detective: Okay

(*Detective Consalo exits the room giving Petitioner time to reflect on his decision to talk to the police*.)

(Ex. 1, Second Transcript, T. 53-58; Ex. 2).

Petitioner then says to himself: Got me in handcuffs man.

(*Detective Consalo then returns to the room*.)

Detective: Alright, here we go.

Petitioner: Listen, listen, okay. Now this is, this is all I want to know. This is all – and I'm being honest with you.

Detective: Okay.

Petitioner: I am, I am not lying sir, I wasn't there sir.

Detective: Okay.

Petitioner: I wasn't there. He telling me somebody heard my voice on the phone. That ain't even telling me I was there.

Detective: I don't want to talk about that.

Petitioner: Okay. Okay.

(Ex. 1, Second Transcript, T. 58; Ex. 28).

[*The detective then proceeds to discuss the tape-recorded conversation that was played for Petitioner by Detective Heinig, since Petitioner had been insisting that they call his mother, who allegedly would confirm his alibi, explaining that his mother called the station, but she was hysterical at the time*.]

Detective: She said, "This is Annie [Petitioner's mother]." And I said, "Annie, this is Tony Consalo." And we started talking. I said, "you remember the old fish market down in Gifford?" I said, "That was my dad's place."

Petitioner: (*Unintelligible*).

Detective: I said, "I know Sherman." I said, "I know some of your family and stuff." I said, "I know you lost a son years ago to this stuff." I said, "You don't need to lose somebody else."

Petitioner: Right.

Detective: I, I – so what you're doing right now is not helping yourself, because there's a difference between a needle in your arm and maybe a set – a, a – you know a different person.

(*Radio transmission in background*).

Unidentified Deputy: Hey Tony, come to my office [sic] before [you] move him.

Detective: Okay? Um—there's a difference between getting a needle put in your arm for what happened tonight and having a life a sentence. Okay? Or maybe even a, a possibility of getting out. And that's remorse. Okay? That's showing that you, you, you have feelings for another human being. I've dated girls and I know how mad they can make you. Okay? And I know I've

snapped, not the extent that what happened tonight. But I'm telling you man to man that your momma called, Annie called just a few minutes ago. She called the front office. My secretary told me that, "Annie Shelly is on the phone and she would like to speak to you." I got on that phone, Annie was on the phone. I explained to her what was going on and she broke down. Um – she broke down like my mom broke down I lost my sister to cancer years ago.

Petitioner: Yes sir.

Detective: I, I know what it's like to lose a family member. A mom knows what it's like to lose a son. Okay?

Petitioner: Yes sir.

Detective: That's when your grandma got on the phone afterwards. Alright? But your mom had already talked to me. Your mom did not go to Fort Pierce. She's saying that. And I – this is my point, you're so confused on the events that happened –

(Ex. 1, Second Transcript, T. 58-61; Ex. 21).

Petitioner then proceeds to tell the detective that he is not confused and again asks the detective to call his mom. He insists she and his cousin picked him up in Fort Pierce. (Ex. 1, Second Transcript, T. 61-62; Ex. 2). The detective responds that he doesn't doubt that Petitioner went south, but that his timeframes are off. (Ex. 1, Second Transcript, T. 63; Ex. 2). Again, the detective notes that the difference is whether Petitioner shows remorse – whether he was sorry for what he did. (Ex. 1, Second Transcript, T. 63-64; Ex. 2). The detective then talks about the overwhelming evidence against him. (Ex. 1, Second Transcript, T. 64-65; Ex. 2). The detective also reminds him that Brittany did not die and she is going to tell them what happened when she wakes up. (Ex. 1, Second Transcript, T. 66-67; Ex. 2). At

which point, the detective is called out of the room. (Ex. 1, Second Transcript, T. 67-68; Ex. 2).

When the detective returns, he reminds Petitioner again that Brittany is OK. (Ex. 1, Second Transcript, T. 68; Ex. 2).

> **Petitioner states**: I'm so happy. I love her, dog.
>
> **Detective**: I, I don't – man, I don't doubt that you love her. Okay? I do not doubt that you love her at all. But Shannon you got all these people and then, and then you're gonna have Brittany. You know what I mean? See if, if things are – there's a difference between, between thinking something out, like I'm gonna go, I'm gonna go hurt them. Or I'm gonna go hurt Brittany, or whatever. And there's a difference, when listen, things went bad and, and just – it wasn't planned or something like that. A huge, huge, huge, huge difference. I mean you know that now for –

(Ex. 1, Second Transcript, T. 68; Ex. 2).

At which point, an unidentified detective opens the door and says: "Hey Tony." (Ex. 1, Second Transcript, T. 68; Ex. 2). The detective responds, "– you know exactly what I'm talking about" and leaves the room again. (Ex. 1, Second Transcript, T. 6; Ex. 28).

When the detective returns, he again confirms that Petitioner's mother did not back up his story about the Greyhound Station in Fort Pierce and Brittany is alive and will pull through. (Ex. 1, Second Transcript, T. 68-70; Ex. 2). Then, he asks Petitioner what happened. (Ex. 1, Second Transcript, T. 70; Ex. 2). However, before anything can be said, a female enters the room and tells the detective his wife is on

the phone and he needs to talk to her. (Ex. 1, Second Transcript, T. 70; Ex. 2). The detective then leaves the room again. *Id.*

When the detective returns, he confirms with Petitioner that he did in fact re-initiate contact with him and then proceeds to read Petitioner his *Miranda* rights for the second time. (Ex. 1, Second Transcript, T. 70-71; Ex. 2). After acknowledging his understanding of each right, Petitioner again waives those rights and agrees to talk with the detective. (Ex. 1, Second Transcript, T. 71-72; Ex. 2). Subsequently, Petitioner admits that he was at the park in Gifford that night and he shot both girls. (Ex. 2).

A. Because Petitioner re-initiated further conversation, is reminded of his rights, and knowingly and voluntarily waives those rights, his statements were properly admitted.

In *Miranda*, the United States Supreme Court determined that the Fifth and Fourteenth Amendments' prohibition against self-incrimination require advising a defendant that they have the right to remain silent and the right to the presence of counsel. *See Miranda v. Arizona*, 384 U.S. 436, 479 (1966); *Edwards v. Arizona*, 451 U.S. 477, 481-82 (1981). Furthermore, once an accused has been advised of his rights, if they indicate that he wishes to remain silent or invokes his right to counsel, "the interrogation must cease." *Miranda*, 384 U.S. at 474; *Edwards*, 451 U.S. at 482. "However, even when an accused has invoked the right to silence or the right to counsel, if the accused initiates further conversation, is reminded of his rights, and

knowingly and voluntarily waives those rights, any incriminating statements made during this conversation may be properly admitted." *Welch v. State*, 992 So. 2d 206, 214 (Fla. 2008); *see also Oregon v. Bradshaw*, 462 U.S. 1039, 1045-46 (1983).

In *Bradshaw*, the United States Supreme Court set forth a two-step process, which is to be utilized when a suspect gives a statement to the police without counsel being present, although the suspect had initially invoked his right to counsel. "First, the trial court must find the suspect initiated the subsequent conversation with law enforcement. Second, the trial court must find, based on the totality of the circumstances, the suspect knowingly and voluntarily waived his right to counsel." *Bryan v. State*, 947 So. 2d 1270, 1272 (Fla. 5th DCA 2007). Both steps were satisfied in this case.

Looking at the above cited dialogue, it is clear that the police ceased all questioning once Petitioner made an unequivocal request for an attorney. (Ex. 1, Second Transcript, T. 50; Ex. 2). They did not continue to interrogate Petitioner, but honored his right to remain silent and his right to an attorney.

But when the police proceeded to arrest Petitioner and place him in handcuffs, Petitioner voluntarily reinitiates contact by continuing to talk to the detective and asking him questions. (Ex. 1, Second Transcript, T. 50-54; Ex. 2); *see also Sapp v. State*, 690 So. 2d 581, 584 (Fla. 1997) (noting that if a suspect initially invokes his right to counsel, that right is effectively waived "if the individual is the one

responsible for reinitiating contact with the police"); *Oregon*, 462 U.S. at 1045-46 (where the Supreme Court found that the defendant's question, "Well, what is going to happen to me now?" had "evinced a willingness and a desire for a generalized discussion about the investigation," thereby waiving his right to counsel).

B. Based on the totality of the circumstances, Petitioner knowingly and voluntarily waived his right to counsel after initially invoking such right.

Then, after Petitioner re-initiates contact, the record shows that the detective repeatedly explained to Petitioner that because he asked for a lawyer and didn't want to talk anymore, all questioning would cease, but if Petitioner wanted to continue to talk to the detective, he would have to explicitly say that he wanted to re-initiate contact. (Ex. 1, Second Transcript, T. 54-57; Ex. 2).

In response, Petitioner proceeds to go back and forth, stating he doesn't want to talk, he does, he doesn't, and then he does – all while continuing to talk to the officer and ask him questions. *Id.* Finally, on page 57 of the transcript, Petitioner confirms that he will talk to the officer and he is in fact "reinitiat[ing]" contact. (Ex. 1, Second Transcript, T. 57); *see Bryan*, 947 So. 2d at 1273 (relying on the Fifth's decision in *State v. Evans*, 462 So. 2d 596, 599 (Fla. 5th DCA 1985), for the proposition that "the law recognizes a defendant's right to voluntarily change his mind after he has invoked his right to be questioned with counsel present").

At which point, the officer still doesn't talk to him, but leaves the room for a

minute so that Petitioner can reflect upon his decision to talk to the police. (Ex. 1, Second Transcript, T. 57-58; Ex. 2). When the officer returns, Petitioner does not re-invoke his right to maintain his silence or his right to an attorney, but instead, talks freely with the detective until the officer elects (*because it was not required*) to re-read Petitioner his *Miranda* rights before Petitioner ultimately confesses to being in Gifford and to shooting both girls. *See State v. Hunt*, 14 So. 3d 1035, 1041 (Fla. 2d DCA 2009) (citing *Ahedo v. State*, 842 So. 2d 868, 871 (Fla. 2d DCA 2003)) (the failure to re-advise a suspect of his or her *Miranda* rights, "in and of itself, does not mean that [the suspects] waiver was invalid."); *Davis v. State*, 698 So. 2d 1182, 1189 (Fla. 1997) (where the Florida Supreme Court has refused to "adhere to an overly mechanical application of *Miranda*" and has explained that "numerous states and federal courts have rejected the talismanic notion that a complete readvisement of *Miranda* is necessary every time an accused undergoes additional custodial interrogation"); *see also Welch v. State*, 992 So. 2d 206 (Fla. 2008) (noting that because the defendant initiated the conversation with law enforcement and confessed only after being re-Mirandized and making a second voluntary, knowing, and intelligent waiver, his confession was admissible).

Similarly, in *Francis v. State*, 808 So. 2d 110 (Fla. 2001), police officers terminated an interview with the defendant after he invoked his right to counsel. Approximately, three-and-a-half hours later, the defendant told an officer he wanted

to talk to police. *Id.* at 125. The officer explained that he could not talk to the police because he had previously requested an attorney. *Id.* The defendant responded that he wanted to talk about the case and he no longer wanted an attorney. *Id.* The statements subsequently made by the defendant, without counsel being present, were found to be admissible, even though *Miranda* rights were not re-read. *Id.* at 125-28.

Here, *Miranda* rights were re-read in an abundance of caution after Petitioner confirmed that he had re-initiated contact with the police previously. Given that Petitioner explicitly waived those rights for a second time and he confirmed that he had in fact re-initiated contact with the police, the trial court's conclusion that Petitioner knowingly and voluntarily made statements both before and after *Miranda* was re-administered is supported by the record.

C. Petitioner's subsequent incriminating statements, made after *Miranda* warnings were re-read, were also made knowingly, voluntarily, and intelligently.

Petitioner further contends that his incriminating statements were the product of improper influences because the police raised the specter of lethal injection and emphasized its impact on his mother. (Initial Brief, p. 23).

Where a defendant alleges that his statement was the product of coercion, the voluntariness of the confession must be "determined by an examination of the totality of the circumstances." *Walker v. State*, 707 So. 2d 300, 311 (Fla. 1998).

> In assessing the totality of the circumstances, and the defendant's ability to overcome pressure brought against him, courts examine such factors

> as "youth, lack of education, low intelligence, explanation of constitutional rights and length of interrogation . . ." *State v. Moore,* 530 So. 2d 349, 351 (Fla. 2d DCA 1988). *In addition, the defendant's prior experience with police may be pertinent, as well as such factors as police brutality, and whether the defendant was deprived of food or water or sleep*. *See* 2 Wayne R. LaFave & Gerold H. Israel, *Criminal Procedure* § 6.2(c). Of particular significance is whether *Miranda* warnings were given, and if they were, that is an important factor in the voluntariness finding. In short, courts look at the conduct of the police and the defendant's ability to resist any pressure which the police may bring to bear. *See, generally,* David R. Jankowsky and Eric R. Sherman, *Custodial Interrogations,* 90 Geo. L.J. 1240, 1259–60 (May 2002).

Green v. State, 878 So. 2d 382, 383-84 (Fla. 1st DCA 2003) (emphasis added).

Importantly, it should be noted that Petitioner failed to preserve his argument that the police exerted improper influence by mentioning the impact lethal injection would have on his mother. This argument was not raised in his written motion to suppress or at the motion to suppress hearing. (R. 34-35; T. 8 – issues: (1) whether Petitioner waived his rights; (2) whether his confession was coerced by intimidation when the police raised the specter of lethal injection and suggested a confession would create a difference in Petitioner's punishment). As such, this particular argument has been waived and cannot be raised for the first time on appeal. *See Dober v. Worrell,* 401 So. 2d 1322, 1323-24 (Fla. 1981) (holding it is improper to raise issues for the first time on appeal); *Universal Underwriters Ins. Co. v. Tucker,* 736 So. 2d 778, 779 (Fla. 4th DCA 1999) (argument not having been raised in trial court is waived).

In addition, it is also important to note that Petitioner is an admitted two-time convicted felon. (T. 695). As such, he cannot claim that he was not familiar with the criminal justice system and what transpires after someone is arrested. This fact alone supports the trial court's finding that Petitioner's confession was knowingly and voluntarily made. *See Green*, 878 So. 2d at 383-84 (noting that in assessing the totality of the circumstances and the defendant's ability to overcome pressure brought against him, courts examine such factors as the defendant's prior experience with police).

In the trial court's order denying Petitioner's motion to suppress his statements, the trial court specifically found that when the detective made the statement – "there is a difference between getting a needle put in your arm for what happened tonight and having a life sentence. Okay? Or maybe even a possibility of getting out. And that's remorse." – "the defendant was simply [being] informed of the potential penalty [he faced] if convicted." (R. 142). The trial court added that "[t]here [was] no evidence that any promise or inducement was made to the defendant in exchange for his statement(s). Additionally, [the trial court noted that] the reference to lethal injection was made only once [and] [t]he actual incriminating statements were made some time later." (R. 142).

Accordingly, the trial court found that "the statements regarding lethal injection, a life sentence, and remorse, did not render any subsequent statements

made by the defendant involuntary." (R. 142).

As noted previously, these findings are supported by competent, substantial evidence in the record. Thus, the trial court did not clearly err when it denied Petitioner's motion to suppress and this Court should affirm the trial court's order on appeal.

In *Walker v. State*, 707 So. 2d 300, 311 (Fla. 1998), the defendant argued that the coercive interrogation techniques employed by the detectives rendered his confession involuntary. *Id.* at 311. The defendant noted that he was not advised prior to the interrogation that he was the focus of the investigation; the police falsely told him that they had found a fingerprint or his fingerprint on the duct tape from one of the victims before they had learned of such results, and repeatedly insisted that they knew he was guilty; the police showed him a picture of the deceased infant's decomposing body and told him that whoever had done this had done a terrible thing; knowing that he was a deacon in his church, the police exploited his religious beliefs when they told him that God would not believe his "abduction" story; police engaged in "racially-charged role playing" with a white officer being the "bad-cop" and the black officer, attempted to related to him "brother to brother;" and the police threatened him with the "electric chair" and then one detective promised he could help him out. *Id.* at 311.

On review, this Court found that the "the police's interrogation [] simply [could] not be characterized as so coercive as to render [the defendant's] confession involuntary." *Id.* at 312. This Court noted that while the defendant was questioned for six hours, the interrogation occurred during the morning and early part of the day. *Id.* [Petitioner's questioning was from 6:30 to 11 a.m.]. Moreover, the defendant was provided with drinks upon request and allowed to use the bathroom when he wished. *Id.* [Petitioner was repeatedly offered drinks, asked if he needed anything, and given a blanket to wrap up in before the interview began.] This Court also noted that while the detective reminded the defendant he could face the death penalty for the murders, he was never threatened with the electric chair or promised anything other than the detective would inform the prosecutor that he had cooperated in the investigation. *Id.* [Petitioner was not promised anything. Instead, once he had already confessed, the detective told Petitioner that he would convey his cooperation to the judge and the state attorney. (Ex. 1, Second Transcript, T. 85). In addition, Petitioner was never "threatened" with death, but merely informed of the penalties he could face, depending upon how the facts played out. *See* Ex. 1, Second Transcript, T. 60; 68 – "there's a difference between, between thinking something out, like I'm gonna go, I'm gonna jack these – or I'm gonna go hurt these girls. They hurt me, I'm gonna go hurt them. Or I'm gonna go hurt Brittany, or whatever. And there's a difference, when listen, things went bad and, and just – it wasn't planned

or something like that. A huge, huge, huge, huge difference."] Hence, this Court affirmed the trial court's denial of the defendant's motion to suppress his statements. *Id.*; *see also Martin v. State*, 107 So. 3d 281, 299-309, 305 (Fla. 2013) (concluding that the detective's comments about the specter of death row did not, based on the totality of the circumstances, incite fear in the defendant to the extent that his resulting confession was a product of improper police coercion – to so conclude "would seriously undercut law enforcement's ability to elicit admissions in the pursuit of the public welfare, to assist victims of crimes, and to investigate disappearances").

Also, in *Nelson v. State*, 688 So. 2d 971 (Fla. 4th DCA 1997), the Fourth District affirmed the trial court's denial of Petitioner's motion to suppress statements when a detective told the defendant, "you know they have the death penalty in the State of Florida don't you . . . You know that premeditated first degree murder, they'll kill you . . . It's time to be honest." *Id.* 972. The detective in that case also added, "And you think they don't kill people in this state, look at Bundy . . . Do you want to die?" *Id.*

In affirming, the Fourth District stated:

> The constitution does not bar the use by investigating officers of any statement that could be construed as a threat or promise, but only those which constitute outrageous behavior and which in fact induce a confession. *United States v. Guerrero*, 847 F.2d 1363, 1366 (9th Cir.1988); *United States v. Barnett*, 814 F. Supp.

> 1449, 1456 (D. Alaska 1992). *See also United States v. Kolodziej,* 706 F.2d 590, 594 (5th Cir. 1983) (what renders a confession involuntary is not any threat or promise, but rather the threat or promise of illegitimate action); *United States v. Davis*, 912 F. Supp. 245 (S.D.Tex.1995) (same). There must be a causal nexus between the improper police conduct and the confession. *United States v. Kelley*, 953 F.2d 562, 565 (9th Cir.1992). **Merely informing a suspect of realistic penalties and encouraging him to tell the truth does not render a confession involuntary**. *United States v. Mendoza–Cecelia*, 963 F.2d 1467 (11th Cir.1992) (confession admissible despite custom official's threat to defendant that "if you don't cooperate with us, ten years can be a long time in jail. Anything can happen and something can happen to your family ..."), *cert. denied*, 506 U.S. 964, 113 S.Ct. 436, 121 L.Ed.2d 356 (1992); *Lindsey v. Smith*, 820 F.2d 1137, 1150 (11th Cir.1987) (no coercion despite fact that officers told defendant that he would be charged with capital murder unless he gave a statement). *See also Milton v. Cochran*, 147 So. 2d 137 (Fla. 1962) (officer's statements that only by confessing could defendant escape death penalty would not of themselves invalidate confession). Here, there does not appear to be a causal nexus between the comments in question and Petitioner's confession when considering the evidence in the light most favorable to the state.

Id. at 974 (emphasis added); *see also Green*, 878 So. 2d at 383 ("urging a defendant to tell the truth is not objectionable, and engaging in a discussion with the defendant about the realistic penalties that may be imposed after cooperation or non-cooperation is not coercive. *See, e.g., United States v. Nash,* 910 F.2d 749, 753 (11th Cir. 1990) (quoting *United States v. Ballard,* 586 F.2d 1060, 1063 (5th Cir. 1978)) ("'telling the [defendant] in a non-coercive manner of the realistically expected penalties and encouraging [him] to tell the truth is no more than affording [him] the

chance to make an informed decision with respect to [his] cooperation with the government.'").

As explained more fully by the Fifth District in *State v. Ernst*,

> Police investigation is a rough business and necessarily involves trickery and strategy to solve a specific crime that has been or is being committed. Although the Court does not condone tactics designed to take advantage of a suspect's ignorance of his or her constitutional rights, the tactics engaged in by [the officer] in this case do not shock the conscience and are not so outrageous that the Court should suppress the fruit of such tactics. Indeed, the Supreme Court held in *Elstad* that such fruits are not to be automatically suppressed as evidence.

809 So. 2d 52, 55 (Fla. 5th DCA 2002) (citing *United States v. Esquilin*, 42 F.Supp.2d 20 (D.Me. 1999)).

Accordingly, the trial court was not clearly erroneous when it denied Petitioner's motion to suppress his taped statements. And because the trial court's findings are supported by competent, substantial evidence in the record, the Fourth District properly affirmed the order of denial on appeal.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, Respondent respectfully requests that this Court affirm the denial of Petitioner's motion to suppress his taped statements and affirm Petitioner's convictions and sentences for first degree murder (with a firearm) of Shanice Smith and attempted first degree murder (with a firearm) of Brittany Jackson.

Respectfully submitted,
PAMELA JO BONDI
ATTORNEY GENERAL
Tallahassee, Florida

CELIA A. TERENZIO
Chief Assistant Attorney General
Florida Bar No.: 0656879
CYNTHIA L. COMRAS
Assistant Attorney General
Florida Bar No.: 0151319
/s/ Luke R. Napodano
LUKE R. NAPODANO
Assistant Attorney General
Florida Bar No.: 028180
1515 North Flagler Drive, 9th Floor
West Palm Beach, Florida 33401
Telephone: (561) 837-5016
CrimAppWPB@myfloridalegal.com

Counsel for Respondent

CERTIFICATE OF SERVICE

I CERTIFY that a copy of this brief was served through the Florida Courts E-Filing Portal on: Cathy A. Williams, Esq., at cat.will2663@gmail.com; Law Office of Cathy A. Williams PLLC, P.O. Box 57, Cornelius, North Carolina 28031, on May 12, 2017.

/s/ Luke R. Napodano

LUKE R. NAPODANO
Counsel for Respondent

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

/s/ Luke R. Napodano
LUKE R. NAPODANO
Counsel for Respondent