IN THE SUPREME COURT OF FLORIDA

CASE NO. SC16-1195

LeSHANNON JEROME SHELLY,

Petitioner,

vs. L. T. Case No. 4D14-1910

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER

On Appeal from the Fourth District Court of Appeal

CATHY A. WILLIAMS
Fla. Bar No. 0088862
Law Office of Cathy A. Williams PLLC
P.O. Box 57
Cornelius, North Carolina 28031
T. (704) 495-1920
E. cat.will2663@gmail.com
Pro Bono Counsel for Petitioner

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PRELIMINARY STATEMENT

Petitioner, LaShannon Jerome Shelly (hereinafter "Petitioner" or "Shelly"), is the Defendant and Respondent is the State of Florida. The trial took place in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Indian River County, Florida.

"R_" indicates the record on appeal which consists of three volumes (I-III) which are consecutively numbered 1-252.

"T_" indicates the trial, motion to suppress, and sentencing transcripts which consist of five volumes (VII –XI) which are consecutively numbered from 1 to 881.

Volumes IV and V contain the State's trial and motion to suppress hearing exhibits. Volume VI contains the court's trial exhibits.

A conformed copy of the Fourth District Court of Appeals' decision is attached in the Appendix.

STATEMENT OF THE CASE

Shelly was interrogated by police on December 15, 2011 for shootings that occurred the night before. The police read Shelly his *Miranda* rights, and he agreed to talk to the detectives. (T. 432) At a later point in the interrogation, Shelly invoked his right to counsel and to remain silent, but ultimately confessed to having committed the shootings. Prior to trial, Shelly moved to suppress the statements he made to the police. (R. 34-35; T. 8, 49-51) Following a hearing on the motion, the trial court denied the motion (R. 138-143) and the case proceeded to trial.

During the jury trial, Shelly renewed his motion to suppress. (T. 425, 429) The trial court again denied the motion. (T. 425, 428, 429) Shelly moved for judgment of acquittal, which was denied. (T. 678) The jury found Shelly guilty of murder in the first degree and attempted murder in the first degree. (R. 220-222, 240-242) He was sentenced to life in prison. (R. 243, 246)

Shelly appealed the judgment to the Fourth District Court of Appeal on the ground his confession should have been suppressed because (1) he invoked his right to an attorney and (2) his confession was involuntary based on the investigator's discussions with him regarding the death penalty. The court below affirmed as to the second argument, without discussion, finding that comments about the death penalty were proper interrogation tactics, "[m]erely informing a

suspect of realistic penalties and encouraging him to tell the truth." *Shelly v. State*, 199 So. 3d 973, 974 (Fla. 4th DCA 2016) (App. 1) As for the first argument, the court below concluded that after invoking his right to counsel, Shelly reinitiated the conversation:

> In reviewing the record, we are satisfied that, given the totality of the circumstances and the statements made by Shelly, he was the one who reinitiated communications with the officers. Since he was the catalyst for further conversation, which eventually led to his confession, we affirm the trial court's order denying his motion to suppress the videotape

Id. Accordingly, the court below affirmed the trial court's denial of Shelly's motion to suppress.

Shelly petitioned this Court for discretionary review. This Court accepted jurisdiction on January 28, 2017. This is Shelly's brief on the merits.

STATEMENT OF THE FACTS

On December 14, 2011, officers were called to the Orangewood apartments in Indian River County, Florida in response to a shooting. (T. 251) When the officers arrived, they found two victims, Shanice Smith, who was dead, and, Brittany Jackson, who was still alive. (T. 251, 254) During the investigation of the shootings, the police suspected Shelly as the shooter but were not able to locate him that night. The following day, December 15, around 5:00 am, Shelly arrived at the Indian River county jail to talk to the police about the shootings the night before. He was taken to

an interrogation room and read his rights pursuant to *Miranda v. Arizona* and agreed to talk to the police. (T. 432) The entire interrogation was video-taped and monitored.[1] (T. 21)

A. Facts Pertaining to the Confession.[2]

During the first half of the interrogation, Shelly denied being in town when the shootings occurred. He claimed he was with his cousin and her boyfriend traveling in a car to Palm Beach for a gathering with friends. (T. 433) He further claimed his mother met him in Fort Pierce that morning on his way back and that she and another cousin drove him to the jail. (T. 491-92, 497)

1. *Shelly's First Request for a Lawyer*.

At some point after talking with the police, Shelly mentioned a lawyer. While seated alone in the interrogation room, he started talking about a television show, The First 48, and referred to an attorney – "You all better watch The First 48. I ain't done, I ain't do it. When the man say he ain't do it and let him talk to his lawyer, you all got to let him go, man." (T. 532-33) Immediately thereafter, Detective Heinig entered the room and advised Shelly that his mother and

[1] Detective Consalo testified at the suppression hearing that the detectives had the ability to monitor the interview from their desktops and that he had been monitoring Shelly's interrogation that way. (T. 21)

[2] The quoted portions of Shelly's statements are from the trial transcript when the taped confession was played to the jury, located at Volume IX, pages 432-583 of the record.

grandmother just called and played a recording of his conversation with Shelly's grandmother. (T. 533) The interrogation did not cease.

2. *Shelly's Second, Third, and Fourth Request for a Lawyer*.

After listening to the recording, Shelly complained the police spoke to his grandmother instead of his mother. He invoked his right to counsel a second time: "Man, let me speak to my lawyer now, dog. Let me talk to my lawyer now man, since you all want to play crazy, man." (T. 537) A detective told Shelly to stand and put his hands behind his back, to which Shelly responded "Doing no more talking without the lawyer." (T. 537-38) The detectives stopped questioning Shelly and talked among themselves about transporting him to another location.

While the detectives were discussing his transport and while he was alone in the interrogation room, Shelly continued to complain that the police called his grandmother instead of his mother. (T. 539-540) He then made a third request for counsel:

> You all are tripping man. You all want to ask my grandma. I ain't say ask my grandma. My grandma wasn't even there. Man, you all, man You all are – you all are calling all the wrong people, dog. You all are calling –You all ain't call Adam, my mom or nothing. ***Yeah, bring my lawyer, we can talk then, dog.*** Book me, whatever you got to do. . . ."

(T. 541) Immediately thereafter, Detective Consalo entered the room and told Shelly he will be transported shortly. At that point Shelly asked the police to call his mom. (T. 541) This time, the police reminded Shelly that he had requested a

lawyer and asserted his right to remain silent and, therefore, they cannot talk to him unless he waives that right. (T. 541-42) After being reminded of his rights, Shelly, for the fourth time, unequivocally asserted his right to counsel and his right to remain silent until counsel could be present:

> Shelly: Yes sir, I understand that. Excuse me, man. Sir. All I ask, can you do one thing?
>
> Det. Consalo: What is that?
>
> A. Just call my mom. Listen. Sir –
>
> Q. Shannon –
>
> A. -- I'm trying to tell you –
>
> Q. -- listen, I just talked to your mom. Your mom called here.
>
> A. Yeah.
>
> Q. All right.
>
> A. Didn't she pick me up from Fort Pierce, sir?
>
> Q. Listen to me. Okay. You already, you asked for an attorney. Okay. You didn't want to talk anymore.
>
> A. Yeah.
>
> Q. Do you, so I'm not gonna ask you any questions.
>
> A. All right.
>
> Q. Okay? If you want me to answer that question, then you need to tell me that you want to reinitiate conversation with us. All right, because I was the one that talked to your mom.
>
> A. I know my mom picked me up from Fort Pierce, sir.
>
> Q. Okay.

A. We met there, dog. Sir. Not dog but sir. I know we did. I know we did. I know we did.

Q. All right.

A. I know we did. We was there man. She was there, sitting in a green Honda, right in the, the Greyhound Station in Fort Pierce, their station, the Greyhound –

Q. Listen—

A. (Inaudible)

Q. 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 –

A. No.

Q. -- longer and then I'll sit there and talk to you. Okay?

A. You all fixing to book me for nothing.

Q. All right.

A. What you all booking me like for? Okay. No more talking.

Q. Well, that's up to you.

A. (Inaudible)

Q. You understand

A. (Inaudible)

Q. You said that you wanted an attorney.

A. No more talking.

Q. -- so no more talking.

A. Yeah.

(T. 541-543)

Instead of stopping the interrogation at this point, the detective continued talking to Shelly. In the very next breath, the detective told Shelly about his familiarity with his family and about the earlier conversation with his mother:

> Q. 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 uncle Adam many, many times. Great –
>
> A. Sir, and –
>
> Q. -- softball player.
>
> A. -- guess what? That's who picked me up man.
>
> Q. I'm--
>
> A. All right.
>
> Q. So you want --
>
> A. I'll talk, I'll talk to you.
>
> Q. You want to – you are reinitiating contact with us; correct?
>
> A. I'll talk to you.
>
> Q. At your request?
>
> A. Uh-huh.
>
> Q. Okay.
>
> A. I don't want to talk man.
>
> Q. Yes, or no?
>
> A. If you're going to lock me up, lock me up.
>
> Q. All right, so—
>
> A. I know I ain't go [sic] it.

Q. Yes or no? You tell me if you want to talk. It's up to you

A. Because it ain't getting nowhere. I told you all who picked me up.

Q. 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—

A. But why—I got a question. I got one more question. Why is you all asking my grandma when my grandma don't—

Q. I didn't ask your grandma.

A. He did. He had it on taperecorder.

Q. You did, you gonna let me tell you—

A. Okay.

Q. —that's what I was going to say. But I'm telling you right now you need to say, I'm—do you want me to sit here and talk to you for a few minutes? You asked for an attorney. All right. 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?

A. Well I ain't getting nowhere with it. You all—

Q. Well, you didn't get anywhere with those guys. All right?

A. But I'm trying, all I need, man, is you to call my mom.

Q. I'm telling you I've talked to your mom, Shannon.

A. But

Q. That's what I'm telling you brother. That's—

A. Well, he--

Q. You tell me. If you want, if you want me to sit down for a few minutes and talk, I'll just talk. I won't even ask you questions.

A. I'll talk. Come on man.

Q. You want to—

A. I reinitiate. Come on, let's do it.

Q. You're reinitiating conversation?

A. (Inaudible).

(T. 543-545)

Shelly agreed to further questioning and he continued to maintain his innocence. (T 546) He claimed he was not in the area when the shootings occurred. Detective Consalo then relayed his conversation with Shelly's mother and told Shelly that expressing remorse could mean the "difference" between a needle in your arm and a life sentence:

> Det. Consalo: Your mom – listen to me for a second, Shannon. Okay? Your mom called and she was hysterical.
>
> Shelly: I know.
>
> Q. Okay?
>
> A. Come on.
>
> . . . .
>
> Q. She said this is Annie. 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.
>
> A. I remember.
>
> Q. 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.
>
> A. Right.

Q: I said what you're doing right now is not helping yourself, because there's a difference between a needle in your arm and maybe –

. . . .

Detective Consalo: Okay? There's 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. 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. I mean, she broke down like my mom broke down when I lost my sister to cancer years ago.

A. Yes, sir.

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

A. Yes, sir.

(T. 547-548)

Following this discussion, the detective again told Shelly there may be a "difference" at trial if he shows remorse:

I just, I'm telling you, there's a difference. When, when this is all said and done and when you're standing in front of the judge, did he show any remorse. And you know what we're going to have to say? You know that all this stuff, all this stuff is, you know, videotaped.

(T. 551) The detectives also told Shelly there will be a parade of witnesses against him:

> There's going to be a parade of witnesses that said, all right, we're going to have her daddy that says my daughter was on the phone with me and she's saying that Shannon will not let us leave. Okay? You're going to have that. You're going to have three witnesses that saw you there. Okay? You're going to have three witnesses that saw you there. You're going to have Ayesha who said that you say I was with her and I went down—

(T. 552)

Finally, the detective advised Shelly that Brittany Jackson was alive and "there's no way to get past that." (T. 558) At some point after this exchange, the police re-read *Miranda* warnings to Shelly. (T. 559) He waived his rights and ultimately admitted to shooting the victims. Shelly told the detectives he had been carrying a gun that night, but he claimed the shooting was an accident and that he did not intent to shoot either woman. (T. 565)

B. *Facts elicited at trial.*

During the trial, the State played the taped interrogation to the jury. (T. 430-583) The State also called the following witnesses. A neighbor, Kenyetta Brunson, lived at the Orangewood apartments. She testified she heard three gunshots—two were quick and the third occurred less than a minute later. (T. 209-210, 215) Brunson did not see the shooting.

Another witness, Kiandra Flowers, testified she lived next to Robinson and heard people arguing and girls screaming. (T. 221) Flowers then heard two or three gunshots. (T. 222) She testified she saw someone in all black run away and

then come back and shoot some more. (T. 223) She walked over to where the shooting took place and claims she noticed two females on the ground. She then called 911. On cross-examination, Flowers admitted she told the 911 operator that she had seen only one female on the ground. (T. 321)

A third witness, Rosheka Helms, testified she and her sister were walking to the Orangewood apartments when she heard three gunshots. (T. 264) A couple of minutes later, she saw Shelly walking from the direction of the apartments. (T. 268-270) She testified he walked past her calmly and then looked back. (T. 270) He crossed the street and began to run. (T. 271-272)

Shanice Smith's father, Rickey Smith, testified he received a call from his daughter at 11:00 pm that night. (T. 279) He said Shanice asked him to pick up her and Brittany and said that Shelly was bothering them. (T. 279) Smith told her he was on his way. (T. 280) He then called Shanice back and, during the second call, heard her tell someone "get that thing out of my face." He heard a scream and then the phone went dead. (T. 280-282) Smith testified that during the call, he heard Shelly in the background asking who Shanice was calling and asking if she was calling the police. (T. 282, 283, 284-285)

Brittany Jackson testified Shelly was her boyfriend but they broke up a year before the incident. (T. 644) Jackson claimed she no longer had any contact with Shelly. (T. 644) On December 14, 2011, Jackson had not seen Shelly all day, but

saw him later that night when she was walking with Shanice Smith. (T. 649, 653) Jackson testified Shelly said "hey bitch, come on." (T. 654) Jackson responded she was not his girlfriend and he was not her boyfriend and tried walking away. (T. 654) Jackson testified she tried to leave but Shelly would not let her go. (T. 655) Smith then accused Shelly of stalking Jackson. (T. 656) Jackson testified Shelly slapped her in the face and pushed Smith to the ground. (T. 656-67) Smith then called her father and told him that Shelly would not leave them alone. (T. 657) Jackson claimed Smith told her father Shelly had a gun. (T. 657) The next thing Jackson remembers is lying on the ground with Shelly standing over her pointing a gun. (T. 658) Jackson claims Shelly looked her straight in the eyes and fired the gun. (T. 658) She remembers hearing one shot at that moment, but three or four shots overall. (T. 660) Jackson does not know why Shelly shot her or who got shot first. (T. 664) Jackson did not know if anyone was shot while they were standing. (T. 671) Shelly walked off. (T. 661)

According to Takashi Koyama, a facial trauma surgeon, Jackson suffered an apparent gunshot wound to her cheekbone. (T. 634) She had a possible exit wound at the left cheek as well as a laceration to the left cheek, consistent with a bullet grazing. (T. 634, 637) She also suffered an injury to the forehead caused by a blunt force trauma wound, consistent with a punch or possible gun hitting her. (T. 638, T. 641) No bullets were found during surgery. (T. 638)

Detective Robert Newman, one of the responding officers, testified there were three spent shell casings, and one live casing found at the scene. (T. 292). The casings were from a .380 automatic weapon. (T. 305) The live round was 21 feet from Smith's body. The other casings were found 10, 12, and 19 feet from her body. (T. 335) From the investigation only three shots were fired. (T. 340)

The medical examiner, Dr. Roger Mittleman, performed the autopsy on Shanice Smith. (T. 346, 349) He testified the cause of death was from multiple gunshot wounds, two of which were independently fatal – the one to the temple and the one just below the ear. (T. 358) The third, non-fatal wound was through her earlobe. (T. 352) Three bullets were removed from Smith's body. (T. 365) Dr. Mittleman testified the order of the shots could not be determined. (T. 365) He also testified it was possible one of the shots grazed Brittany and hit Shanice. (T. 366) Only the wound to the temple had gunpowder stippling; the shot to the temple could have been from a foot or a foot and a half away. (T. 364-65) There was no stippling around the other wounds. (T. 364)

The State called a tool mark and firearm examiner, Mark Chapman. (T. 383) Chapman opined the three bullets were fired from the same firearm. (T. 395, 410) He noted the casings all had ".380 auto" stamped on them. (T. 408) Mr. Chapman testified he was not able to determine the distance gunpowder flies from a .380 due to the variables involved. (T. 419) The gun could go off a couple times

in a struggle as long as the trigger is pulled sometime during the struggle. (T. 422) He further testified that trigger rates vary. (T. 422) Chapman admitted it is possible for a gun to shoot when thrown to the ground if it malfunctioned. (T. 423)

Shelly took the stand in his own defense. In contrast to his taped confession, Shelly testified Brittany Jackson shot Shanice Smith. (T. 681) He stated that around 6 pm on December 14, 2011, his cousin had told him that a .380 handgun was missing from his house and that Brittany Jackson had been the last one in the house. (T. 683-84) Shelly testified he had met Brittany Jackson and Shanice Smith at the Orangewood apartments around 11 pm that same night to retrieve the gun from Jackson. (T. 683, 685) According to Shelly, Jackson claimed she accidentally placed the gun in her bag the night before. (T. 686) As Shelly tried to reach for the gun Jackson pulled it out not knowing her finger was on the trigger and it fired twice shooting Shanice Smith. (T. 689) Shelly testified he took the firearm away from Jackson, ejected a live casing, and threw the gun to the ground. (T. 690) The gun fired when it hit the ground, shooting Jackson in the side of the head. (T. 690) Shelly claims he left the scene because he was scared. (T. 691) He explained he turned himself in the next day because he was getting calls about the incident. Shelly testified he had lied to the police during the interrogation because he did not want to implicate Jackson as the shooter. (T. 692)

On cross examination, the prosecutor used Shelly's taped statements to rebut

his trial testimony. She walked Shelly through his interrogation statements and confession to the police and had him right on a poster board the number of times he lied. The State repeatedly mentioned Shelly's December 15 confession in its closing arguments to the jury and played several portions of the confession to the jury. (T. 776, 783-84, 789-91, 793-94) As noted above, the jury found Shelly guilty of first degree murder and attempted first degree murder.

SUMMARY OF THE ARGUMENT

Shelly's confession was improperly obtained because the police did not honor his request for counsel or his right to remain silent. After talking with the police about his whereabouts the night of the shooting, Shelly decided to stop talking and invoked his right to counsel. The detectives ignored this request and continued to interrogate him. Shelly subsequently invoked his right to counsel at least three more times during the interrogation. Although Shelly continued to talk after the second and third invocation of his rights, it was merely to determine if the police spoke to his mother. Upon being reminded of his rights, however, Shelly unequivocally asserted his rights to counsel and to remain silent. Despite his clear and unequivocal invocation, the police improperly continued to talk to Shelly in an attempt to change his mind. Their tactics worked. Shelly agreed to reinitiate the conversation and ultimately confessed.

The police violated Shelly's *Miranda* rights by failing to scrupulously

honor his request that all questioning cease until his counsel could be present pursuant to *Miranda*. Because his "reinitiation" was the product of the detective's refusal to scrupulously honor his earlier request for counsel, Shelly's subsequent statements and waiver of his *Miranda* rights were not made knowingly or voluntarily.

Likewise, Shelly's confession to the shootings should have been suppressed because his statements resulted from improper and undue influence at the hands of the police. The detectives told Shelly that showing remorse could mean the difference between a needle in the arm and a life sentence. The comments were not meant to inform Shelly of a possible sentence. Rather, the comments were meant to coerce Shelly into confessing to murder. For the same reasons stated above, his subsequent waiver was not "free and voluntary."

Accordingly, the trial court erred in admitting his confession at trial. The error was not harmless because the taped interrogation was shown to the jury and the prosecution relied on it in its case-in-chief as well as in its closing argument. Without the confession, the jury may have reached a different verdict. Accordingly, the court below erred in affirming the trial court's ruling.

STANDARD OF REVIEW

In reviewing a ruling on a motion to suppress, the appellate court, "presumes that a trial court's findings of fact are correct and reverses those findings only if they are not supported by competent, substantial evidence." *Cuervo v. State*, 967 So. 2d 155, 160 (Fla 2007). But review of the trial court's application of the law to the facts is de novo. *Id*. "Accordingly, 'appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the … Fifth Amendment and by extension, Article I, section 9 of the Florida Constitution.'" *Id*. (quoting *Fitzpatrick v. State*, 900 So. 2d 495, 510 (Fla. 2005) (quoting *Nelson v. State*, 850 So. 2d 514, 521 (Fla. 2003))).

ARGUMENT

I. THE COURT BELOW ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF SHELLY'S MOTION TO SUPPRESS HIS TAPED STATEMENTS TO THE POLICE BECAUSE THE POLICE VIOLATED SHELLY'S RIGHT AGAINST SELF-INCRIMINATION AND RIGHT TO COUNSEL

A. The Police Did Not Scrupulously Honor Shelly's Invocation of His Rights Against Self-Incrimination.

The detectives obtained Shelly's confession in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), because they did not scrupulously honor Shelly's request to cease the interrogation until he could confer with a lawyer. The Fifth Amendment to the United States Constitution and Article I, section 9 of the Florida Constitution provide that no person shall be compelled in any criminal matter to be a witness against himself. *See* U.S. Const. amend. V; Art. I, § 9, Fla. Const. Statements obtained from a defendant in violation of the right against self-incrimination may not be used against the defendant at trial. *Cuervo*, 967 So. 2d at 160.

Under *Miranda* a suspect is entitled to certain procedural rights to protect his or her Fifth Amendment right against self-incrimination. *Miranda*, 384 U.S. at 444. Those rights include the right to an attorney and the right to remain silent. If the suspect "indicates ***in any manner*** and ***at any stage*** of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Id*. at 444-45 (emphasis added) Likewise, if the individual is alone and indicates in

any manner that he does not wish to be interrogated, the police may not question him." *Id*. at 445. "The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." *Id*.

"'The term 'interrogation' under *Miranda* refers not only to express questioning, but also to any word or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Calder v. State*, 133 So. 3d 1025, 1030 (Fla. 4th DCA 2014) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)). Once an accused invokes his right to counsel, "'courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoke.'" *Moss v. State*, 60 So. 3d 540, 544 (Fla. 5th DCA 2011) (quoting *Smith v. Illinois*, 469 U.S. 91, 95, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984)). *See also Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L.Ed.2d 378 (1981) (The suspect may not be interrogated further by police "until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."); *Traylor v. State*, 596 So. 2d 957 (Fla. 1992);

Globe v. State, 877 So.2d 663, 670 (Fla. 2004). The admissibility of any statements obtained after the accused has invoked his right to counsel and decided to remain silent "depends under *Miranda* on whether his 'right to cut off questioning' was scrupulously honored.'" *Michigan v. Mosley*, 423 U.S 96, 104, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975); *see also Cuervo*, 967 So. 2d at 161.

The State has the burden to show Shelly knowingly and intelligently waived his right against self-incrimination and right to counsel. *Moss*, 60 So. 3d at 545. In this case, the State cannot meet its heavy burden.

1. *Shelly Unequivocally Invoked his Right to Counsel and Right Against Self-incrimination.*

Shelly unequivocally invoked his rights to counsel and to remain silent several times during his interrogation.[3] The record reveals Shelly first mentioned an attorney while seated alone in the interrogation room. He stated: "You all better watch The First 48. I ain't done, I ain't do it. ***When the man say he ain't do it and let him talk to his lawyer***, you all got to let him go, man." (T. 532-33) Because he was being monitored at all times, the detectives would have heard his statements. Shelly's statement "let him talk to his lawyer," at a minimum, should have been reasonably "'construed as an expression of a desire for the assistance of

[3] The trial court correctly concluded Shelly had clearly and unequivocally invoked his right against self-incrimination. (R. 140) As explained in greater detail below, however, both the trial court and the court below incorrectly found Shelly had re-initiated dialogue with the police and subsequently knowingly waived his rights.

an attorney'" and thus a sufficient invocation of his rights requiring the cessation of further questioning by the police. *Moss*, 60 So. 3d at 543 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991)).

When detective Heinig re-entered the room immediately after Shelly mentioned talking to a lawyer, he advised Shelly that his mother and grandmother just called. (T. 533) Detective Heinig did not mention Shelly's statement about an attorney or make any attempt to terminate the interrogation. Based on Shelly's statement that the police should "let him talk to his lawyer," the police should treated his statement as an unequivocal invocation of his right to counsel and stopped all questioning. In refusing to do so, the police failed to scrupulously honor Shelly's request for a lawyer.

At the suppression hearing, Detective Consalo testified he did not believe Shelly's statement was a request for an attorney. (T. 37) This Court has held that the police "need not ask clarifying question if a defendant who has received proper Miranda warnings makes only an equivocal or ambiguous request to terminate an interrogation after having validly waived his Miranda rights." *State v. Owen*, 696 So. 2d 715, 719 (Fla. 1997). In this case, however, Shelly's statement was not equivocal. Although he referred to a television show, his statement "Let him talk to his lawyer" was sufficiently clear to reasonably conclude he was invoking his right to counsel. *Moss*, 60 So. 3d at 543. At the very least, the police could have

attempted to clarify whether Shelly had invoked his right to counsel while seated alone in the interrogation room. He was being monitored. (T. 38) Any one of the officers listening to the interrogation would have heard his statement. But the police did not stop the interrogation or clarify whether Shelly had just asked for a lawyer. Instead, as mentioned above, the police continued to interrogate Shelly as if he never mentioned talking to a lawyer and played a tape recording of their conversation with his grandmother. In doing so, the police violated Shelly's *Miranda* rights.

2. *The Police Violated Shelly's Rights Against Self-Incrimination by Continuing to Question Him After He Unequivocally Asserted His Right to Counsel.*

Even if the Court finds Shelly's initial reference to an attorney was equivocal and thus did not require the police to end any further interrogation, Shelly invoked his right to counsel at least three more times. After listening to the recording, Shelly complained that the police had spoken to his grandmother instead of his mother. (T. 537) He claimed his grandmother was not present when his mother allegedly picked him up at the bus station early that morning. This time, Shelly made a second request for an attorney directly to detectives in the interrogation room. Shelly clearly and unequivocally stated, "Man, let me speak to my lawyer now, dog. Let me talk to my lawyer now man . . ." (T. 537) The detective in the room then told Shelly to stand up and put his hands behind his

back. The interrogation appears to have ceased at this point because the police talked to each other about transporting Shelly to another location. Shelly, however, continued to complain that the police had spoken to his grandmother instead of his mother. (T. 539-40)

While the police continued to discuss transportation, and while sitting alone inside the interrogation room, Shelly continued to talk to himself, and stated, for the third time, "bring my lawyer and we can talk then." (T. 541) Shelly's comment showed that he would continue to talk ***but only*** with his lawyer present. Immediately thereafter, Detective Consalo entered the room and told Shelly he was being transported to another location. Shelly again asked the police to call his mom. (T. 541)

The trial court correctly ruled that Shelly's request for counsel was unequivocal. (R. at 140) The trial court concluded, however, because Shelly continued to talk to the police about whether they had spoken to his mother, he had reinitiated conversation with the police thereby waiving his earlier invocation. (R. 141) The Fourth District Court of Appeal agreed. *Shelly*, 199 So. 3d at 974; (App. 2) It concluded "the record . . . reveals that Shelly continued the conversation with investigators, requesting more than once, that the officers follow up on his alleged alibi by calling his mother." *Id*.

Both the trial court and the court below are wrong for two reasons. First, as

discussed above, Shelly had already invoked his right to counsel, the first time being while seated alone in the interrogation room. That request was wholly ignored by the police because they continued to talk to Shelly and played a tape recording of their conversation with his grandmother. Any statements he made after that point violated *Miranda* and should have been suppressed because the police did not scrupulously honor his request for an attorney. *See Cuervo*, 967 So. 2d at 161.

Second, even if Shelly's second and third requests for counsel (T. 537, 541) is considered waived by his repeated comments to the police about his mother, his fourth request for counsel should have ended any further interrogation. Both the trial court and the court below ignored the remainder of the transcript, which shows that following the first three attempts to invoke his right to counsel, the police continued to talk to Shelly to encourage him to change his mind. Where, as here, Shelly invoked his right to counsel, his statements or responses to further question may be admitted only if the court finds (a) Shelly initiated further discussions with the police and (b) he knowingly and intelligently waived the right he had invoked. *See Moss*, 60 So. 3d at 544. A close reading of the transcript, quoted below, shows that after Shelly invoked his right to counsel for the fourth time, the police continued talking to him in an obvious effort to change his mind.

3. *The Police, not Shelly, Reinitiated the Conversation After Shelly's Fourth Invocation of His Right to Counsel*.

After Shelly asked the detective to call his mother, Detective Consalo told Shelly that he had talked to his mother, and then reminded him that he had requested an attorney and had stated he did not want to talk anymore. (T. 541-43) He told Shelly if he wanted to talk "you need to tell me you want to reinitiate conversation with us." (T. 542) Shelly immediately responded "no" and re-affirmed his request for an attorney. (T. 542)

> Q. 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 –
>
> A. ***No.***
>
> Q. -- longer and then I'll sit there and talk to you. Okay?
>
> A. You all fixing to book me for nothing.
>
> Q. All right.
>
> A. What you all booking me like for? ***Okay. No more talking.***
>
> Q. Well, that's up to you.
>
> A. (Inaudible)
>
> Q. You understand
>
> A. (Inaudible)
>
> Q. You said that you wanted an attorney.
>
> A. ***No more talking***.
>
> Q. -- so no more talking.

A. ***Yeah.***

(T. 541-543)

At that point, all further questioning or conversation with Shelly should have ceased immediately. The police reminded Shelly that he had invoked his right to counsel. Upon being reminded of his *Miranda* rights, Shelly immediately stated he did not want to talk and requested an attorney. Instead of honoring Shelly's request, the detective continued talking to Shelly to coax him into changing his mind:

> Q. 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 uncle Adam many, many times. Great
>
> A. Sir, and –
>
> Q. -- softball player.
>
> A. -- guess what? That's who picked me up man.
>
> Q. I'm--
>
> A. All right.
>
> Q. So you want --
>
> A. I'll talk, I'll talk to you.
>
> Q. You want to – you are reinitiating contact with us; correct?
>
> A. I'll talk to you.

(T. 543)

But when the detective attempted to clarify that Shelly was agreeing to talk at his *own* request, Shelly immediately stated that he did not want to talk.

Q. At your request?

A. Uh-huh.

Q. Okay.

A. I don't want to talk man.

Q. Yes, or no?

A. If you're going to lock me up, lock me up.

(T. 543-545)

Although Shelly, at times, had continued talking to the police after invoking his rights, this time, when the police attempted to clarify whether he wanted to re-initiate the conversation, Shelly clearly stated he did not. It was only upon police prompting and continued dialogue that Shelly agreed to talk.

Following his statement "[i]f you gonna lock me up, lock me up," the detective continued to press Shelly and brought up his conversation with his mother. This time the tactic worked because Shelly agreed to re-initiate the interrogation:

Q. Yes or no? You tell me if you want to talk. It's up to you

A. Because it ain't getting nowhere. I told you all who picked me up.

Q. 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—

A. But why--I got a question. I got one more question. Why is you all asking my grandma when my grandma don't—

Q. I didn't ask your grandma.

A. He did. He had it on taperecorder.

Q. You did, you gonna let me tell you—

A. Okay.

Q. —that's what I was going to say. But I'm telling you right now you need to say, I'm--do you want me to sit here and talk to you for a few minutes? You asked for an attorney. All right. 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?

A. Well I ain't getting nowhere with it. You all—

Q. Well, you didn't get anywhere with those guys. All right?

A. ***But I'm trying, all I need, man, is you to call my mom.***

Q. I'm telling you I've talked to your mom, Shannon.

A. But

Q. That's what I'm telling you brother. That's—

A. Well, he--

Q. You tell me. If you want, if you want me to sit down for a few minutes and talk, I'll just talk. I won't even ask you questions.

A. I'll talk. Come on man.

Q. You want to—

A. I reinitiate. Come on, let's do it.

Q. You're reinitiating conversation?

A. (Inaudible).

(T 544-545)

The above comments were improper. When Shelly said "okay, no more

talk," "no more talking," and confirmed his earlier request for counsel (T. 543), the police should have ceased all attempts to communicate with Shelly. He did not reinitiate any dialogue with the police at that point. This time, the police started talking to Shelly immediately after his invocation. The detective "subtly undermined" Shelly's request for a lawyer by mentioning his friendship with Shelly's uncle and by promising to tell Shelly what his mother had told the police, but only if he agreed to reinitiate conversation.

Contrary to the trial court's and the Fourth District's conclusion, Shelly did not reinitiate the interrogation because the interrogation never stopped. *Moss*, 60 So. 3d at 544. Accordingly, Shelly's statements from the first time he requested counsel up to and including his confession should have been suppressed because the police did not scrupulously honor his request for counsel and to terminate the interrogation until counsel could be present. *See Calder v. State*, 133 So. 3d 1025 (Fla. 4th DCA 2014); *Black v. State*, 59 So. 3d 340, 346 (Fla. 4th DCA 2011) (*Miranda* violated by continuing to ask defendant if he wanted to talk about the crimes after defendant had invoked his right to counsel); *Moss*, 60 So. 3d at 544-45; *Gilbert v. State*, 104 So. 3d 1123, 1125 (Fla. 4th DCA 2012) (*Miranda* violated by police telling defendant they were trying to protect him and encourage him to tell his side of the story).

4. *Shelly's Subsequent Waiver of His Miranda Warnings was Not Made Knowingly or Voluntarily*.

Because Shelly agreed to reinitiate the interrogation as a direct result of the detective's coercive conduct, his subsequent waiver of his *Miranda* rights was not knowing, intelligent, or voluntary. Under the totality of the circumstances in this case, Shelly's reinitiation of the interrogation after the detective's statement to him and the subsequent waiver of his *Miranda* rights after they were re-read to him, were not voluntary, but instead, the product of improper police conduct. *See Calder*, 133 So. 2d at 1033.

The facts in *Calder* are similar to the facts in this case. In *Calder*, like here, the police failed to scrupulously honor Calder's request for counsel and to remain silent after he invoked his rights. Calder was arrested for killing his girlfriend. During interrogation, after asking Calder some preliminary questions, the police advised him of his *Miranda* rights and the following exchange occurred:

> Detective: Are you willing to give your side of the story without a lawyer present, yes or no?
>
> Calder: No, I want to feel the comfortable level.
>
> . . .
>
> Detective: In other words, you want to tell your side of the story, however, you will feel more comfortable having a lawyer present regardless of what happened?
>
> Calder: Yes.
>
> . . .

> Detective: So you saying you want to have a lawyer present? I can't talk to anymore, do you understand that?
>
> Calder: Yeah. . . .

Calder, 133 So.3d at 1028.

After asking Calder a few more questions about whether he wanted a lawyer present, the detective told Calder "it was his legal right to have an attorney." But before leaving him alone in the interrogation room, the detective told Calder:

> [I]f you do change your mind and you do want to talk to me about your side of the story, okay, what I need you to do is—knock on the door but knock kind of loud, just knock on it kind of loud, I'll come back in and then if you say you know what, Detective Sessions, I really, it really would make me feel better if I got the opportunity to give my side of the story, talk about what happened on Saturday, I know what happened, okay? I know that it's very difficult for you and it's going to be tough for you to sleep because the bottom line is you been through a tough situation and nobody wants to be in your shoes, obviously, but at the same time one of the things that makes somebody feel a lot better is if they get the opportunity to get things off of their chest, it kind of clears their mind, it clears their conscious [*sic*] and it makes them feel better, you know.

Id. at 1028-29. Calder cried for several minutes then opened the door and asked to speak to the detective. The detective re-read the *Miranda* warnings, Calder signed a waiver and then confessed to killing his girlfriend. *Id*. at 1029. Like Shelly, Calder claimed the shooting was accidental.

The trial court denied Calder's motion to suppress. On appeal, the Fourth District reversed the trial court's order, finding "after Calder made his unequivocal request for counsel, the detective did not cease questioning him. Instead, he

continued talking to Calder in an effort to coax him into speaking without counsel." *Id*. at 1030. The court held the detective's comments reminding Calder that it was his opportunity to tell his side of the story "constituted interrogation because the detective should have known that they were 'reasonably likely to elicit an incriminating response.'" *Id*.at 1031 (quoting *Innis*, 446 U.S. at 301). "When . . . an officer persists in asking a suspect whether he wishes to give his side of the story after the suspect has unequivocally invoke his rights, the officer is not asking harmless clarifying questions; he is violating the suspects rights under *Miranda*." *Id*.

Because Calder initiated further conversation with the police after being left alone in the interrogation room following his request for counsel, the Fourth District had to determine whether Calder's confession after being re-read his *Miranda* rights was voluntary. The court held it was not. It reasoned:

> in this case, it cannot be seriously questioned that the officer's improper comments, after Calder invoked his right to counsel, were designed to induce him to reinitiate the communication without a lawyer. This ploy was successful, bringing Calder to tears and prompting him to ask to speak to the detective only a few minutes after the first interrogation had ended.

Id. Under the totality of the circumstances, "Calder's reinitiation of the interrogation and waiver of his previously invoked right to counsel were not voluntary, but instead, the product of improper police conduct." 133 So.3d at 1033. The Fourth District further held the error was not harmless and reversed and

remanded the case for a new trial. *Id*.

The court below should have reached the same conclusion in Shelly's case. Here, as in *Calder*, Shelly unequivocally invoked his right to counsel. The first time he invoked he was ignored. He invoked his rights several more times. After the fourth time he invoked his right to counsel, the police, not Shelly, continued the conversation. Just as the court below held in *Calder*, it should have held in this case that the police's statement to Shelly about his uncle and his mother constituted improper interrogation because the detective should have known they were "reasonably likely to elicit an incriminating response." Any statements by Shelly in response to the detective's improper questioning should have been suppressed. Accordingly, none of Shelly's statements and confession after initially invoking his right to counsel should have been admitted at trial. At the very least, none of his statements after the fourth time he invoked should have been admitted because the police continued talking to Shelly. Accordingly, the court below erred in affirming the trial court's denial of Shelly's motion to suppress.

B. Shelly's Statements and Confession Were the Product of Improper Influence by the Police.

Shelly moved to suppress his statements to police on the second ground they were the product of improper influences by the police in suggesting that showing remorse was the difference between a "needle in the arm" and a life sentence. For a confession or an incriminating statement by the defendant to be admissible in

evidence, it must be shown that the confession or statement was voluntarily made. *Brewer v. State*, 386 So. 2d 232, 235 (Fla. 1980). In determining whether a confession was voluntary, the standard is whether the confession was "free and voluntary" and was "not extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *Id*. (quoting *Bram v. United States*, 168 U.S. 532, 542-43, 18 S. Ct. 183, 187, 42 L. Ed. 568 (1897)). For a statement to be voluntary, the defendant's mind must be "uninfluenced by either hope or fear" at the time the statement is made. *Frazier v. State*, 107 So.2d 16, 21 (Fla.1958). "A confession cannot be obtained by 'any direct or implied promises, however slight, nor by the exertion of any improper influence." *Arizona v. Fulminante*, 499 U.S. 279, 285, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

In *Martinez v. State*, 545 So.2d 466 (Fla. 4th DCA 1989), the Fourth District reversed the defendant's conviction and sentence where the trial court erred in not suppressing the defendant's confession. The court held the State had failed to establish by a preponderance of the evidence that Martinez's confession was voluntary and free of any coercion. *Id.* at 467. During interrogation, Martinez denied any involvement in the murder. The police told him that if he told them what happened "he wouldn't be in any more trouble than he already was." During a subsequent polygraph, the polygraphist told Martinez that he "'could wind up' in

the electric chair." *Id*. The Fourth District reasoned:

> Although the polygraphist claimed he mentioned the electric chair to advise Martinez of an option which was available to the state, he failed to mention any other option available to the state. Thus, raising the spectre of the electric chair was not simply intended to be informative, but to unduly emphasize this particular option, and psychologically coerce Martinez into confessing to the crime.

Id. The police also told Martinez that the State had many witnessed against him and that "everybody has already said what they had to say and you're going to wind up in a problem and you will be the only one that's going to wind up in problems." Based on these comments, the court found the polygraphist exerted improper influence over Martinez by emphasizing that both the polygraph results and the state's witnesses would contradict his story, and by telling him that he was going to wind up in a problem. *Id*. (citing *Brewer*, 386 So.2d at 235-36). Accordingly, the Fourth District held:

> Viewing the circumstances surrounding the interrogation in their totality, we conclude that the confession which was ultimately elicited from Martinez was not "the product of an essentially free and unconstrained choice." Accordingly, we reverse Martinez' conviction and sentence and remand for a new trial absent the confession.

545 So.2d at 467.

The facts in this case are similar to those in *Martinez*. Throughout the interrogation, Shelly continued to maintain his innocence, claiming he was not present when the shootings occurred. In an apparent effort to convince Shelly to confess, the detective told Shelly that expressing "remorse" was the "difference

between lethal injection and a life sentence." (T. 547) The detective emphasized lethal injection a number of times by using the word "difference" – as in there is a "difference" between getting a needle in your arm and being sentenced to life in prison.

At one point, the detective mentioned the "difference" again in suggesting that Shelly's sentence may depend on whether he showed remorse on the video-tape of the interrogation when it was shown to the court:

> All right. I just, I'm telling you, there's a difference. When, when this is all said and done and when you're standing in front of the judge, did he show any remorse. And you know what we're going to have to say? You know that all this stuff, all this stuff is, you know, videotaped.

(T. 551-52)

In this case, not only did police exert improper influence over Shelly by emphasizing the possibility of lethal injection, they also emphasized its impact on his mother if she were to "lose another son:"

> Det. Consalo: Your mom – listen to me for a second, Shannon. Okay? Your mom called and she was hysterical.
>
> Shelly: I know.
>
> Q. Okay?
>
> A. Come on.
>
> . . . .
>
> Q. She said this is Annie. 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.

A. I remember.

Q. 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.

A. Right.

Q: I said what you're doing right now is not helping yourself, because there's a **difference** between a needle in your arm and maybe –

. . . .

Detective Consalo: Okay? There's 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. 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. I mean, she broke down like my mom broke down when I lost my sister to cancer years ago.

A. Yes, sir.

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

A. Yes, sir.

(T. 547-548) (emphasis added)

Although informing a defendant about possible penalties, by itself, is not

deemed an improper influence, it is improper if the purpose in doing so is to influence the defendant into giving an incriminating statement. *See Brewer*, 386 So. 2d at 235–36; *Martinez*, 545 So. 2d at 467. The detective's repeated reference to the "difference" between life and death and evidence of guilt was not done to merely inform Shelly of potential penalties; it was psychological coercion. *See Brewer*, 386 So.2d at 235–36. The obvious implication of the detective's statements was that Shelly's mom would lose a second son if Shelly is sentenced to death for the shootings unless he admitted his involvement and showed remorse. Indeed, the sole purpose of the detective's comments was to influence Shelly to give an incriminating statement to avoid lethal injection. *Cf. Martin v. State*, 107 So. 3d 281 (Fla. 2012) (interrogation comments which raised the "spectre of the electric chair" were not coercive where the stated objective of the detective interviewing the defendant was to locate the victim, who was not yet determined to be dead or alive). As mentioned above, up until this point, Shelly had maintained his innocence and claimed he was out of town when the shootings occurred. The police investigation, however, targeted Shelly as the prime suspect of the homicide. Based on the evidence they had collected, the detectives believed Shelly was the shooter. The detective's comments, therefore, were intended to induce incriminating statements from Shelly.

The detective's comments about lethal injection, that his mother will lose

another son if he received the death penalty, and that Brittany Jackson was alive, implying she would testify against him, unduly influenced Shelly to confess. He admitted to being at the scene and to having a gun, a fact he later denied at trial. The Fourth District concluded, without discussion, the detective's comments were "merely informing a suspect of realistic penalties and encouraging him to tell the truth." *Shelly*, 199 So. 3d at 974. (App. 1) In this case, the detective's reference to the possibility of lethal injection and the fact Shelly's mom will lose another son was to unduly influence Shelly into making incriminating statements. The detective's goal was to obtain a confession for murder and not merely to inform Shelly of a possible penalty. Under the totality of the circumstances of this case, the court below erred in affirming the trial court's denial of Shelly's motion to suppress.

C. The Error in Admitting Shelly's Confession was Not Harmless.

The burden is on the State to demonstrate "beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla.1986); *Goodwin v. State*, 751 So.2d 537 (Fla. 1999). "The burden on the state to prove harmless error is 'most severe.'" *Varona v. State*, 674 So.2d 823, 825 (Fla. 4th DCA 1996) (citing *Holland v. State*, 503 So.2d 1250, 1253 (Fla. 1987)). The State cannot meet its heavy burden in this

case.

It cannot be said beyond a reasonable doubt that the error did not contribute to the verdict where the prosecution played the entire recorded statement to the jury as part of its evidence in its case-in-chief and relied on it to rebut Shelly's trial testimony. In contrast to his confession, Shelly testified at trial that Brittany Jackson had taken the .380 handgun from his cousin's house the night before the shootings. He met with her on the evening of December 14 to retrieve the gun. According to Shelly's trial testimony, Jackson pulled the gun from her sweater pocket. As Shelly reached for the gun, Jackson had her finger on the trigger and two shots were fired, hitting Shanice Smith. Shelly grabbed the gun, released a live casing and dropped it to the ground. When it hit the ground, a shot fired hitting Jackson in the side of the head. The State's firearm expert testified that it is possible a gun could go off a couple times in a struggle if the trigger is pulled sometime during the struggle. (T. 422) He admitted trigger rates vary and that it is possible the gun fired when it was thrown to the ground. (T. 423)

To rebut Shelly's testimony, the prosecutor walked Shelly through his interrogation statements pointing out lies he told to the police before confessing to the shootings. The prosecutor also pointed out that Shelly's confession was contrary to his trial testimony. Shelly responded that he had lied to the police during his confession about carrying the gun because he did not want to implicate

Jackson in the shooting. In its closing argument, the State repeatedly mentioned Shelly's confession during the interrogation and played several clips of the taped confession. (T. 776, 781, 783-84, 789-91, 793-94, 810, 835) The State argued that Shelly's confession was closer to the truth than his trial testimony. (T. 788, 789, 796, 798, 799, 808) Without Shelly's taped confession, the jury would only have had Jackson's testimony and Shelly's trial testimony to weigh in rendering a verdict and may not have rendered a verdict of first degree murder or first degree attempted murder. No other witness at trial saw Shelly shoot the victims. Some of the forensic evidence was consistent with Shelly's version of events. As noted above, the State's firearm expert testified it was possible a .380 handgun could have fired if dropped to the ground. It cannot be said, therefore, that the confession did not contribute to the verdict.

CONCLUSION

Based on the foregoing arguments and authorities, this Court should reverse Shelly's convictions and sentences and remand this cause for a new trial.

CERTIFICATE OF SERVICE

I certify that a copy of this brief was electronically filed with the Court and a copy of it was served to Celia Terenzio, Assistant Attorney General, by email at CrimAppWPB@MyFloridaLegal.com this 3rd day April, 2017.

/s/ Cathy A. Williams
Cathy A. Williams
Pro Bono Counsel for Petitioner
Fla. State Bar No. 0088862
Law Office of Cathy A. Williams PLLC
P.O. Box 57
Cornelius, North Carolina 28031
T. (704) 495-1920
E. cat.will2663@gmail.com

CERTIFICATE OF FONT

I HEREBY CERTIFY the instant brief has been prepared with 14 point Times New Roman type, in compliance with a Fla. R. App. P. 9.210(a)(2).

/s/ Cathy A. Williams
Cathy A. Williams