IN THE DISTRICT COURT OF APPEAL
FOR THE THIRD DISTRICT
STATE OF FLORIDA

CASE NO.: _____
(Lower Tribunal Case No.: F-15-006632-C)

MARC WABAFIYEBAZU,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

PETITION FOR WRIT OF HABEAS CORPUS
(REFUSAL TO SET BOND)

Petitioner, Marc Wabafiyebazu ("Marc"), a minor child, pursuant to Fla. R. App. P. 9.030 and 9.100(g), Article I, Section 14 of the Florida Constitution and the 5th Amendment to the United States Constitution, files this Petition for Writ of Habeas Corpus ("Petition") seeking reversal of the Honorable Teresa M. Pooler's denial of Marc's Motion for Pretrial Release ("Motion for Release")[1] and refusal to

[1] The documents contained in the Appendix accompanying this Petition will be cited according to the Appendix Number ("Apx.") associated with each document. At times, this Petition will cite exhibits to documents contained in the Appendix. In this case, the citation will refer to Appendix Number followed by the Exhibit ("Ex.") number(s) or letter(s), as that exhibit is referenced in the underlying document. All citations to transcripts will be followed by the page ("P.") and line ("L.") numbers cited. The Motion for Release is attached at Apx. 1.

set reasonable conditions for bail on Counts IV, V, VIII, IX and X of the Indictment filed on April 15, 2015 ("Indictment") in the case styled *State of Florida v. Marc Wabafiyebazu*, Miami-Dade Circuit Court Case No.: F-15-006632-C ("Lower Court Case").[2] In support of the Petition, Marc would respectfully refer this Court to the following Memorandum of Law.

MEMORANDUM OF LAW[3]

I. INTRODUCTION.

After a two (2) day evidentiary hearing the Lower Court entered an Order denying Marc's Motion for Release, finding that the State of Florida proffered sufficient evidence to establish Marc's guilt by "proof evident, presumption great" on two (2) counts of felony murder, one (1) count of attempted felony murder and one count of attempted armed robbery.[4] This was a mistake. Marc is a 15 year old boy with no criminal record and no prior contact with law enforcement. On March 30, 2015 (the "Date of Incident"), Marc's brother Jean Wabafiyebazu ("Jean") met up with several drug dealers for the purpose of purchasing marijuana at 3600 S.W. 17th Terrace, Unit # 1, Miami, Florida (the "Unit"). While Jean brought Marc with

[2] A copy of the Indictment is attached at Apx. 2.

[3] Any emphasis or brackets appearing in quoted material in this Petition is that of the writer unless indicated otherwise.

[4] *See* the Order on Motion for Release attached at Apx. 8.

him to this address, he left Marc in the passenger seat of their car when he went inside the Unit. An argument ensued and Jean and three (3) other individuals were shot. Jean and another victim later died. Marc was in the passenger seat of their car the whole time.

The State of Florida pursued Marc as a principal to this crime first under the theory that he was the "getaway driver,"[5] then under the theory that Marc directly participated by shooting at one of the drug dealers,[6] and finally on the theory that Marc, while he was sitting in the passenger seat of their car, was acting as his brother's "lookout."[7] The flaws in the State's Plan C lookout theory are numerous. There was absolutely no direct evidence that Marc was acting as a lookout for his brother. The circumstantial evidence offered by the State was pure conjecture which

[5] *See generally*, Apx. 1, Ex. A; Apx. 3, Ex. 1; and Apx. 3, Ex. 3. That theory was debunked by the "March 30 Video" (discussed below) which clearly shows that Marc never sits in the driver's side seat of the BMW, never makes an attempt to shift over to the driver's side of the BMW and, for the period of time he is out of the BMW, shows that he never touches or even approaches the driver's side door of the BMW. Not even after he hears the gun shots. *See* Apx. 4 at P. 87, L. 2-15.

[6] The State ultimately abandoned this theory when the physical evidence and witness statements showed that Marc never shot at, or even pointed a gun at anyone on the Date of Incident. As a result, the State dropped Count VII of the Indictment relying on this theory. *See* Apx. 5 at P. 105 through P. 118 and P. 140 through P. 144. For a detailed discussion of the evidence proving that Marc never took a shot at Rodriguez, see the Supplemental Memorandum, Apx. 3 at Section II(C).

[7] *See* Apx. 5, P. 115, L. 2-3 (arguing that Marc is a principal to the underlying crimes because "[t]he defendant is acting as a lookout.")

was contradicted by other evidence proffered at the hearing on the Motion for Release. As an example, although the evidence established that Jean brought two (2) guns with him to the exchange, he didn't leave one (1) with Marc who was supposedly his lookout and backup. Also, Marc had absolutely no way to contact Jean in the event he saw (as part of his alleged lookout responsibilities) any danger. ***Jean had a cell phone, but that phone was left in the car charging.***

The State is attempting to rely on "spontaneous statements" allegedly made by Marc 12 hours after he was taken into custody. However, as discussed below, the unrebutted evidence proffered by the defense at the hearing on the Motion for Release firmly established that: **(1)** upon being taken into custody, Marc was promptly handcuffed to a chair in a Miami Police Department ("MPD") homicide interrogation room where he remained for at least seven (7) hours; **(2)** that the MPD failed to follow its own policy on recording interactions with homicide suspects and as a result of which there isn't one (1) minute of video from the seven (7) to eight (8) hours Marc was handcuffed to a chair in the interrogation room; **(3)** Marc's repeated requests to call his mother were denied; **(4)** MPD did not make reasonable attempts to contact Marc's mother; **(5)** at no time was Marc ever advised of his *Miranda* rights; **(6)** Marc was subject to the functional equivalent of interrogation; **(7)** MPD's position on the statements made by Marc (namely, that in a stream of conscious narrative, Marc spontaneously offered 23 pieces of information over a

period of less than two (2) minutes) is so suspicious and implausible that, even at this stage, it should have been viewed with extreme caution; and **(8)** even if the alleged statements were made and validly obtained by MPD (which they were not) they do not substantively advance the State's case because they are flatly contradicted by the undisputed physical evidence and witnesses.

In short, as discussed in detail below, the evidence proffered by the State of Florida at the hearing on the Motion for Release was substantially contradicted by the evidence proffered by Marc ***and the State's own evidence***. The uncontradicted evidence left to support the State's Plan C "lookout theory" is complete conjecture and so replete with improper inference stacking that it would not even be enough to sustain a conviction for attempted armed robbery (the felony underlying the felony murder and attempted felony murder counts) against Marc, let alone meet the high burden of proving Marc's guilt by "proof evident, presumption great."

II. BASIS FOR INVOKING THE JURISDICTION OF THIS COURT.

A. Procedural History.

Marc was arrested on March 30, 2015 and later charged by arrest affidavit with: (1) Felony Murder;[8] (2) Corruption by Threat Against a Public Servant;[9] (3)

[8] *See* Arrest Affidavit dated March 31, 2015 ("A-Form A") signed by Detective Rolando Garcia ("Det. Garcia"). A-Form A is attached at Apx. 1, Ex. A.

[9] See Arrest Affidavit dated March 31, 2015 ("A-Form B") signed by Officers Vera and Michel. A-Form B is attached at Apx. 1, Ex. B.

Possession of a Firearm by a Minor; and (4) Discharging a Firearm in Public in violation of § 790.15, Fla. Stat. (2014).[10]

On April 20, 2015 Marc filed his Motion for Release.[11] Following delivery of Respondent, the State of Florida's (the "State") initial discovery to Marc, on May 25, 2015, Marc filed his Supplemental Memorandum in Support of the Motion for Release ("Supplemental Memorandum").[12] The State did not file a written response to either the Motion for Release or the Supplemental Memorandum. Instead, the Motion for Release was set for hearing on May 27, 2015.[13]

Immediately before the start of the May 27, 2015 hearing, the State dropped Counts VI (Attempted Armed Robbery of Wright) and VII (Attempted Murder of

[10] For these final two (2) charges, see the Arrest Affidavit dated March 31, 2015 ("A-Form C") also signed by Officers Vera and Officer Michel. A-Form C is attached to the Appendix at Apx. 1, Ex. C. A-Forms A, B and C were later superseded by the Indictment charging Marc with: (1) the First Degree Felony Murder of Joshua Wright ("Wright") (Count IV of the Indictment); (2) the Second Degree Felony Murder of Jean Wabafiyebazu ("Jean"), Marc's brother (Count V of the Indictment); (3) Attempted Felony Murder of Marc's Co-Defendant in the Lower Court Case, Anthony Rodriguez ("Rodriguez") (Count VI of the Indictment); (4) Attempted Armed Robbery of Wight (Count VII of the Indictment"); (5) Attempted Armed Robbery of Rodriguez (Count VIII of the Indictment); (6) Unlawful Possession of a Firearm by a Minor (Count IX of the Indictment); and (7) Attempted Felony Murder of Marc's Co-Defendant, Johann Ruiz-Perez ("Ruiz-Perez) (Count X of the Indictment). *See* Apx. 2.

[11] *See* Apx. 1.

[12] A copy of the Supplemental Memorandum is attached at Apx. 3.

[13] The transcript of the proceedings on May 27, 2015 is attached at Apx. 4.

Rodriguez) against Marc and announced its intention to proceed only on Counts IV, V, VIII, IX and X of the Indictment.[14] The hearing on the Motion for Release was continued to May 29, 2015 where all parties completed their evidentiary proffer in support and in opposition to the Motion for Release.[15] After hearing the evidence presented and the argument of the parties, the Court reset the Motion for Release for ruling on June 3, 2015.[16]

At the June 3rd hearing on Motion for Release, the Court orally denied the Motion for Release finding that the State had met its burden of showing that Marc was guilt by "proof evident, presumption great" and also declining to exercise its discretion to grant Marc pretrial release on reasonable conditions.[17] The Court reduced its ruling to the Order on Motion for Release which was entered on July 1, 2015.[18] This Petition follows.

B. <u>Basis for Jurisdiction</u>.

[14] *See* Apx. 4 at P. 5, L. 11-14.

[15] The transcript of the proceedings on May 29, 2015 are contained in two volumes. Volume One of this transcript is attached at Apx. 5. Volume Two of the May 29, 2015 transcript is attached as Apx. 6.

[16] The transcript of the proceedings on June 3, 2015 is attached at Apx. 7.

[17] *See* the Order on Motion for Release attached at Apx. 8.

[18] *See Id.*

The jurisdiction of this Honorable Court is invoked pursuant to Fla. R. App. P. 9.030(3) and 9.110, as well as Article I of the Florida Constitution and the 5th Amendment to the United States Constitution. The Third District Court of Appeals for the State of Florida possess jurisdiction to issue the requested Writ of Habeas Corpus. *See e.g. Preston v. Gee*, 133 So. 3d 1218, 1221 (Fla. 2d DCA 2014) ("[a] petition for writ of habeas corpus is the appropriate vehicle for challenging an order denying pretrial release."); and *Rosa* v. *State*, 21 So.3d 115, 116 (Fla. 5th DCA 2009) (Fifth District granted writ of *habeas corpus* where trial court failed to properly set reasonable conditions for release).

III. FACTS UPON WHICH PETITIONER RELIES.

A. The State of Florida Did Not Put on Any Direct Evidence of Marc's Participation in the Underlying Armed Robbery.

The evidence proffered in the Motion for Release, the Supplemental Memorandum and introduced at the hearing on the Motion for Release clearly demonstrate that Marc did not "participate" in the underlying attempted armed robbery.[19] First, on the Date of Incident, Wright, Rodriguez, Ruiz-Perez, Robert Sanchez ("Sanchez") and Camila Orellana ("Orellana")[20] were at the Unit smoking

[19] The State of Florida did not file any response to the Motion for Release.

[20] Collectively Wright, Rodriguez, Ruiz-Perez, Sanchez and Orellana will be referred to in this Petition as the "Sellers." According to the State, the specific roles of each of the Sellers was: (a) Ruiz-Perez was the renter of the Unit at which this transaction was to take place; (b) Wright was a close friend of Ruiz-Perez'; (c)

marijuana and waiting for Jean to show up and purchase marijuana. There was no evidence proffered at the hearing on the Motion for Release that any of the Suppliers were waiting for Marc, had ever communicated with Marc or had even met him before the Date of Incident.

Jean arrived at the Unit at approximately 1:54p.m. on the Date of Incident driving his mother's black BMW (the "BMW").[21] Marc, Jean's 15 year old brother with no prior criminal record, was sitting in the passenger seat of the BMW when Jean arrived.[22] When Jean exited the BMW to enter the Unit, he left his little brother, Marc, seated in the passenger seat.[23] Jean entered the Unit and began negotiations for the purchase of the subject marijuana with Rodriguez and the other Sellers.[24] At approximately 2:00p.m., an argument ensued between Jean, Rodriguez and

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Rodriguez was the drug supplier; (d) Sanchez was the broker of the transaction; and Orellana was a friend of Ruiz-Perez who was at the Unit smoking marijuana. *See* Apx. 4 at P. 56, L. 7-14; and P. 57, L. 5-18.

[21] *See Id.* at P. 65, L. 1-18.

[22] *See Id.* at P. 87, L. 2-15. At the hearing on the Motion for Release, Marc's mother testified that Marc had no criminal record, had never been arrested before the Date of Incident and had never had any problems with the police. *See* Apx. 7 at P. 180, L. 5 through P. 181, L. 5. Marc's mother also provided a certification from the Royal Canadian Mounted Police certifying that Marc had no prior criminal record. *Id.*

[23] *See* Apx. 4 at P. 87, L. 2-15.

[24] *See* Apx. 3, Ex. 19 at P. 6, L. 11 through P. 7, L. 6.

Wright.[25] Wright and Jean pulled out firearms and a gunfight ensued.[26] Jean and Wright were mortally wounded and later died.[27] Rodriguez and Ruiz-Perez were both hit by stray gunfire.[28]

Marc was not present for any of this. The evidence conclusively established that while all of this was happening, Marc was sitting in the passenger seat of the BMW. After all of the shots were fired, Marc exited the BMW looking "agitated"[29] and "not calm."[30] He exited the vehicle and aimlessly wandered around for a few seconds staring at a fence which was not in the direction of the shooting, or in the direction of the two streets adjoining the parking lot (the way a "lookout" might).[31]

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[25] *See Id.*, Ex. 19 at P. 7, L. 1-14 (Rodriguez discussing the argument); Apx. 4, P. 68, L. 10-18 (Lieutenant Castellanos testifying that Marc gets out of the BMW at approximately 2:00p.m.); and Apx. 4 at P. 99, L. 7-10 (Lieutenant Castellanos testifying that when Marc exited the BMW he appears agitated because he was "responding to the incident that was taking place.")

[26] *See* Apx. 3, Ex. 19 at P. 7, L. 8-23.

[27] *See* Apx. 1, Ex. A at P. 1.

[28] *See* Apx. 3, Ex. 19 at P. 7, L. 8-23; and Apx. 3, Ex. 19, P. 7, L. 6-11.

[29] *See* Apx. 4 at P. 99, L. 7-10.

[30] *See Id.* at P. 88, L. 15-25.

[31] *See Id.* at P. 89, L. 1-17; P. 89, L. 1 through P. 90, L. 24 and P. 90, L. 6-24. Photographs of the fence Marc was staring at directly to the West of the subject property were introduced at the hearing on the Motion for Release as Defense Exhibits B and C, respectively. These photographs are attached at Apx. 12.

Marc then returned to the passenger seat of the BMW and waited a few more seconds before heading to the Unit.[32] Upon arriving at the Unit, Marc sees his brother Jean dying from a gunshot wound to the head.[33] Marc then picks up a gun that is lying next to his brother's body.[34] Although he picks the gun up, Marc does not point the gun at anyone or make any threats to any of the Sellers.[35] Marc then follows Rodriguez out to his car, a blue Chevy Malibu (the "Malibu") and watches Rodriguez flee the scene at approximately 2:02p.m..[36]

Instead of fleeing the scene, like Rodriguez, Marc returns to the Unit and fires the gun into the air three (3) times in an effort to alert the police.[37] After firing the

[32] *See* Apx. 4 at P. 69, L. 7-11.

[33] *See* Apx. 3 at Ex. 2, P. 7, L. 14-19 and Ex. 18.

[34] *See Id.* at Ex. 18.

[35] *See* Apx. 4 at P. 91, L. 20 through P. 93, L. 8.

[36] *See Id.* at P. 69, L. 20 through P. 70, L. 15.

[37] *See* Apx. 2 at P. 12, L. 23 through P. 13, L. 3 and Ex. 18. Although the State concedes that Marc fired the gun into the air and not at anyone, the State argued in a conclusory fashion that Marc was not firing the gun into the air in an effort to alert police but, instead, "because he was angry, frustrated, he was venting in some manner, but not because he was trying to alert police." Apx. 5 at P. 141, L. 1-9. The State did not put on any evidence, direct or circumstantial to support this argument that Marc fired the gun out of anger or frustration. The only evidence proffered at the hearing on the Motion for Release was that Marc fired the gun in the air in an effort to attract the police. *See* Apx. 2 at P. 12, L. 23 through P. 13, L. 3 and Ex. 18.

shots into the air, Marc waits several minutes for the police to arrive at the scene, which they do at approximately 2:07p.m..[38] Upon arrival and without offering any violence to the responding MPD officers whatsoever, Marc surrenders, is handcuffed and placed into the back seat of a patrol car.[39]

MPD interviewed each of the surviving Sellers, Rodriguez, Sanchez, Orellana and Ruiz-Perez. MPD also reviewed a security video taken on the Date of Incident (the "March 30 Video") showing Marc sitting in the BMW while the shootout between Jean and the Sellers occurred.[40] None of the Sellers implicate Marc in the drug deal they organized with Jean or indicate that he offered them any violence on the Date of Incident.[41]

Based on his investigation, Detective Garcia decided not to file an arrest affidavit for Marc charging him with either felony murder or attempted armed robbery.[42] Instead, Detective Garcia charged Marc with possession of a firearm by

[38] *See* Apx. 4 at P. 75, L. 6-17.

[39] *See Id.* at P. 75, L. 6-17.

[40] *See Id.* at P. 87, L. 2-15. The March 30 Video is attached at Apx. 9. The timer on the March 30 Video was incorrectly set approximately one hour early so that the events shown on the March 30 Video actually occurred approximately one hour after the time shown on the March 30 Video. *See Id.* at P. 64, L. 4-10.

[41] *See Id.* at P. 155, L. 17 through P. 156, L. 25.

[42] *See Id.* at P. 173, L. 16 through P. 174, L. 11 (Detective Garcia did not write A-Form A until after Officer Velez returned from transporting Marc to the JAC,

a minor and threats against a public servant (discussed below and later dropped) and called for a transport officer (Officer Velez) to take Marc to the Miami-Dade Juvenile Assessment Center (known as the "JAC").

B. Marc's Detention, MPD's Failure to Make Reasonable Attempts to Contact Marc's Parents and the Un-Mirandized "Alleged" Confession Made 12 Hours After Marc is Taken into Custody.

As noted above, Marc was taken into MPD custody around 2:07p.m. on the Date of Incident.[43] Marc was taken to MPD headquarters between 3:00p.m. and 4:00p.m. on the Date of Incident.[44] When Marc arrived at MPD headquarters, he was immediately placed in an MPD homicide interrogation room.[45] In the interrogation room, Marc was handcuffed to a chair and left there to wait for at least

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sometime after 1:00am on March 31, 2015); and Apx. 4 at P. 172, L. 7-12 (Detective Garcia spoke with Officer Velez upon his return from transporting Marc to the JAC).

[43] *See* Apx. 4 at P. 75, L. 6-17. This was also confirmed by Lieutenant Castellanos who testified that when he arrived on the scene (at approximately 3:00p.m.) Marc was already in custody, locked in the back of a marked police car. *See* Apx. 4 at P. 16, L. 1-3 (Lieutenant Castellanos confirming that he arrived on the scene "shortly after 3 p.m."); Apx. 4 at P. 51, L. 14-16 (confirming that Marc was on scene when he arrived); and Apx. 4 at P. 52, L. 3-12 (confirming that on his arrival Marc was in the back of a marked police car with the door closed).

[44]Officer Vera provided a sworn statement indicating that he transported Marc to the MPD homicide office between 3p.m. and 4p.m. on the Date of Incident and "left" Marc in the interrogation room. *See* Apx. 3, Ex. 2 at P. 14, L. 12-19, P. 16, L. 12-15 and 20-23 and P. 18, L. 4-6.

[45] *See* Apx. 2, Ex. 2 at P. 14, L. 12-19; P. 16, L. 12-15 and 20-23; and P. 18, L. 4-6.

seven (7) hours, perhaps more, without a bathroom break.[46] None of the witnesses who testified at the hearing on Motion for Release[47] were able to testify as to exactly how long Marc was handcuffed to a chair in the interrogation room.[48]

i. Marc's Detention and the Missing Interrogation Video.

We don't know exactly what happened during the seven (7) to eight (8) hours Marc, a 15 year old boy, was handcuffed to a chair. The reason we don't know exactly what happened is Detective Garcia's failure to follow MPD policy on videotaping homicide suspects. Lieutenant Castellanos, a 19 year veteran of the

[46] This timeline is established by a combination of the Sworn Statements of Officer Velez and Vera. Officer Vera transported Marc to the MPD homicide office between 3p.m. and 4p.m. and "left" Marc in the interrogation room. Apx. 3, Ex. 2 at P. 14, L. 12-19; P. 16, L. 12-15 and 20-23; and P. 18, L. 4-6. Officer Velez did not remove Marc from the Homicide "interrogation room" until between 10:45p.m. and 11p.m. when Marc was moved to the "robbery side" of MPD headquarters. *See* Apx. 3, Ex. 1 at P. 5, L. 9-20 and P. 10, L. 12-22. *See Also,* Apx. 5 at P. 41, L. 10-16 (Officer Velez testifying that he didn't know whether Marc had been handcuffed to the chair in the MPD interrogation room for six, seven or eight hours).

[47] The witnesses who testified at the hearing on the Motion for Release were Detective Garcia, Lieutenant Carlos Castellanos ("Lieutenant Castellanos") and Officer Juan Velez ("Officer Velez").

[48] *See* Apx. 5 at P. 41, L. 10-16 (Officer Velez testifying that he didn't know whether Marc had been handcuffed to the chair in the MPD interrogation room for six, seven or eight hours or whether Marc had been given a bathroom break during all of that time); Apx. 4 at P. 168, L. 21 through P. 169, L. 3 (Detective Garcia testifying that he did not know how long Marc was handcuffed to a chair in the homicide interrogation room); and Apx. 4 at P. 168, L. 4-8 (Detective Garcia testifying that he did not know whether Marc had been given a bathroom break during the entire time he was handcuffed to a chair).

MPD and 10 year veteran of the MPD Homicide Unit, testified as to MPD policy on when the video-taping of a homicide suspect placed into a homicide interrogation room is required to begin:

> **Q.** Let me ask you a final question on policy. What is the City of Miami Police Department's policy on video-taping interviews with homicide suspects?
> **A.** The policy is if the equipment is operational, that once they are brought into the homicide office, the video surveillance is activated and the meeting with this particular individual would be videotaped.
>
> ***Q. Okay. So once somebody is put into the homicide interrogation room, the video equipment, again if it's working, is activated?***
> ***A. Yes, sir.***[49]

Although this is basic MPD Homicide Unit policy, when it was Detective Garcia's turn to testify, he testified that he does not "personally" follow that policy and did not record any of his interactions with Marc on the Date of Incident.[50] He

[49] *See* Apx. 4 at P. 81, L. 15-25. Parenthetically, in furtherance of Marc's evidentiary proffer in support of his Motion for Pretrial Release, Marc's counsel attempted to proffer the sworn deposition testimony of Lieutenant Castellanos' predecessor in the MPD Homicide Unit, Commander Eunice Cooper taken in the case of *Taiwan Smart v. City of Miami*, United States Southern District of Florida Case No. 13-CIV-24354-Cooke/Torres for the proposition that the recording policy had always been in place (not just once Lieutenant Castellanos was promoted to his current position). The Court denied this request finding that ***"[Garcia] already said it was his personal policy and it was almost as if I don't care what the regular policy is."*** With this finding, the Court denied the Defendant's request to admit the transcript into evidence as part of Marc's evidentiary proffer. *See* Apx. 4 at P. 100, L. 15 through P. 101, L. 17.

[50] *See* Apx. 4 at P. 131, L. 8-21 (Detective Garcia acknowledging that other officers at MPD record suspects as soon as they are placed in the interrogation room but that he does not personally "practice that policy.") Detective Garcia also testified that

also testified that he saw nothing wrong with keeping a 15 year old boy handcuffed to a chair in the MPD interrogation room ***"until next week,"*** if necessary:

> **Q.** Why, well let me ask this. How long would you keep a juvenile in an interrogation room?
> **A.** As long as it's necessary.
>
> **Q.** So there's no time limit?
> **A.** If he's a suspect, no.
>
> **Q.** So whether personal policy or City of Miami policy, there's no particular time limit on how long you're allowed to keep a juvenile handcuffed to a chair in an interrogation room?
> **A.** ***Counselor, remember. He was under arrest, so he could have been there until next week.*** He was under arrest. It's not like he was, we were detaining him and he could have left at any time.
>
> **Q.** I understand that. All I'm trying to figure out is how long, when is it too long to have a 15-year- old child handcuffed to a chair in an interrogation room? Do you have a set time limit?
> **A.** I don't think you understood. He's under arrest. He was going to jail, ***so I could keep him there as long as we deemed it necessary to keep him there.***
>
> **Q.** ***Handcuffed to a chair?***
> **A.** ***Yes.***[51]

According to Detective Garcia, he had no interactions with Marc at MPD headquarters until approximately nine (9) hours after he was taken into custody

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he was unaware of this policy but waivered on whether that was, in fact, established MPD policy saying generally that "policies change." See Apx. 4 at P. 162, L. 8 through P. 163, L. 8.

[51] *See Id.* at P. 169, L. 9 through P. 170, L. 5.

(approximately 11:00p.m.)[52] According to Detective Garcia, he intended to interrogate Marc after interrogating Rodriguez.[53] When he finished interrogating Rodriguez (at approximately 11:00p.m.) he proceeded to the interrogation room Marc was being held in.[54] However, despite his prior testimony that his "personal policy" was to videotape suspects when he began to interview them, Detective Garcia did not videotape this interaction.[55] Instead, Detective Garcia testified that while he originally planned to interrogate Marc after interrogating Rodriguez, the purpose of this interaction with Marc was not to interrogate him but, instead, just to tell him that his brother Jean was dead.[56]

It is important to note at this point that while Detective Garcia testified that this was the first interaction he had with Marc at MPD headquarters, this was not the

[52] *See* Apx. 4 at P. 130, L. 4-20 (Detective Garcia testifying that, other than the initial contact he had with Marc at the scene, he had no other contact with Marc until the 11:00p.m. interview).

[53] *See Id.* at P. 170, L. 6 through 171, L. 1. Garcia's interrogation of Rodriguez began at approximately 10:30p.m. on the Date of Incident. The time of this interview is indicated on the Miranda Rights Waiver Form signed by Rodriguez, a copy of which is attached at Apx. 10. *See Also*, Apx. 4 at P. 116, L. 20-25 (Detective Garcia first made contact with Anthony Rodriguez at 10:20 or 10:30).

[54] *See* Apx. 3 at P. 166, L. 14-21.

[55] *See* Apx. 4 at P. 130, L. 4-20 (Detective Garcia testifying that, other than the initial contact he had with Marc at the scene, he had no other contact with Marc until the 11:00p.m. interview).

[56] *See Id.* at P. 130, L. 4-20.

first time he had interacted with Marc on the Date of Incident.[57] According to Detective Garcia, he first spoke with Marc at the scene of the incident and Marc allegedly tried to spit at him.[58]

This is important because ***Detective Garcia did not believe it was necessary to videotape the encounter***, despite the fact that:[59] (1) he alleged that his first

[57] Even this fact is in conflict with other evidence proffered at the hearing on the Motion to Release. According to Detective Garcia, the only contact he had with Marc at MPD headquarters was the 11:00p.m. confrontation he had with Marc after interviewing Rodriguez around 10:30. *See* Apx. 4 at P. 130, L. 4-20 (Detective Garcia testifying that, other than the initial contact he had with Marc at the scene, he had no other contact with Marc until the 11:00p.m. interview); and Apx. 4 at P. 116, L. 20-25 (Detective Garcia first made contact with Anthony Rodriguez at 10:20 or 10:30). However, A-Form B (the affidavit charging Marc with threats against Detective Garcia) indicates that altercation occurred at 9:00p.m.. The State did not explain this discrepancy or put on any evidence indicating what, if any, questions were asked of Marc at this additional 9:00p.m. interview.

[58] This alleged spitting incident is also suspicious. Marc has not been charged, either on the Date of Incident or in the Indictment with assault or battery on a law enforcement officer. Moreover, Detective Garcia initially testified that as soon as he approached Marc to get his biographical information, Marc tried to spit at him. *See* Apx. 4 at P. 112, L. 14-18 (Detective Garcia initially testified that Marc spit at him when he was taken out of the squad car and he was asked his name). Later he couldn't remember exactly when Marc allegedly attempted to spit at him. *See* Apx. 4 at P. 113, L. 1-12 (Marc allegedly spit at Garcia, he moved out of the way, Garcia did not say anything in response and did not try to take a statement from Marc at that time). Nor did he ever explain how he got the rest of Marc's biographical information as he testified that he stopped talking to Marc as soon as Marc tried to spit at him. In fact, earlier in his testimony, he even testified that Marc voluntarily gave him his name, address, date of birth and emergency contact information. See Apx. 4 at P. 109, L. 14-24, P. 110, L. 12-25 and P. 111, L. 21 through P. 112, L. 6.

[59] *See* Apx. 4 at P. 132, L. 22 through P. 133, L. 5.

interaction with Marc resulted in Marc attempting to batter him (by spitting at him); (2) he intended to interrogate Marc immediately after interrogating Rodriguez; (3) before he stepped into the interrogation room, Marc had been screaming and tearing the soundproofing off of the walls of the interrogation room and being destructive;[60] and (4) he was about to step into the interrogation room and tell Marc that his brother just died. Even though he decided not to videotape this interaction with Marc, at the hearing on the Motion for Release, Detective Garcia expressed remorse for this mistake:

> **Q.** Okay. So I understand you have a personal policy not to videotape suspects as soon as they are put into the interrogation room, but after you have been spit at and your prior testimony about Marc trying to tear cushions off the walls, when you made, when you were given these instructions to go in and tell this volatile teen that his brother was dead, you didn't think at that point that that was the type of conversation that you would want videotaped or documented?
> **A.** You know, in retrospect, I agree with you. I should have put the disc in and that way it would have shown him threatening to kill me and tearing up the room. You're right.
>
> **Q.** But you didn't?

[60] Detective Garcia described the scene as follows:

> **Q.** And did you observe anything before you entered the room to give him the news about his brother?
>
> **A.** He had been destructive. He had been breaking down, breaking the soundproofing off the walls, he was ripping it off, he was trying to rip the chairs off the floor, the chair off the floor.

Apx. 4, P. 132, L. 22 through P. 133, L. 2.

A. I didn't.[61]

The State, apparently taking Garcia's cue (*i.e.* remorse that he did not record the encounter), on re-direct examination tried to emphasize this point:

> **Q.** And in hindsight, you wish that you had hit the record button from the beginning, right?
> **A.** Yes.
>
> **Q.** Because then we would all be able to see what you've testified to?
> **A.** That's correct.[62]

Garcia's contrition was not genuine. On re-cross examination, Garcia was asked simply if the lesson he learned not recording this incident with Marc changed his personal policy on recording homicide suspects, predictably, it did not:

> **Q.** Detective Garcia, you said you wished that you had hit the record button from the beginning. Let me ask is it now your policy to record suspects as soon as they are put into the interrogation room?
> **A.** ***No.***[63]

In truth, Garcia didn't even check if the video equipment in the MPD interrogation room was working because he had no intention of recording his encounter with Marc.[64] According to Detective Garcia, although he earlier indicated

[61] *See* Apx. 4 at P. 165, L. 18 P. 166, L. 8.

[62] *See Id.* at P. 186, L. 2-7.

[63] *See Id.* at P. 186, L. 16-20.

[64] *See* Apx. at P. 168, L. 13-15. It is worth noting that all of the reasons proffered by Detective Garcia for his personal policy are pretextual. Detective Garcia's initial reason for his "personal" policy is that if he records a suspect from the time they are

an intent to interrogate Marc after interrogating Rodriguez, he did not ask Marc any questions when he entered the interrogation room. As Detective Garcia told it, he simply entered the interrogation room and told Marc that his brother was dead.[65] Marc then allegedly got emotional and threatened Detective Garcia's life.[66] Thereafter, without being advised of his Miranda rights and, at least according to Detective Garcia, ***without being asked a single question,*** Marc invoked his right to remain silent and advised Detective Garcia that he did not wish to speak with him.[67] According to Detective Garcia, nothing else happened during this interview.[68] Of course, we are forced into a position of taking Detective Garcia's word for it because he chose not to videotape the encounter.

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placed in the interrogation room, the discs may run out and need to be changed in the middle of an interrogation. *See* Apx. 4 at P. 162, L. 8 through P. 163, L. 8 However, Detective Garcia did not know how long each disc lasted. *See* Apx. 4, P. 163 at L. 14-16. Detective Garcia's only other reason for his personal policy was that breaks in time between conversations upsets the stenographers. *See* Apx. 4 at P. 163, L. 22 through P. 164, L. 4. Ultimately, however, Detective Garcia admitted that both of these reasons were solely for "convenience" purposes and not based on some legitimate law enforcement purpose. *See* Apx. 4 at P. 164, L. 5-9.

[65] *See* Apx. 4 at P. 181, L. 17-23.

[66] *See Id.* at P. 133, L. 24 through P. 134, L. 8.

[67] *See Id.* at P. 181, L. 18 through P. 182, L. 5 (Detective Garcia testifying that he understood Marc's statement that "I don't want to talk to you guys" as an invocation of his Miranda rights).

[68] *See Id.* at P. 133, L. 24 through P. 134, L. 22.

ii. MPD's Failure to Make Reasonable Attempts to Contact Marc's Parents.

Also relevant to the validity of the alleged confession (discussed below) is MPD's failure to comply with § 985.101, Fla. Stat. (2014) (requiring arresting officers to make, and continue to make, efforts to contact a juvenile's parents ***as soon as the juvenile is taken into custody***).

On the Date of Incident, as soon as Marc was taken into custody, he started begging MPD officers to allow him to use his cell phone to call his mother who worked at the Canadian Consulate. One of the initial responding MPD Officers, Officer Vera, recounted some of these pleas directed to him while Marc was seated in the back of his cruiser:

> Q. Okay. While he's sitting there did he say anything else to you?
>
> A. While he was sitting there he kept on telling me, please. He kept on asking me again, my brother, how's my brother doing? ***And he told me you need to call my mother, please, you have to get my cell phone, it's on the floor there next to my mom's BMW. You have to call my mother, please, to let her know what happened. And that's when he stated to me you have to call my mother, she's a Canadian Consulate.***[69]

Moreover, Lieutenant Castellanos testified that MPD policy requires efforts to contact a juvenile's parent once that juvenile defendant is in custody by "whatever

[69] *See* Apx. 3, Ex. 2 at P. 12, L. 12-22.

means may be available at that time."[70] It is undisputed that MPD was well aware that Marc's mother worked for the Canadian consulate in Miami.[71] Despite this policy, Detective Garcia testified that he only attempted to contact Marc's mother twice on the Date of Incident. The first attempt was around 5:00p.m. (three (3) hours after Marc was taken into custody) using a cellular phone number allegedly provided to him by Marc.[72] Detective Garcia could not remember exactly when he made the second attempt to contact Marc's mother but, he did remember that it was sometime in the evening when MPD was arresting Marc.[73] Even though the issue was raised in the Motion for Release and the Supplemental Memorandum, the State did not introduce any phone records or any evidence other than Garcia's vague recollection that he called twice at some point on the Date of Incident.

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[70] *See* Apx. 4 at P. 77, L. 24 through P. 78, L. 11.

[71] *See Id.* at P. 23, L. 6-10 (noting that the BMW itself had a tag which read "Consul"); P. 79, L. 12-24 (Lieutenant Castellanos testifying that it was generally known among the officers on the scene of the incident that the incident had a connection to the Canadian Consulate); P. 140, L. 20 through P. 141, L. 6 (Garcia admitting that he knew Marc's mother "had something to do with Canada's government" but that he did not think to call the Canadian Consulate); and P. 111, L. 21 through P. 112, L. 6 (Detective Garcia testifying that Marc advised him that his mother had a job concerning "something of Canada" but that he could not exactly remember what).

[72] *See* Apx. 4 at P. 139, L. 21 through P. 140, L. 1.

[73] *See Id.* at P. 140, L. 7-13.

Lieutenant Castellanos testified that if an officer were aware of the place a juvenile's parent worked, contacting that office may be part of the reasonable efforts necessary to contact a parent under MPD Policy. When posed with an analogous hypothetical, Lieutenant Castellanos testified that if a juvenile advised that his parent worked at Marlins Stadium in Miami, calling Marlins stadium may be part of an officer's reasonable efforts to contact a juvenile's parent.[74] No attempt was ever made to contact Marc's mother at the Canadian Consulate to advise her that one of her sons was dead and the other was possibly facing murder charges.[75] Nor did Detective Garcia or any other MPD officer even drive to Marc's home on the Date of Incident in an attempt to contact Marc's mother.[76] The record contains at least three (3) instances where MPD officers admitted that Marc asked for access to a telephone to call his mother, each of which was surreptitiously denied.[77]

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[74] *See* Apx. 4 at P. 100, L. 18 through P. 101, L. 4.

[75] *See Id.* at P. 80, L. 4-11 (Lieutenant Castellanos testifying that he was not aware of any attempt being made to contact Marc's mother at the Canadian Consulate); and Apx. 4 at P. 140, L. 24 through P. 141, L. 1 (Detective Garcia testifying that he didn't think to try and call Marc's mother at work).

[76] Detective Garcia testified that he first drove to Marc's home in an attempt to contact his mother sometime early on the morning of March 31, 2015. *See* Apx. 4 at P. 180, L. 21 though P. 181, L. 3; *Id.* at P. 141, L. 15-17.

[77] See Apx. 5 at P. 15, L. 8-11 (Officer Velez testifying that Marc asked to speak to his mother while being held in the robbery section and that the request was denied, Officer Velez denied this request); Apx. 5 at P. 46, L. 19 through P. 47, L. 20 (Officer Velez testifying that right before Marc's alleged "confession" during transport, Marc

iii. The Alleged Confession.

At the hearing on the Motion for Release, none of the parties disputed that Marc had suffered a range of emotions on the Date of the Incident. As noted above, he had just seen his brother shot in the head.[78] After being held in the MPD homicide interrogation room for up to eight (8) hours, both Officers Velez and Garcia testified that Marc was angry and yelling.[79] After being released from the interrogation room and in the custody of Officer Velez, Marc was taken to the robbery section of MPD headquarters and handcuffed to a bench for an additional two hours.[80]

After being held in the robbery section of MPD headquarters and asking for his mother two more times, Marc, apparently overcome by emotion, became "very

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asked to speak with his mother for a second time); and Apx. 3, Ex. 2 at P. 12, L. 12-22 (Marc's initial requests to Officer Vera recounted above).

[78] *See* Apx. 3, Ex. 2 at P. 7, L. 14-19; and Ex. 18.

[79] *See* Apx. 5 at P. 10, L. 1-17 (Officer Velez noting that when he first saw Marc, through the operational video monitor, in the Homicide interrogation room he was "screaming" and "not calm"); Apx. 5 at P. 39, L. 8-16 (Officer Velez noting that in the interrogation room, Marc was "angry" and "screaming" to "let him out"); Apx. 4 at P. 188, L. 15-21 (Officer Garcia noting that when he confronted Marc in the interrogation room, he had been "yelling").

[80] See Apx. 5 at P. 14, L. 24 through P. 15, L. 4 (Officer Velez testifying that he and another officer handcuffed Marc to a bench in the robbery section of MPD Headquarters); Apx. 5 at P. 16, L. 5-7 (Officer Velez testifying that after moving Marc to the robbery section of MPD headquarters, he waited for the arresting officers to complete paperwork for "[p]robably an hour or two.")

open and talkative."[81] Officer Velez testified that in the brief time Marc was in his custody immediately before transport and the alleged confession, Marc asked to speak with his mother twice, each of which was denied.[82]

After finally being released from the bench (in total Marc was handcuffed to the chair in the interrogation room and the bench in the robbery section for up to 11 hours), Marc allegedly became very calm and "comfortable" with Officer Velez.[83] Officer Velez testified at that point, all aggression seemed to have left Marc and he seemed calm and "sad."[84] It was at this point that Officer Velez had his alleged "conversation" with Marc.

According to Officer Velez, after asking to speak with his mother for a second time and being denied, Marc asked Officer Velez what he was being charged with.[85]

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[81] See Apx. 5 at P. 84, L. 4-18 (Officer Velez testifying that after Marc was removed from MPD headquarters he became "very open and talkative")

[82] See *Id.* at P. 15, L. 8-11 (Officer Velez testifying that Marc asked to speak to his mother while being held in the robbery section and that the request was denied, Officer Velez denied this request); Apx. 5 at P. 46, L. 19 through P. 47, L. 20 (Officer Velez testifying that right before Marc's alleged "confession" during transport, Marc asked to speak with his mother for a second time).

[83] See *Id.* at P. 84, L. 4-18.

[84] See *Id.* at P. 84, L. 4-18; Apx. 5 at P. 92, L. 18-21 (on questioning by Court Velez admitted that while speaking to Marc he seemed "calm, and kind of sad."); Apx. 5 at P. 94, L. 4-13 (Officer Velez testifying that while he was conversing with Marc he could hear the sadness in Marc's voice).

[85] *See* Apx. 4, P. 16, L. 24 through P. 17, L. 5.

Officer Velez advised Marc that he was being charged with possession of a firearm and threatening Detective Garcia.[86] Officer Velez testified that, in response to this information, Marc told him that that the only reason he threatened the officer was because he had just been told his brother was dead.[87] Marc did not say anything else and did not make any reference to the underlying incident.[88] Officer Velez then began to give Marc unsolicited "advice," telling him that he needed to, *inter alia*, "look towards a better direction,"[89] that "sometimes in life things happen and these things are sometimes for the better,"[90] and that Marc "needs to make a change in his life."[91]

Responding to these statements from Officer Velez, according to the State, Marc began an incredible (Petitioner submits impossible) "stream of consciousness,"[92] narrative confession to Officer Velez.[93] While the order of

[86] *See Id.* at P. 17, L. 6-11.

[87] See Apx. 5 at P. 50, L. 21 through P. 51, L. 7.

[88] See *Id.* at P. 50, L. 21 through P. 51, L. 7.

[89] See *Id.* at P. 52, L. 8-14.

[90] *See Id.* at P. 53, L. 4-9.

[91] *See Id.* at P. 54, L. 25 through P. 55, L. 4.

[92] *See* Apx. 5 at P. 60, L. 3 through P. 61, L. 3.

[93] *See Id.* at P. 52, L. 18-21; and P. 53, L. 21-24.

statements Marc gave have changed, in total, he allegedly provided Officer Velez with the following 23 pieces information, without any prodding, questioning or intervening statements from Officer Velez: (1) "he [Marc] goes, he knows that I am a police officer but that he knows that everyone is going to talk so he might as well talk and things are going to come to light;"[94] (2) "it was a job gone bad" or a "job gone wrong;"[95] (3) my brother Jean is very smart;[96] (4) that my brother Jean took two guns with him into the Unit;[97] (5) that he knows other people are talking to the police;[98] (6) we have done this on several occasions before;[99] (7) I am from Canada;[100] (8) my brother and I have done the same type of thing in Canada;[101] (9)

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[94] *See Id.* at P. 18, L. 16 through P. 19, L. 5.

[95] *See* Apx. 4 at P. 174, L. 4-11; Apx. 3, Ex. 1 at P. 19, L. 2-6; and Apx. 3, Ex. 3.

[96] *See* Apx. 4 at P. 174, L. 4-11; Apx. 3, Ex. 1 at P. 19, L. 2-13; Apx. 3, Ex. 1; Apx. 5 at P. 19, L. 14-19; and Apx. 5 at P. 61, L. 19 through P. 62, L. 6.

[97] *See* Apx. 4 at P. 174, L. 4-11; Apx. 3, Ex. 1 at P. 19, L. 7-8 and P. 20, L. 10-12; Apx. 5 at P. 20, L. 20-25; and Apx. 5 at P. 61, L. 13-16.

[98] *See* Apx. 4 at P. 174, L. 4-11.

[99] *See* Apx. 4 at P. 174, L. 4-11; Apx. 3, Ex. 1 at P. 19, L. 8-10; P. 20, L. 16-17; Apx. 3, Ex. 3; and Apx. 5 at P. 19, L. 14-19.

[100] *See* Apx. 4 at P. 180, L. 3-20.

[101] *See* Apx. 4 at P. 180, L. 3-20; and Apx. 1, Ex. A at P. 3.

we have also done other drug rip-offs in Miami;[102] (10) "[i]t wasn't supposed to go like that;"[103] (11) when we got to the Unit, Jean went inside the house ***while I waited in the driver's seat of the BMW***;[104] (12) moments [or minutes] after Jean went into the house, I heard gun shots;[105] (13) we were there that day to rob "these people" of their ***"narcotics;"***[106] (14) my brother Jean "knew what he was doing;"[107] (15) After I heard the gunshots, I ran inside, saw my brother on the floor and another guy on the floor and I saw two other individuals;[108] (16) I did not get out of the car until I heard the gun shots;[109] (17) there was a female there [at the Unit] as well;[110] (18) after I [Marc] ran inside the house, I saw another guy who was shot in the arm;[111]

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[102] *See* Apx. 4 at P. 180, L. 3-20; and Apx. 1, Ex. A at P. 3.

[103] *See* Apx. 5, P. 19, L. 14-19.

[104] *See* Apx. 3, Ex. 1 at P. 19, L. 10-11; Apx. 3, Ex. 3; and Apx. 5 at P. 20, L. 20-25.

[105] *See* Apx. 3, Ex. 1 at P. 19, L. 11-13; P. 20, L. 19-20; Apx. 3, Ex. 3; and Apx. 5 at P. 21, L. 4-10.

[106] *See* Apx. 3, Ex. 1 at P. 19, L. 20-22; and Apx. 5 at P. 19, L. 14-19.

[107] *See* Apx. 3, Ex. 1 at P. 20, L. 13-14.

[108] *See* Apx. 3, Ex. 1 at P. 20, L. 20-24; Apx. 3, Ex. 3; and Apx. 5 at P. 21, L. 4-10.

[109] *See* Apx. 5 at P. 69, L. 17-20.

[110] *See Id.* at P. 21, L. 11-13.

[111] *See* Apx. 3, Ex. 1 at P. 21, L. 1-4; and Apx. 5 at P. 21, L. 4-10.

(19) I then saw my brother with "the guns in his hand;"[112] (20) I [Marc] then picked up one of the guns and I saw another guy running outside;[113] (21) I [Marc] then chased after the man running outside;[114] (22) ***I [Marc] then took a shot at the car of the fleeing man (apparently Rodriguez) with the gun I was holding as the man was driving away from the scene***;[115] and (23) that I [Marc] was there to be the "getaway driver," that this was my "role."[116]

[112] *See* Apx. 3, Ex. 1 at L. 4-6; and Apx. 5 at P. 21, L. 4-10.

[113] *See* Apx. 3, Ex. 1 at L. 6-7; Apx. 3, Ex. 3; and Apx. 5 at P. 21, L. 14-16.

[114] *See* Apx. 3, Ex. 1 at P. 21, L. 6-8; Apx. 3, Ex. 3; and Apx. 5 at P. 21, L. 14-16.

[115] *See* Apx. 3, Ex. 1 at P. 20, L. 25 through P. 21, L. 10; Apx. 3, Ex. 3; and Apx. 5 at P. 21, L. 17-19.

[116] *See* Apx. 3, Ex. 1 at P. 22, L. 10-20; and P. 66, L. 7-9. It was only after this extraordinary (Marc's counsel would submit impossibly so) narrative that Officer Velez asked his first question, *i.e.* whether Marc was intentionally shooting at Rodriguez and not in the air. *See* Apx. 5 at P. 22, L. 3-10. Even this candid admission to questioning is suspicious. At the hearing on the Motion for Release, the State of Florida heavily leaned on the fact that Officer Velez had no information concerning this incident other than what was contained in A-Form B and A-Form C (the only arrest affidavits in existence at the time of Marc's transport). On cross-examination, Officer Velez was asked where he learned that Marc claimed that he shot the gun in the air. Officer Velez responded that the information was in the arrest forms he was provided. *See* Apx. 5 at P. 22, L. 14-18; and Apx. 5, P. 64, L. 14 through P. 66, L. 3. This information is not contained anywhere in A-Form A, A-Form B or A-Form C leading to the conclusion that Officer Velez had more discussions with the arresting officers (specifically Officer Vera who noted in his report that Marc claimed that he fired the gun in the air) than he actually let on at the hearing on the Motion for Release. *See* Apx. 1, Ex. A, B and C.

While it may be possible for someone in Marc's emotional condition to ramble off these pieces over the course of a few hours (notwithstanding the fact that we know, ***and the State concedes***, that several of these alleged statements are untrue, *e.g.* Marc sitting in the "driver's" seat and taking shots at Rodriguez and, the fact that it would seem highly unlikely that a 15 year old would use the word "narcotics"), what makes this "confession" even more impossible is that, according to Officer Velez, the entire conversation took place within one (1) or two (2) minutes it takes to drive a couple of blocks from MPD headquarters to the JAC.[117] Moreover, according to Velez, the entire "confession" was allegedly given to him while he was driving his patrol car, with Marc sitting in the back seat behind a safety barrier, and with the police radio squawking on and off intermittently.[118] Finally, while the State has always taken the position that this entire "stream of consciousness" narrative took place during Marc's transport to the JAC, Officer Velez qualified this statement at the hearing on the Motion for Release where he indicated that he did not know if part of the "conversation" took place at the JAC itself.[119]

On cross examination, Officer Velez admitted that he was trained not to

[117] According to Officer Velez, the JAC is only about two (2) blocks from MPD Headquarters and drive that lasts only "[m]aybe a minute or two." *See* Apx. 3, Ex. 1 at P. 16, L. 16 through P. 17, L. 1.

[118] See Apx. 5, P. 77, L. 17 through P. 78, L. 13.

[119] *See* Apx. 5 at P. 74, L. 17-24.

engage in conversations with suspects in general concerning the circumstances of their arrest before reading them their Miranda rights.[120] According to Officer Velez, the reason for this training is to ensure that a general conversation does not result in the suspect discussing the case without first being advised of his Miranda rights.[121] Officer Velez candidly admitted that during his "conversation" with Marc, he was not aware whether Marc had ever been advised of his *Miranda* rights.[122] He also testified that at no point before, during or after this "conversation," with Marc did he advise Marc of his *Miranda* rights.[123] Officer Velez made no attempt to record this alleged confession or reduce it to writing for Marc's signature.[124] Nor did he take Marc back to MPD headquarters so that his statement could be formalized.[125] Instead, Officer Velez simply drove back to MPD headquarters, advised Detective Garcia of the alleged confession, and Officer Garcia completed A-Form A.[126]

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[120] *See Id.* at P. 30, L. 14-22.

[121] *See Id.* at P. 30, L. 23-25.

[122] *See Id.* at P. 49, L. 7-14.

[123] *See Id.* at P. 56, L. 7-15.

[124] *See Id.* at P. 58, L. 21 through P. 59, L. 1.

[125] *See* Apx. 5 at P. 23, L. 24 through P. 24, L. 2.

[126] *See* Apx. 5 at P. 23, L. 24 through P. 25, L. 9 (Velez went back to MPD headquarters after dropping Marc off at the JAC and filled out a supplemental

C. The Lower Court's Ruling on the Motion for Release.

Notwithstanding the conflicting evidence concerning Marc's participation in the underlying attempted armed robbery and the suspicious circumstances concerning Marc's "confession," the Court ruled that the State's proffer met the burden of proving Marc's guilt by the proof evident, presumption great standard. In doing so, the Court made very few findings and relied almost entirely on the alleged un-Mirandized confession obtained by Officer Velez nearly 12 hours after Marc was taken into custody. The Court found:[127]

> I find Officer Velez's testimony to be very credible. He answered all the questions that were presented to him in a straightforward way, a direct manner during the questioning by the State, the rigorous cross-examination by the Defense, and the questions I presented to him. It was clear to this court that the Officer's comments to the defendant were responding to this young man's apparent distress which is motivated by the loss of his brother, which he had just learned about. These comments by the Officer as he was transporting Mr. Wabafiyebazu to Juvenile, in the opinion of this Court, were not meant to elicit any incriminating statements from the defendant. It was also clear to me that Officer Velez, and this is based on his demeanor in this Court, was not the type of officer who would be fabricating the statements from the defendant to get himself involved in a big case. Based on the statements made to Officer Velez as well as the other evidence in this

report); Apx. 4, P. 172, L. 3-12 (Velez spoke with Garcia upon his return to MPD headquarters and was asked to fill out a supplemental report); and Apx. 1, Ex. A.

[127] As noted in the Motion for Release, Marc was not transported to the JAC until 1:38a.m. on March 31, 2015 (nearly 12 after the shootings). This timeline. is generally confirmed by Officer Velez who alleges that Marc stayed "on the robbery side" for "a couple of hours, you know, like an hour or so." *See* Apx. 3, Ex. 1 at P. 14, L. 7-12.

> case, this Court finds as to the charges contained in the indictment regarding Mr. Wabafiyebazu, the proof of guilt is evident and the presumption is great to hold him without bond.[128]

As discussed below, Marc submits that the Court's heavy reliance on the improper confession is misplaced and, that even if the alleged confession was properly considered, the statements made therein are almost uniformly contradicted by the undisputed physical evidence and witness statements. Thus, the evidence proffered by the State did not come close to meeting the proof evident, presumption great standard necessary to deny Marc pretrial release.

IV. ARGUMENT IN SUPPORT OF PETITION.

A. Standard of Review.

This Court should review this Petition as a mixed question of fact and law implicating constitutional protections and, thus, subject this Petition to *de novo* review. *See e.g. Connor v. State*, 803 So. 2d 598, 608 (Fla. 2001).

B. Standard for Denial of Pre-Trial Release.

The Florida Constitution guarantees pretrial release to an individual charged with a crime unless certain limited circumstances are met. Where a party is charged with an offense punishable by life imprisonment, pretrial release should be granted unless the State of Florida can show that their proof of the Defendant's guilt is

[128] *See* Ex. 7 at P. 4, L. 25 through P. 5, L. 23; and Apx. 8.

evident or the presumption thereof is great. See Art. I, § 14, Fla. Const.; Fla. R. Crim. P. 3.131 and *State v. Arthur*, 390 So.2d 717, 717 (Fla.1980).[129]

This is one of the highest standards known to the law, higher even than beyond a reasonable doubt (the standard necessary to convict an individual of a crime). In fact, the standard requires the proof presented to the Court to exclude all doubt of the Defendant's guilt. *See Russell v. State*, 71 So. 27 (Fla. 1916) ("[t]he word 'evident' has been defined as clear to the understanding and satisfactory to the judgment. Its synonyms are manifest, clear, plain, obvious, conclusive. The word 'manifest' means ***to put beyond question of doubt.***") To meet this standard, the evidence of guilt must: (a) be uncontradicted; (b) not even arguably impeached; (c) cannot be wholly circumstantial; and (d) must exclude each and every hypothesis

[129] *See Also, Stallings v. Ryan*, 979 So. 2d 1167, 1169 (Fla. 3d DCA 2008) ("…On an application for bond, the trial court must find that the proof of guilt is evident or the presumption great. The burden is on the State to meet this standard. The State is held to a degree of proof greater than that required to establish guilt beyond a reasonable doubt.") (internal citations omitted); *Preston v. Gee*, 133 So. 3d 1218, 1226 (Fla. 2d DCA 2014) (same); *Kirkland v. Fortune*, 661 So.2d 395, 397 (Fla. 1st DCA 1995) (same); *Elderbroom v. Knowles*, 621 So. 2d 518, 520 (Fla. 4th DCA 1993) ("Indeed, the state is held to a degree of proof greater than that required to establish guilt beyond a reasonable doubt. ***Furthermore, where the state's evidence is arguably sufficient to convict, but is contradicted in material respects such that substantial questions of fact are raised as to the guilt or innocence of a defendant, then a trial court may properly find that the proof of guilt is not evident or the presumption of guilt is not great.***"); *Seymour v. State*, 132 So. 3d 300, 303 (Fla. 4th DCA 2014) ("The burden is upon the state because the accused is presumed innocent while awaiting trial.").

except guilt. *See State ex rel. Hyde v. Thursby*, 184 So. 2d 505, 507 (Fla. 1st DCA 1966) (requiring the evidence supporting denial of pretrial release to "...***exclude every other hypotheses except that of guilt.***"); *Hoskins v. Knowles*, 757 So.2d 512 (Fla. 4th DCA 1998) (concluding the state failed to establish that the proof of guilt was evident or the presumption great, ***where the accused's evidence substantially contradicted and impeached*** the state's case); *Elderbroom*, 621 So.2d at 520 (reversing denial of bond where there was evidence supporting both the state and the defense); *Stallings*, 979 So. 2d at 1169 ("Further, where the State's evidence is sufficient to convict for a capital or life offense but is ***arguably impeached*** in substantial respects by other evidence or is replete with substantial contradictions and discrepancies, the proof does not meet the standard."); and *Nix v. McCallister*, 202 So. 2d 1, 2 (Fla. 1st DCA 1967) (overturning denial of pretrial release where "…***the evidence of guilt is wholly circumstantial***…")

C. The Court Should Not Have Relied on the Alleged Confession Because, Even if Officer Velez was Telling the Truth, the Alleged Confession Was Illegally Obtained.

i. The Alleged Confession Was Not Voluntarily Made.

Under the circumstances of this case, the "spontaneous statement[s]" allegedly made by Marc 12 hours after being taken into custody should not have been relied upon by the Lower Court. This is so because, in evaluating an evidentiary proffer in connection with an *Arthur* hearing, the Court can and should

evaluate whether the proffered evidence may not ultimately be admissible. *See e.g. Stallings*, 979 So. 2d at 1168 (in evaluating the State's evidentiary proffer at an Arthur hearing, the Court noted that key admission offered by the State were of questionable admissibility.)[130]

"The requirement of warnings and waiver of rights is fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." *Miranda v. Arizona*, 384 U.S. at 476 (1966).[131] When dealing with a juvenile suspect, the concerns explained by the *Miranda* Court are heightened. As in the case of an adult, the State has the burden to show that any waiver of *Miranda* rights must have been knowing and voluntary. *See Miranda*, 384 U.S. at 436. However, the State bears a heavier burden to show voluntariness "when the suspect is a juvenile." *B.M.B. v. State*, 927 So. 2d 219, 222 (Fla. 2d DCA 2006).

In evaluating voluntariness, "[f]or a juvenile's confession, the relevant

[130] *See Also State v. Passino*, 154 Vt. 377, 380, 577 A.2d 281, 284 (1990) (finding "that a denial of bail could not be based on a confession taken in violation of the protections set out in *Miranda v. Arizona*. …[T]he determination that the defendant can be held without bail must rest on a finding that the State has the evidence to convict. If the evidence held by the State is inadmissible, it cannot meet its burden.")

[131] *See Also, Ramirez v. State*, 739 So. 2d 568, 576 (Fla. 1999) ("[a]s we have explained**:** '[T]he requirement of giving *Miranda* warnings before custodial interrogation is a prophylactic rule intended to *ensure* that the uninformed or uneducated in our society know they are guaranteed the rights encompassed in the warnings.") (quoting *Davis v. State*, 698 So. 2d 1182, 1189 (Fla. 1997)).

circumstances include: (a) the manner in which the police administered *Miranda* rights, (b) the juvenile's age, experience, education, background and intelligence, (c) whether the juvenile had an opportunity to speak with his/her parents before confessing, and (d) whether the juvenile executed a written waiver of the *Miranda* rights prior to making the confession." *Brancaccio v. State*, 773 So. 2d 582, 583-84 (Fla. 4th DCA 2000). *See Also*, *Doerr v. State*, 383 So. 2d 905, 908 (Fla. 1980) ("[l]ack of notification of a child's parents is a factor which the court may consider in determining the voluntariness of any child's confession…")

The fact that Marc was left in the MPD interrogation room alone for up to eight (8) hours handcuffed to a chair, and then handcuffed to a bench in the robbery section for an additional two (2) hours, without even being given a bathroom break is also a significant factor in evaluating the voluntariness of Marc's alleged confession.[132]

In this case, nothing proffered by the State at the hearing on the Motion for Release suggests: (a) that Miranda rights were ever administered to Marc; (b) that Marc ever signed a Miranda waiver form; (c) that the MPD made any reasonable

[132] *See e.g. J.G.*, 883 So. 2d at 926 (in evaluating the admissibility of a juvenile's confession, the Court noted that: "[w]e cannot ignore the fact that the police placed 13–year–old Appellant in the interview room around 12:30 A.M., where he remained for 2– ½ hours before the questioning commenced. Appellant was effectively "alone" and without any adult with whom he could consult or on whom he could rely to protect his interests.")

attempt to contact Marc's parents before interrogating him; or (d) that Marc was able to speak with his parents before the statements were allegedly made. Moreover, Marc's extremely young age (having turned 15 mere weeks before the Date of Incident) militates against any alleged statements being admissible against him. In short, it seems unlikely that Marc's alleged confession, obtained 12 hours after the underlying incident will be admissible in consideration of the facts alleged herein.

ii. <u>The Alleged Confession Was the Product of Improper Custodial Interrogation</u>.

The law is clear that "[w]hile direct questioning of a suspect is the clearest example of an interrogation, 'the term 'interrogation' under *Miranda* refers ... also to any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response.'" *J.X. v. State*, 125 So. 3d 364, 366 (Fla. 3d DCA 2013) quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

The Lower Court appeared to heavily weigh Officer Velez' intent in telling Marc that he needed to change his life.[133] This was misplaced. While an officer's intent is not necessarily irrelevant, the test under *Innis* is an objective one (whether a reasonable officer would have anticipated that an incriminating response to the statement is foreseeable). *See United States v. Walters*, 963 F. Supp. 2d 138, 151 (E.D.N.Y. 2013) ("[h]owever, the benign intent of the law enforcement officer is not

[133] *See* Ex. 7 at P. 4, L. 25 through P. 5, L. 23.

the primary consideration under *Innis*. ***Rather, the definition of interrogation is focused on the perceptions of the suspect, as the protections of Miranda are to be applied "without regard to objective proof of the underlying intent of the police."***) (quoting *Innis*, 446 U.S. at 301). To the contrary, "[t]he test of whether a statement by the police 'was reasonably likely to elicit an incriminating response,' focuses on the perception of the subject." *United States v. Smalls*, 617 F. Supp. 2d 1240, 1261 (S.D. Fla. 2008) *aff'd,* 342 Fed. Appx. 505 (11th Cir. 2009) (quoting *Innis,* 446 U.S. at 301 n. 7).

In this case, immediately before Velez's statements to Marc that allegedly elicited the confession, Marc was "sad," and begging for his mother.[134] Even the Court acknowledged, in its oral ruling on the Motion for Release, that Marc was suffering from ***"apparent distress"*** when he allegedly confessed to Officer Velez.[135]

[134] See Apx. 5 at P. 84, L. 4-18; Apx. 5 at P. 92, L. 18-21 (on questioning by Court Velez admitted that while speaking to Marc he seemed "calm, and kind of sad."); Apx. 5 at P. 94, L. 4-13 (Officer Velez testifying that while he was conversing with Marc he could hear the sadness in Marc's voice); and Apx. 5 at P. 46, L. 19 through P. 47, L. 20 (Officer Velez testifying that right before Marc's alleged "confession" during transport, Marc asked to speak with his mother for a second time).

[135] Even the Court noted that during his "conversation" with Officer Velez, Marc was suffering from distress. *See* Apx. 7 at P. 4, L. 25 through P. 5, L. 23 ("[i]t was clear to this court that the Officer's comments to the defendant were ***responding to this young man's apparent distress*** which is motivated by the loss of his brother, which he had just learned about.")

The reasonableness of Officer Velez' charge to Marc needed to ***"change his life"*** needs to be viewed in this context.

This case is factually similar to a recent case decided by the Washington Supreme Court. In *In re Cross*, 180 Wash. 2d 664, 684, 327 P.3d 660 (2014), the Court found that an officer's statement to a suspect that "sometimes we do things we normally wouldn't do and feel bad about it later" was the functional equivalent to interrogation for *Miranda* purposes. The Court specifically focused on the fact that the statement could be tied back to the underlying events which resulted in defendant's arrest. *See Id. at* 675. As in that case, Officer Velez' statement that Marc needs to "change his life" was clearly a reference to the events which led to Marc's arrest. While Officer Velez may not have intended this statement to lead to an incriminating response from Marc, under the circumstances, he should have. *See e.g. State v. Low*, 192 P.3d 867, 884 (finding that statement by officer to suspect in custody that "Sometimes you just need to talk to somebody, huh?" was likely to lead to an incriminating response).

D. The Felony Murder Rule Does Not Apply in this Case Because the State Failed to Show Marc's Overt Participation in the Underlying Attempted Armed Robbery.

If the State's evidence on the remaining charge of attempted armed robbery (Count VIII of the Indictment) failed to meet the "proof evident, presumption great" standard, the two charges for felony murder (Counts IV and V of the Indictment)

and the remaining charge of attempted felony murder (Count X of the Indictment) also must fail. *See Hodge v. State*, 970 So.2d 923, 927 (Fla. 4th DCA 2008) ("The focus in a felony murder charge is not on the accused's participation in the murder but in the underlying felony.")

Even assuming, *arguendo*, that the alleged confession was properly taken by Officer Velez (which it was not), the evidence presented by the State of Florida at the hearing on the Motion for Release failed to prove Marc's participation in the underlying attempted armed robbery of Rodriguez. The law in Florida is crystal clear that "[t]o be convicted as a principal for a crime physically committed by another, the defendant must intend that the crime be committed and must do some act to assist the other person in actually committing the crime." *State v. Larzelere*, 979 So. 2d 195, 215 (Fla. 2008). Equally clear is the black letter Florida law that ***"…mere presence at the scene and knowledge that an offense is being committed does not equate to participation with criminal intent…"*** *Miami-Dade County v. Asad*, 78 So. 3d 660, 672 (Fla. 3d DCA 2012). *See Also, R.E. v. State*, 13 So. 3d 97, 98-99 (Fla. 4th DCA 2009) (same); *W. v. State*, 585 So. 2d 439, 441 (Fla. 4th DCA 1991) (same); *D.C. v. State*, 442 So. 2d 289, 290 (Fla. 3d DCA 1983) ("[t]he adjudication of delinquency is reversed upon a holding that the evidence presented at trial was circumstantial ***and failed to exclude every reasonable hypothesis of innocence***… In addition, mere presence at the scene of a crime is insufficient to

establish intent to participate."); *Theophile v. State*, 78 So. 3d 574, 578 (Fla. 4th DCA 2011) ("[m]ere knowledge that an offense is being committed, mere presence at the scene, and even a display of questionable behavior after the fact, are not, alone, sufficient to establish participation."); *Collins v. State*, 438 So. 2d 1036 (Fla. 2nd DCA 1983) ("[m]ere knowledge that an offense is being committed is not the same as participation with criminal intent, and mere presence at the scene, including driving the perpetrator to and from the scene or a display of questionable behavior after the fact, is not sufficient to establish participation."); and *Hill v. State*, 958 So. 2d 549, 551 (Fla. 4th DCA 2007) (same)[136]

Even accepting the illegally obtained "confession," discussed above, Marc could not be convicted of the attempted armed robbery charged in Count VIII of the Indictment. This is so because the alleged statements made in the confession are directly contradicted by the undisputed evidence adduced at the hearing on the Motion for Release. For example, Marc's alleged statement that he was the "getaway driver" was contradicted by the March 30 Video and this argument was abandoned by the State of Florida in favor of their Plan C "lookout" theory.[137]

[136] The general law of principals applies to any felony murder rule analysis because: "…the felony murder rule and the law of principals combine to make a felon liable for the acts of a co-felon." *Beachy v. State*, 837 So.2d 1152, 1152 (Fla. 1st DCA 2003).

[137] *See* Apx. 5 at P. 115, L. 2-3 (arguing that Marc is a principal to the underlying crimes because "[t]he defendant is acting as a lookout.")

Likewise, Marc's alleged statement that he intentionally shot at Rodriguez as he fled the scene was refuted by the physical evidence and witness statements and the entire count of the Indictment focusing on these alleged actions (Count VII) was dropped by the State of Florida.[138]

Just as in the case of Plan A and Plan B, the evidence proffered at the hearing on the Motion for Release discredits the State's argument that Marc was the "lookout" for the attempted armed robbery. First, the alleged confession the State so heavily relies upon contradicts its Plan C theory. In the confession, Marc allegedly indicates that his role was that of the "getaway driver" not the "lookout."[139]

Second, although Jean allegedly brought two (2) handguns to the exchange, he didn't leave either in the BMW with Marc. There were no guns found in the BMW.[140] The gun Marc touched on the Date of Incident, he picked up next to his brother's dying body.[141]

Third, if Marc was supposed to be the "lookout," his brother would have kept his cellular phone on him so that Marc could contact him in the event of trouble. In

[138] *See* Apx. 4 at P. 5, L. 11-14.

[139] *See* Apx. 3, Ex. 1 at P. 22, L. 10-20; and P. 66, L. 7-9.

[140] *See* Apx. 4 at P. 157, L. 11-13.

[141] See Apx. 5 at P. 157, L. 11 through P. 158, L. 1.

this case, ***there was no intent that Marc would stay in contact with Jean once he was inside the Unit.*** We know this because Jean left his cellular phone in the BMW, plugged in and charging.[142] No other communication devices were found on Jean's body.[143]

Finally, the State argued that a few seconds of the March 30 Video, where Marc was aimlessly wandering around the parking lot and staring at nothing in particular except for a fence, was direct evidence that he was acting as the "lookout." At best, this is circumstantial evidence of participation (requiring the inference that Marc is looking out for danger). The property is located on a dead-end street with two roads leading from the property, one heading North and one heading East.[144] A lookout would be looking down one of those roads where any potential danger was likely to come. The only place the March 30 Video shows Marc looking for any length of time is West, directly into a long wooden fence.[145]

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[142] *See* Apx 3, Ex. 8; Apx. 4 at P. 83, L. 19 through P. 84, L. 9; and Apx. 5 at P. 149, L. 16-25.

[143] *See* Apx. 4 at P. 83, L. 19 through P. 84, L. 9; and Apx. 5 at P. 157, L. 11 through P. 158, L. 1.

[144] *See* Apx. 4 at P. 93, L. 21 through P. 94, L. 24. Photographs of the subject property looking East and North from the parking lot were introduced as Defense Exhibits D and E, respectively. These photographs are attached as Apx. 11.

[145] *See* Apx. 4, P. 89, L. 1 through P. 90, L. 24. Photographs of the fence Marc was staring at directly to the West of the subject property were introduced at the hearing

Ultimately, the State's position asked the Court to ignore all of the contradictory statements allegedly made in the alleged confession and focus instead on the sole statement that cannot be contradicted by physical evidence (Marc's alleged intent to participate in the robbery) however, this statement alone cannot meet the State's burden of proof where the evidence of Marc's alleged actions in furtherance of the attempted armed robbery is substantially contradictory. *See e.g. J. L. B. v. State*, 396 So. 2d 761 (Fla. 3d DCA 1981) ("It is a 'basic premise of Anglo-American criminal law ... that no crime can be committed by bad thoughts alone. Something in the way of an act ... is required too.' So far as this record demonstrates, J.L.B. simply walked to the car along with an acquaintance, stood there while the crime took place, and ran off after it occurred. This is simply insufficient to establish the overt assistance or participation which is required to justify an adjudication as an aider and abettor.") (internal citations removed).

While the State of Florida may be able to argue in favor of its view of the evidence at trial, because the evidence is conflicting and because it is subject to multiple interpretations, the State of Florida did not meet the proof evident, presumption great standard. *See Seymour,* 132 So. 3d at 303 (If facts would support something other than life felony, proof not evident, ***if the facts are subject to more***

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on the Motion for Release as Defense Exhibits B and C, respectively. These photographs are attached at Apx. 12.

than one interpretation then guilt is not evident.) *Mininni v. Gillum*, 477 So.2d 1013, 1015 (Fla. 2d DCA 1985) ("It may well be that a jury could legitimately conclude that [the defendant] acted without justification and is, in fact, guilty as charged. ***On the other hand, the facts as presented to the circuit court are also susceptible of interpretations ranging from a lesser degree of murder down to excusable homicide. We simply cannot conclude that the state met the substantial burden of proof…"***)

The evidence established at the hearing on the Motion for Release clearly demonstrated that: (a) Marc was not a getaway driver as he is seated in the passenger seat of the car driven by his brother; (b) Marc does not actively participate in any way in the alleged attempted armed robbery as he is seated in the car until after the shots are fired and the attempted armed robbery, if any, has already failed; (c) Marc is not even in eyesight of the shootings while sitting in the car parked on the other side of the Unit in which the incident took place; (d) Marc does not threaten or shoot at anyone; (e) Marc does not touch anyone; (f) Marc does not even flee the scene after the shootings, instead he waits for the authorities; and (g) Marc immediately and peacefully surrenders to the police once they arrive.

The Third District case of *G.C. v. State*, 407 So.2d 639 (Fla. 3d DCA 1981), is directly on point:

Accepting all of the evidence in a light most favorable to the state at

> best there is proof that (1) G.C. knew that Delgado was going to burglarize an apartment, (2) G.C. followed Delgado to the scene of the crime, (3) G.C. stood back at least fifteen feet and watched Delgado remove jalousie glasses from the window of the apartment. The evidence before the court is less than that necessary to prove that G.C. aided and abetted in the attempted burglary.
> …
>
> The state implores that the necessary elements of intent and act may be inferred because G.C. knew that Delgado was going to commit a crime and was present during Delgado's attempt, ***it is established beyond and to the exclusion of any reasonable doubt that G.C. was a "lookout".*** Where two or more inferences must be drawn from the direct evidence, then pyramided to prove the offense, the evidence lacks the conclusive nature necessary to support a conviction.
>
> ***Presence at the scene, without more, is not sufficient to establish either intent to participate or act of participation. Mere knowledge that an offense is being committed is not equivalent to participation with criminal intent.***

Id. at 640 (internal citations omitted).

Facts of participation in the underlying crime, even beyond those proffered by the State at the hearing on the Motion for Release have been held to be insufficient overt acts to make the Defendant liable as a principal for crimes committed by co-defendants.

The facts of Marc's participation in the alleged attempted armed robbery are even less than those submitted in *G.C.* (as Marc did not see the alleged crime occur because he was waiting in the car) and *J. L. B.* (as Marc was not present for the alleged crime as a show of force and did not flee the crime scene after the crime had

been committed). ***Even with the un-Mirandized confession, discussed above, the State of Florida's current pending charges seek to stretch the law of principal liability to include mere presence at a crime scene with knowledge that a crime is going to occur.*** Marc will defend against any attempt by the State to do so, however, at this stage of the litigation, Marc is entitled to pretrial release on reasonable conditions while the State of Florida pursues these novel charges.

V. NATURE OF RELIEF SOUGHT.

For all of the foregoing reasons, Marc seeks issuance of a Writ of Habeas Corpus requiring the Circuit Court to order Marc's release upon satisfaction of reasonable conditions of bail.

Respectfully Submitted,

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By: */s/ Michael James Corey*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of July, 2015, I served the foregoing document via the method of service indicated in the below service list.

/s/ Michael James Corey

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CERTIFICATE OF COMPLIANCE WITH FLA. R. APP. P. 9.110(L)

I HEREBY CERTIFY that this Petition is computer generated in Times New Roman 14 point font and complies with the font requirements of Fla. R. App. P. 9.110(l).

/s/ Michael James Corey