

# LEGAL BULLETIN

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ELECTRA THEODORIDES-BUSTLE, EXECUTIVE DIRECTOR

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## 11th Circuit Court of Appeals

### Florida's willful fleeing statute (§ 316.1935(2)) is not a "violent felony" under ACCA residual clause of 18 U.S.C. § 924(e)(2)(B)(ii).

Harrison pled guilty to possession of a firearm by a convicted felon, 18 U.S.C. § 922(g)(1) ("Count 1"), and to possession of an unregistered, short-barrel shotgun, 26 U.S.C. § 586(d) ("Count 2"). His sentence was enhanced under the Armed Career Criminal Act's (ACCA) residual clause of 18 U.S.C. § 924(e)(2)(B)(ii). Harrison appealed his enhanced sentence arguing his prior 2000 conviction under § 316.1935(2) (willful fleeing) does not constitute a "violent felony" under ACCA.

The 11th Circuit noted that the United State's Supreme Court, in the last two years, has "instructed lower courts on how to read the residual clause." See Chambers v. United States, 555 U.S. -, 129 S. Ct. 687, 691-93 (2009); Begay v. United States, - U.S. -, 128 S. Ct. 1581, 1586-88 (2008); and James v. United States, 550 U.S. 192, 127 S. Ct. 1586, 1597 (2007). The Supreme Court determined in each case

"whether a state crime was a 'violent felony' under ACCA" and the 11th Circuit recounted, in its lengthy analysis, the history surrounding the Supreme Court's decisions for "determining whether a state crime involved 'conduct that presents a serious potential risk of physical injury to another' within the meaning of the ACCA."

After a lengthy analysis and noting Florida's willful fleeing "statutory scheme differentiates between different types of fleeing behavior," the 11th Circuit concluded that the nature of simple fleeing (§ 316.1935(2)) does not present a "serious potential risk of injury" because "disobeying a police officer's signal and continuing to drive on, without high speed or reckless conduct, is not sufficiently aggressive and violent enough to be like the enumerated ACCA crimes." The 11th Circuit remanded for resentencing "without the ACCA's increased penalties."

[*United States v. Harrison* , 02/19/09]



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## 8th Circuit Court of Appeals

### Coworkers who looked at employee's computer did

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**not amount to an illegal search.**

Inman worked as a paramedic. While he was away, his coworkers began a casual conversation about him and his new girlfriend. When they could not remember her name, they opened Inman's laptop that was sitting on the table. Upon opening the computer, they noticed file names that suggested child pornography. After seeking "hypothetical advice", they later turned Inman in and he got charged with three counts of child pornography. Inman moved to suppress the evidence as an illegal search in violation of the Fourth Amendment. The federal district court denied his motion.

The Eighth Circuit affirmed saying that Inman's coworkers were not acting with the intent to assist the government in an investigatory or administrative purpose. They were acting as ordinary citizens.

[United States v. Inman 03/05/09]



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## **Florida Supreme Court**

**Redacted police report was not hearsay; it was properly admitted into evidence to show defendant had knowledge**

**about Brown testifying against him, thus showing motive to kill Brown.**

Smith who was convicted of first-degree murder and sentenced to death raised nine issues on direct appeal. One issue argued was that the trial court erred "in admitting into evidence a police report concerning the Johnson murder that was found in Smith's bedroom."

The record reflected that Smith, along with seven other individuals, was "indicted by a Miami-Dade County grand jury in a seventeen-count indictment for crimes committed in connection with the John Doe organization." The John Doe organization, a criminal enterprise, was "the subject of a joint state and federal task force. Smith, alleged to be the ring leader was "named in fourteen counts of the indictment, including conspiracy to engage in a criminal enterprise, engaging in a criminal enterprise, conspiracy to traffic in marijuana, conspiracy to traffic in cocaine, five counts of first-degree murder for the deaths of Leon Hadley, Cynthia Brown, Jackie Pope, Angel Wilson, and Melvin Lipscomb, four counts of conspiracy to commit murder, and second-degree murder for the death of Marlon Beneby."

Cynthia Brown was the sole witness against Smith in the murder of Dominique Johnson. Charges against Smith were dropped "when Brown was discovered dead less than a week before the Johnson trial." In the instant trial, the State introduced a "report through Detective Frank Alphonso, who had investigated the Johnson killing." The detective "recovered a copy of this report from the nightstand in Corey Smith's bedroom in his mother's house when a search warrant related to the John Doe

drug investigation was executed.” The report “included information about Cynthia Brown coming forward as a witness to the shooting and the fact that she had identified Smith as the shooter.” Defense objected to the report saying it was full of hearsay. Agreeing to redact portions of the report, the State argued that it only wanted to admit the part that said “Brown had identified Smith as the shooter and was planning to testify against him at trial, which gave Smith motive for killing Brown.”

The Court determined that the police report in this case clearly goes to the material issues of knowledge and motive in Brown’s murder and held that the report was properly admitted into evidence under § 90.801(1)(c), Fla. Stat. (2005). The Court held “the police report was not hearsay because it was not admitted to prove that Smith killed Dominique Johnson. Rather, it was admitted to prove Smith’s knowledge and motive in the Brown killing, both of which were relevant issues.” The Court also found the death sentences to be proportionate.

[*Smith v. State*, 03/19/09]



## 1st District Court of Appeals

**Trial court properly denied suppression motion; search of vehicle did not exceed the scope of the warrant.**

Merriel pled no contest to trafficking in cocaine and appealed the dispositive denial of his motion to suppress incriminating evidence arguing that the search exceeded the scope of the warrant.

The record revealed that Merriel was under police surveillance as he was believed to be involved “in the illegal drug trade.” Police had a warrant “commanding them to search appellant’s home as well as ‘all persons, vehicles, and outbuildings, located on the curtilage thereof,’ for ‘evidence of possession and/or distribution of controlled substances.’” Investigator Gilbert testified they could have executed the search warrant at any time during their surveillance, “but they made a ‘deliberate decision’ to wait until appellant left the premises” because they believed a small child and some dangerous dogs were inside Merriel’s home and detaining Merriel “off-site would eliminate the dangers associated with executing the warrant with him inside the home.” Merriel left the home in a vehicle driven by his wife. He was approximately one block from the house when the vehicle was stopped. While Merriel was detained in a police van, the vehicle was brought back to the home and a search revealed a quantity of cocaine.

The 1st DCA determined that the “officers could and would have searched the car while it was on the premises, but for their reasonable concern about the prudence of doing so.” The 1st DCA noted that in Lassiter v. State, 959 So. 2d 360, 362 (Fla. 5th DCA 2007), “five miles was a ‘reasonable . . . distance’ from the residence to neutralize officers’ safety concerns; the block between the vehicle and its origin in this case was equally reasonable under these circumstances.” The 1st DCA found that Merriel’s rights were not violated because stopping the vehicle immediately after it left the home did

not exceed the scope of the search warrant. When affirming Merriel's conviction and sentence, the 1st DCA noted that "[c]ases such as this require us to take note of the realities of law enforcement and police officers' duty to conduct operations safely while assiduously honoring suspects' constitutional rights."

[Merriel v. State, 03/13/09]



**Trial court correctly excluded officer's testimony; evidence is evidence that proves or disproves a material fact.**

Joyner, convicted for first-degree murder and robbery with a firearm, appealed raising two issues: Whether the trial court erred in denying his peremptory strike of a juror, and whether it was error to exclude a defense witness. The 1st DCA affirmed Joyner's convictions and wrote only to address why it was not error to exclude the one witness.

The record reflected a discrepancy in the testimony of the medical examiner, the police officer who found the casings and an FDLE expert firearms analyst regarding the bullets recovered from the victim during autopsy and the casings recovered at the scene of the incident. The FDLE expert firearms analyst confirmed that the bullet casing initially identified at the crime scene as a .22 caliber casing was actually from a .25 caliber cartridge. He also identified the three bullets removed from the victim's body as one .25 caliber bullet and two .380

caliber bullets which contradicted the medical examiners identification of the .25 caliber bullet as a .22 caliber bullet. At trial, Joyner wanted to call Officer Bailey regarding the arrest, eight months after the victim's murder, of a Mr. Morman and his possession of a .22 caliber weapon. Joyner argued it was relevant and presented a jury question since the jury could find that a .22 caliber bullet had been found and Mr. Morman could be implicated for the murder. The trial court, sustaining the State's objection, excluded Officer Bailey's testimony, finding that Mr. Morman's arrest with a .22 caliber weapon was prejudicial and not relevant in a homicide case where a .25 caliber weapon was used.

The 1st DCA noted that [r]elevant evidence is evidence tending to prove or disprove a material fact. 90.401, Fla. Stat. A trial court should exclude even relevant evidence if any probative value of the proffered evidence is substantially outweighed by the danger of unfair prejudice, confusion of issues, [or] misleading the jury. Bartlett v. State, 993 So. 2d 157, 165 (Fla. 1st DCA 2008)(quoting 90.403, Fla. Stat. (2003)).

The 1st DCA determined that there was no probative evidence that a .22 caliber weapon was used in the crime. Joyner did not rely on the medical examiner's testimony in support of his argument to admit it into evidence, the officer confirmed his error and the FDLE expert testified and confirmed the correct bullets removed from the victim's body and the correct casings located at the crime scene. As such, the 1st DCA held there was no abuse of discretion in the trial court's ruling that admitting such evidence would present a danger of unfair prejudice or confusion of the facts and affirmed the trial court's ruling.

[Joyner v. State, 02/24/09]



1D07-5544Joyner.pdf

## 3rd District Court of Appeals

### Trial court did not err; confession was not the product of an illegal detention.

Robinson, convicted on two counts of first-degree murder, one count of attempted first-degree murder, one count of possession of a firearm by a convicted felon, and one count of use of a firearm while committing a felony, appealed arguing “his initial consensual encounter with the police evolved into an arrest without probable cause, triggering a Fourth Amendment violation.”

The record reflected that Robinson called the police, “saying that he was wanted on murder charges and wanted to turn himself in.” When the police picked-up Robinson, he was handcuffed and placed in the back of the police vehicle. While in the police vehicle, Robinson had a “panic attack.” “Fire Rescue was called” and Robinson was treated. After being treated, Robinson was transported to the police station, placed in an interview room, his handcuffs were removed, he was given his Miranda warnings, he was interviewed by the police and “he admitted his involvement in the homicides.” Robinson was again given his Miranda warnings and the detectives “took a formal statement in front of a court reporter, which was also videotaped.” Robinson wanted to “withdraw his previous statements” and the detectives “asked about the details of his earlier unrecorded

statement,” which is listed in detail in the opinion. Miranda v. Arizona, 384 U.S. 436 (1966).

The 3rd DCA determined that Robinson’s confession was not the product of an illegal detention. Robinson voluntarily turned himself in; based on his statement he was wanted on murder charges, it was reasonable for the officers to transport him in handcuffs; and in his sworn statement at the station, Robinson again “confirmed he voluntarily turned himself in.” The 3rd DCA affirmed the denial of the suppression motion basing its reliance on the authority used in Simmons v. State, 934 So. 2d 110, 1113-14 (Fla. 2006), a similar case to the instant case.

Robinson further argued that “the detectives’ questions amounted to factual assertions about what the defendant had said previously in the unrecorded interview” and that “these questions amounted to testimonial assertions” and were admitted in violation of Crawford v. Washington, 541 U.S. 36 (2004). The 3rd DCA rejected this argument stating that “the Crawford decision addresses the Confrontation Clause test for the admissibility of out-of-court testimonial witness statements,” noting that in this case “the officers asked interrogation questions.” The 3rd DCA stated that Robinson had not “offered any authority for the proposition that a police officer’s questions amount to testimonial statements for purposes of Crawford.” The decision of the trial court was affirmed.

[Robinson v. State, 03/04/09]



3D06-2534Robinson.pdf

### Suppression of evidence related to the ownership of the scooter was error.

The State appealed the order granting Reyes' motion to suppress all evidence regarding Reyes' identity and the scooter in his possession.

The record revealed Reyes, charged with third degree grand theft of a motor scooter and giving a false name, argued in his suppression motion that "there was nothing about his behavior that would objectively justify the investigatory stop that led to discovery of that evidence." The incident centered around Officer Cuellar asking Reyes if he needed assistance pushing a red scooter across a busy intersection. The officer testified at the hearing to several reports of stolen scooters, there was no key in the ignition, Reyes appeared nervous and was sweating, and Reyes told the officer he had no identification on him but said his name was Caesar Rodriguez and the scooter belonged to a friend, "whose last name and address he did not know." The officer suspected the scooter was stolen, feared "Reyes might be armed," and conducted a pat-down. No weapon was found, however, the officer pulled out a driver's license with Reyes' real name and photograph. While Officer Cuellar was conducting the pat-down, a back-up officer confirmed the scooter belonged to a local scooter store after checking the scooter's vehicle identification number (VIN). Reyes was then arrested.

The 3rd DCA affirmed the suppression of the evidence seized regarding Reyes' identity because that "exceeded the scope authorized by section 901.151 of the Florida Statutes." However, the evidence regarding the legal ownership of the scooter should not have been suppressed. The 3rd DCA concluded that the confirmation regarding the legal ownership of the scooter was independent from the pat-down search and "legally obtained following a valid

investigatory stop and temporary detention." Thus, "[s]ince it was not connected to the tainted evidence obtained pursuant to the illegal pat-down search, it should not have been suppressed." The 3rd DCA reversed the suppression of the evidence relating to ownership of the scooter.

[*State v. Reyes*, 02/18/09]



3D08-0710Reyes.pdf

## 4th District Court of Appeals

**Suppression order reversed; proceedings necessary to determine whether defendant was subject to custodial interrogation when he made the statements.**

The State appealed the order granting Soloman's motion to suppress the statements he gave to police. The statements were suppressed after the trial court found "that Soloman was not given adequate Miranda warnings; specifically, the trial court found that Soloman was not informed that he had the right to the presence of an attorney during questioning." Miranda v. State, 384 U.S. 436 (1966).

The 2nd DCA noted that Soloman's Miranda warnings were identical to the warnings at issue in State v. Powell, 998

So. 2d 531 (Fla. 2008). In Powell, the Florida Supreme Court held that Powell was not “clearly informed” of his right to the presence of an attorney during the custodial interrogation and that “to advise a suspect that he has the right ‘to talk to a lawyer before answering any of our questions’ constitutes a narrower and less functional warning than that required by Miranda.”

The 2nd DCA held that based on Powell, Soloman was not adequately informed of his right to the presence of an attorney during custodial interrogation. However, the 2nd DCA stated that “even if the Miranda warnings were insufficient, Soloman’s statements to detectives are admissible if Soloman was not subject to custodial interrogation when he made the statements.” As such, the 2nd DCA reversed the suppression order and remanded “for further proceedings in which the trial court must determine whether Soloman was subject to custodial interrogation when he made the statements at issue.”

*EDITOR’S NOTE: THE STATE WILL FILE A PETITION FOR CERTIORARI REVIEW FROM State v. Powell, 998 So. 2d 531 (Fla. 2008), IN THE USSC ON OR BEFORE MARCH 23, 2009.*

[*State v. Soloman*, 03/11/09]



2D08-1250Soloman.pdf

## **Trial court erred; evidence was lacking to prove defendant aided and abetted the shooter.**

Aime, convicted and sentenced for

manslaughter with a firearm, appealed arguing “the evidence was insufficient to support the manslaughter conviction because the State failed to establish that he was the shooter and aided and abetted another in the fatal shooting.”

Aime was originally charged with first-degree murder. At trial, the State’s two witnesses revealed that they never “actually saw the defendant rob or shoot the victim or saw the defendant in possession of a firearm.” Defendant moved for judgment of acquittal at the close of the State’s case and “the trial court granted the motion on the first-degree murder charge because the State was unable to prove that the defendant had possessed the gun, but allowed the case to go to the jury on a felony murder charge based on the principal theory and robbery.” The State requested “all of the category 1 lessers” and the jury was instructed on “first degree felony murder and the lesser offenses of second degree murder and manslaughter, both with and without a firearm.” The jury found Aime guilty of “the lesser included offense of manslaughter with a firearm, and also made a factual finding that the defendant did not possess the firearm.”

The 4th DCA noted that on appeal the State argued that since Aime did not object to the lesser included offenses, he therefore, “waived his right to raise the sufficiency of the evidence as to the manslaughter charge,” and further argued that the evidence was sufficient. The 4th DCA determined that it was not Aime who asked “for the instruction on category one lesser included offenses,” it was the State that requested them. Further, “as category one . . . , the trial court had no discretion on whether to give the instruction. . . Thus, there was no waiver on the part of the defendant that prevents him from arguing the insufficiency of the evidence on the

lesser included manslaughter charge.” As to the sufficiency of the evidence, the 4th DCA concluded that the “trial court had already determined that the evidence was insufficient to establish that the defendant possessed a gun, leaving only the possibility that the defendant aided or abetted the shooter” and that evidence was lacking. The 4th DCA held the evidence presented was insufficient to “prove beyond a reasonable doubt that the defendant committed manslaughter” and reversed Aime’s conviction and remanded for discharge.

[*Aime v. State*, 02/18/09]



4D07-1759Aime.op.pdf

## **Trial court erred; defendant made an unequivocal request for counsel.**

After the trial court denied the withdrawal of his negotiated no contest plea, Collins filed a rule 3.850 motion raising several issues. Following an evidentiary hearing, the trial court denied Collins’ claims and he appealed arguing ineffective assistance of counsel for counsel’s failure “to seek suppression of his statement to police and in connection with the entry of his plea.” Collins contends the evidence produced at the evidentiary hearing “was sufficient to warrant relief under Strickland.” Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984).

The 4th DCA noted in its analysis that while “police are not required to stop a custodial interrogation when a suspect, who has waived his *Miranda* rights, makes an

equivocal or ambiguous request for counsel,” questioning must cease when the suspect makes an unequivocal request for counsel. State v. Owen, 696 So. 2d 715, 717-18 (Fla. 1997) and Davis v. United States, 512 U.S. 452, 459 (1994).

The 4th DCA found that Collins “made an unequivocal request for counsel.” Collins received his Miranda warnings and on two occasions, as reflected in the record, requested the presence of counsel. On one occasion Collins said “I still would feel more comfortable with a lawyer present” and another time said “I’d like to speak with legal counsel. . .” This last time the officer said “okay” but continued to talk with Collins and told him the police had his prints and that he was picked out as the suspect in a photo line-up. Collins finally agreed to talk to the police without counsel and confessed. The 4th DCA concluded that “since the police failed to cease questioning following such unequivocal request for counsel, Collins’ statement was subject to suppression.”

Defense counsel testified she made a tactical decision to not suppress the statement to police because the portrait of Collins as a hungry homeless person, who was a drug addict and only went into Subway to steal food was “better admitted via the statement, than having Collins, a ten-time convicted felon, testify.” Further, defense counsel did not believe “the statement would be a deciding factor in the case.” The 4th DCA determined that the “statement went a long way toward establishing his guilt” and held that “trial counsel’s failure to seek suppression of Collins’ statement to police cannot be justified as a reasonable tactical decision.” Further, the 4th DCA held that “Collins has satisfied *Strickland*’s prejudice prong, i.e., that there is a reasonable probability that but for counsel’s error, he would not have

entered the plea.” The suppression order was reversed and the 4th DCA remanded “the case to the trial court with directions that Collins be permitted to withdraw his plea.”

[*Collins v. State*, 03/04/09]



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## **Trial court violated defendant's right against self-incrimination under Art. I, § 9, Fla. Const.**

Cowan, convicted of burglary, appealed his conviction arguing the trial court violated his Florida right against self-incrimination.

The record reflected that after Cowan “and a companion” were arrested for burglary, they were placed in the back of a police vehicle where a video monitor recorded them. At trial and over defense counsel’s objection, the trial court allowed the recording to be admitted into evidence reasoning that Cowan “was not being interrogated by police at the time.” The prosecution was also allowed to ask several questions regarding why Cowan never responded to “his companion’s implied accusations” and was later to repeatedly “emphasize defendant’s silence” during closing arguments. Cowen argued “the trial court violated his Florida right against self-incrimination when it admitted the recording” and that the trial court erred in allowing the prosecution to emphasize his silence during closing argument. Cowan “contends that the recording became the foundation for the State instead to question him about remaining silent and to argue that his silence was really evidence that he was guilty.”

The 4th DCA noted that while it did not appear Cowan and his companion had received their *Miranda* warnings when they were left in the police vehicle, “[t]he Florida Supreme Court has held that regardless of whether the federal *Miranda* warning has been given, the Florida right against self-incrimination attaches at the time of arrest.” *State v. Hoggins*, 718 So. 2d 761, 768-69 (Fla. 1998); Art. I, § 9, Fla. Const. (providing that an individual shall not “be compelled in any criminal matter to be a witness against himself”). Thus, “defendant’s right against self-incrimination attached at the instant of his arrest --- even without *Miranda* warnings.” Further, “[w]hen evidence or argument is ‘fairly susceptible of being interpreted by the jury as a comment on silence,’ it violates defendant’s right against self-incrimination under Florida Law.” *Hoggins*, 718 So. 2d 769.

The 4th DCA concluded “the prosecution’s cross-examination and closing argument were ‘fairly susceptible’ of being interpreted by the jury as a comment on defendant’s silence” and that the “State has failed to demonstrate beyond a reasonable doubt that this error had no effect on the jury.” The 4th DCA reversed for a new trial.

[*Cowan v. State*, 03/11/09]



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