IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08 - 751

EUDENIS TRIANA, :

Petitioner, :

vs. :

THE STATE OF FLORIDA, :

Respondent. :

ON REVIEW OF A DECISION OF THE
THIRD DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER EUDENIS TRIANA

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TABLE OF CONTENTS

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 1

JURISDICTIONAL ARGUMENT 2

I. THE THIRD DISTRICT DECISION'S MISAPPLICATION OF A DECISION FROM THIS COURT CREATES JURISDICTIONAL CONFLICT 2

II. THE THIRD DISTRICT DECISION CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ON THE SAME POINTS OF LAW 6

III. REASONS WHY THIS COURT SHOULD EXERCISE ITS DISCRETION AND ACCEPT JURISDICTION 10

CONCLUSION 10

CERTIFICATE OF SERVICE 11

CERTIFICATE OF COMPLIANCE 11

TABLE OF AUTHORITIES

Cases

Aravena v. Miami-Dade County,
928 So.2d 1163 (Fla. 2006).....6

Conner v. State,
803 So.2d 598 (Fla. 2001)..... 1, 2, 3, 4

Cowan Liebowitz & Latman, P.C. v. Kaplan,
902 So.2d 755 (Fla. 2005).....6

Cox v. State,
975 So.2d 1163 (Fla. 1st DCA 2008) 4

Davis v. Monahan,
832 So.2d 708 (Fla. 2002).....6

Knowles v. State,
848 So.2d 1055 (Fla. 2003).....2

Kutzorik v. State,
891 So.2d 645 (Fla. 2d DCA 2005) 1, 7, 10

Luna-Martinez v. State,
33 Fla.L.Weekly D854, 2008 WL 782889, (Fla. 2d DCA March 26, 2008) 10

Miller v. State,
865 So.2d 584 (Fla. 5th DCA 2004) 1, 6, 10

Pinkerton-Hays Lumber Company v. Pope,
127 So.2d 441 (Fla. 1961).....2

Spivey v. Battaglia,
258 So.2d 815 (Fla. 1972).....2

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STATEMENT OF THE CASE

The Third District opinion is by its very nature an incomplete recitation of the facts and the evidence before the trial court, and to that extent misleading simply by omission. But for purposes of determining jurisdiction, Triana accepts the Third District opinion as the statement of the case. A copy of the decision is appended.

SUMMARY OF ARGUMENT

The Third District's reversal of the suppression order in this case cannot be reconciled with *Miller v. State,* 865 So.2d 584 (Fla. 5th DCA 2004), or *Kutzorik v. State*, 891 So.2d 645 (Fla. 2d DCA 2005), both of which directed suppression on similar fact patterns. The three cases share over nine similar circumstances within the totality of circumstances reviewable under the obligation of two stage appellate review dictated by *Connor v. State,* 803 So.2d 598 (Fla. 2001). "This obligation stems from

the appellate court's responsibilities to ensure that the law is applied uniformly in decisions based on similar facts . . . ." *Connor*, 803 So.2d at 608. The Third District's misapplication of *Connor*, and the lack of uniformity in appellate treatment of "knock and talk" residential warrantless searches by the several district courts are patent.

JURISDICTIONAL ARGUMENT

I.

THE THIRD DISTRICT DECISION'S MISAPPLICATION OF A DECISION FROM THIS COURT CREATES JURISDICTIONAL CONFLICT.

Misapplication of a decision of this Court creates conflict vesting jurisdiction in this Court. See, e.g., *Knowles v. State*, 848 So.2d 1055 (Fla. 2003). This becomes especially acute when standards of review are misconstrued. *Id.* Cf. *Spivey v. Battaglia*, 258 So.2d 815 (Fla. 1972) (summary judgment ruling that unsolicited hug was an assault as a matter of law rather than a question of fact was a misapplication of assault/negligence precedent in *McDonald*); *Pinkerton-Hays Lumber Company v. Pope*, 127 So.2d 441 (Fla. 1961) (subjective application of the objective test of foreseeability was a misapplication of the law announced in *Cone*).

The Third District set forth the standard of review it utilized in this case in the following language:

> We employ a mixed standard of review in considering the trial court's ruling on Mr. Triana's motion to suppress. The trial court's determination of historical facts enjoys a presumption of correctness and is subject to reversal only if not supported by competent, substantial evidence in the record. *However, the trial court's determinations on mixed questions of law and fact and its legal conclusions are subject to de novo review*. [Slip op. at 5; e.s.]

The Third District cites this Court's decision in *Conner v. State*, 803 So.2d 598, 608 (Fla. 2001), to support its methodology of review. The highlighted portion of the District Court is a misstatement and misapplication of *Connor*. On appeal the evidence, and all reasonable inferences and deductions that can be derived from the evidence, must be interpreted in the manner most favorable to sustaining the trial court's ruling. Legal conclusions are reviewed *de novo*. The standard of review in this case and cases like it is an "independent" review that combines deference to facts and uniform application of the law to those facts. In full context, *Connor* provides:

> This Court previously has accorded great deference to a trial court's ruling on a motion to suppress: "A trial court's ruling on a motion to suppress comes to us clothed with a presumption of correctness and, as the reviewing court, we must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling." As stated by the United States Supreme Court, mixed questions of law and fact that ultimately determine constitutional rights should be reviewed by appellate courts using a two-step approach, deferring to the trial court on questions of historical fact but conducting a de novo review of the constitutional issue.

* * *

> Despite this deference to a trial court's findings of fact, the appellate court's obligation to independently review mixed questions of fact and law of constitutional magnitude is also an extremely important appellate principle. This obligation stems from the appellate court's responsibilities to ensure that the law is applied uniformly in decisions based on similar facts and that the defendant's representation is within constitutionally acceptable parameters.
>
> Accordingly, . . . appellate courts should continue to accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth and Fifth Amendment and, by extension, article I, section 9 of the Florida Constitution. [803 So.2d at 605-608; citations omitted].

The Third District's *de novo* review of "the trial court's determinations on mixed questions of law and fact" was a clear misapplication and misinterpretation of *Connor*. *Connor* mandates an "independent" review conducted in two stages, the first of which is due deference to the trial court's findings of fact. It is only the trial court's conclusions of law that are subject to *de novo* review.

A correct interpretation of the *Connor* standard of review can be found in the recent *Cox v. State*, 975 So.2d 1163, 1166 (Fla. 1st DCA 2008):

> Although the trial court's "determination of historical facts" is presumed correct, we must "independently review mixed questions of law and fact that ultimately determine constitutional issues" arising from the Fourth Amendment. *Connor v. State*, 803 So.2d 598, 608 (Fla.2001); [citation omitted]. We review *de novo* the legal conclusions drawn from the facts. *See Connor*, 803 So.2d at 606.

The Third District's reweighing of evidence and rejection of reasonable inferences is apparent on the face of the opinion. While the Court acknowledged the State's proof of voluntary consent must survive a "totality of the circumstances" analysis (Slip op. at 2), the Third District goes on to dissect the totality of circumstances into separate pieces for analysis in isolation.

As one example, the Third District says, "The fact that four officers were present during the encounter does not *necessarily* indicate coercion . . ." and cites a federal case with a parenthetical "presence of four officers, *without more* . . ." and a Fourth District case with a parenthetical "presence of two officers at defendants' hotel room *alone*, *absent evidence* of coercive words or acts, misrepresentation, deception, or trickery . . ." (Slip op. at 10 - 11, e.s.). In this case, the trial court found factually a great deal more than the mere presence of four officers. The opinion discloses a number of the circumstances within the totality of the circumstances considered by the trial court, that take this case out of the "four officers, without more" category.

II.

THE THIRD DISTRICT DECISION CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ON THE SAME POINTS OF LAW.

It is the irreconcilable, real and embarrassing conflict that vests jurisdiction in this Court. See, *Aravena v. Miami-Dade County*, 928 So.2d 1163 (Fla. 2006); *Cowan Liebowitz & Latman, P.C. v. Kaplan*, 902 So.2d 755 (Fla. 2005); *Davis v. Monahan*, 832 So.2d 708 (Fla. 2002).

The District Court decision in this case is in irreconcilable conflict with *Miller v. State*, 865 So.2d 584 (Fla. 5th DCA 2004) which states:

> [W]e must determine if a seizure occurred based on a "show of authority." This determination is made by consideration of the "totality of the circumstances" of the encounter. If the circumstances would cause a reasonable person to conclude that he or she is "not free to decline the officers' requests or otherwise terminate the encounter," then the encounter is a seizure requiring, at a minimum, reasonable suspicion as a prerequisite.
>
> Among the factors that the court should consider in its analysis are the place and time of the encounter, the number of officers, and the words and actions of the officers. No one factor is dispositive. Rather, it is the court's responsibility to consider all factors in the amalgam and reach the conclusion suggested by the "totality of the circumstances." Here, our review of the relevant factors leads us to the conclusion that a reasonable person would not have felt free to decline the officer's requests.
>
> The first factor, the place of the encounter, the front yard of Ap-

> pellant's home, rather than a public place, militates against the state. . . . [T]he intrusion into the citizen's life involves not only a physical intrusion on the citizen's property but also the likely realization by the citizen that the government knows who he or she is and where he or she lives. This unsettling revelation is further exacerbated when, as here, the officers make clear to the citizen that he or she is the suspect in a specific criminal investigation. Although somewhat mitigated by the time of day, these circumstances certainly foster a more intimidating atmosphere in the mind of a reasonable person.
>
> . . . [T]he issue is not the validity of the police purpose in choosing its manpower commitment. Rather, we must determine how a reasonable person would perceive three officers arriving at one's home, simultaneously, dressed as these officers were dressed. [citations omitted].

The District Court decision in this case is in irreconcilable conflict with *Kutzorik v. State*, 891 So.2d 645 (Fla. 2d DCA 2005), which states:

> To begin with, the search was of Kutzorik's home. The home is where a person enjoys the highest expectation of privacy. [citations omitted]. As such, the factors bearing on the voluntariness of a consent to search must be specially scrutinized. . . . Moreover, when the police confront a person in her home, it is clear that the authorities know who she is and where she lives. This is far different from-and far more unsettling than-an anonymous encounter on the street. . . . When law enforcement announces its presence at a citizen's home, she has no real opportunity to walk away. Here, the police knocked on Kutzorik's door at about 10 p.m. This late hour of the night added to the intimidating circumstance that Kutzorik faced.
>
> At least three uniformed officers entered the small mobile home. . . . The fact that Kutzorik knew she was the target of the investi-

> gation, and that law enforcement believed she was hiding drugs in her home, suggests a seizure rather than a consensual encounter. Moreover, the number of uniformed officers present inside Kutzorik's small home was likely alarming to her.
>
> * * *
>
> The totality of the circumstances in this case-beginning with the late-night arrival of a uniformed officer at the door, continuing with the entry of three uniformed officers into the small home, followed by an announcement that the police suspected a crime and knew drugs were on the premises, and culminating with repeated requests for consent to search when the resident was in an emotional state-were such that no reasonable person would have felt free to end the encounter by demanding that law enforcement leave her home. To the contrary, a reasonable person would believe that compliance with the officers' "requests" was mandatory.

The totality of the circumstances in *Miller*, *Kutzorik*, and *Triana* include the following circumstances in common:

	Miller	*Kutzorik*	*Triana*
Home/residence confrontation/search	Yes	Yes	Yes
Confined quarters with limited ingress/egress	Yes	Yes	Yes[1]
Time of day/night	Noon	10:00 PM	9:00 PM

[1] *Miller* - initial confrontation outside residence between residence and automobile, with police at the edge of driveway; *Kutzorik* - initial confrontation outside mobile home; *Triana* - initial confrontation outside gated, six foot fenced residence.

Number of uniformed officers	three	at least 3	at least 4
Identified as Target/Suspect	Yes	Yes	Yes
Accusation of Drugs on Premises	Yes	Yes	Yes
Emotional state preceding "consent"	Yes	Yes	Yes
Concession of "no probable cause" for search	Yes	Yes	Yes
Case Specific Coercion/Intimidation	Yes	Yes	Yes[2]

Based on the totality of circumstances, the *Miller* court held: "We conclude, based upon the totality of the circumstances, that a reasonable person would have felt compelled to comply with the officers' requests . . . ." 865 So.2d at 585. Based on the totality of circumstances, the *Kutzorik* court held: "The totality of the circumstances in this case . . . were such that no reasonable no reasonable person would have felt free to end the encounter by demanding that law enforcement leave her home." 891 So.2d at 648. Based on the totality of circumstances, the Third District in *Triana* held: "Under these facts, there is no basis for concluding that a reasonable person in Mr. Triana's

[2] It is undisputed one of the officers in this case "blew the emergency horn on his police car . . . to announce their presence at the residence. *As a result* [e.s.], Triana's girlfriend exited the residence and met the officers at the locked gate." (Slip op. at 3). The trial court found this show of authority, and the reasonable inference and deduction therefrom, to be a coercive circumstance among the totality of circumstances. The Third District substituted its judgment for that of the trial court and trivialized this circumstance within the totality of the coercive circumstances present in this case.

situation would believe that he was either under arrest or otherwise compelled to leave the house (sic)." The express and direct conflict is indeed irreconcilable.

III.

REASONS WHY THIS COURT SHOULD EXERCISE ITS DISCRETION AND ACCEPT JURISDICTION.

There are actually four cases in irreconcilable conflict. *Miller, Kutzorik, Triana*, and *Luna-Martinez v. State*, 33 Fla.L.Weekly D854, 2008 WL 782889, (Fla. 2d DCA March 26, 2008). A reading of all four cases, including the several dissenting opinions, makes it clear there is a need for uniformity in *Connor* directed appellate review of the totality of the circumstances in these warrantless, no probable cause "knock and talk" residential searches and seizures.

CONCLUSION

This Court should accept jurisdiction, resolve the conflicts, and reinstate the order of suppression in this case.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on Magaly Rodriguez, Esquire, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 444 Brickell Avenue, Suite 650, Miami, Florida 33131; Silvia M. Gonzalez, Esquire, 6500 Cow Pen Road, Suite 303, Miami Lakes, Florida 33014; and Marco A. Quesada, Esquire, Quesada Beckham, PLLC, 2730 S.W. 3rd Avenue, Suite 305, Miami, Florida 33129, this 9th day of May, 2008.

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