

**IN THE SUPREME COURT OF FLORIDA**

CASE NO. SC07-1105  
DCA CASE NO. 3D06-199

**RODNEY CALABRO,**

**Petitioner,**

**-vs-**

**STATE OF FLORIDA**

**Respondent.**

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**ON PETITION FOR DISCRETIONARY REVIEW FROM  
THE DISTRICT COURT OF APPEAL OF FLORIDA,  
THIRD DISTRICT**

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**BRIEF OF RESPONDENT ON JURISDICTION**

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## **INTRODUCTION**

Petitioner, Rodney Calabro, was the defendant in the trial court and the appellant in the Third District Court of Appeal. Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the Third District Court of Appeal. The parties shall be referred to as they stand in this Court.

## STATEMENT OF THE CASE AND FACTS

Respondent appealed a trial court order excluding certain statements Petitioner made at his November, 2002 arraignment. After the assistant public defender was appointed, he made his appearance, requested a jury trial, demanded discovery and asked about the charges. The prosecutor responded and the clerk gave the parties a trial date in March, 2003. The following exchange then took place:

Mr. Calabro: Is there any possible way I can get an earlier date? I just want to get this over with as soon as possible. I know what I'm saying. I'm very coherent, my mind is a proven perspective. I'll just like to avoid trial and get sentenced on this.

You should have talked to me three weeks ago, I haven't had no representation since I've been in jail, for three weeks. Where have you been? I will like to avoid the trial and have some kind of plea agreement set earlier than March or whatever that was.

The Court: Four weeks for report.

The Prosecutor: No.

The Court: Just report regarding status.

The Prosecutor: That's fine, Judge.

Mr. Calabro: I know this is unusual but unfortunately, I'm guilty of this. And the police up there, what they say up there is what you are getting. And you are getting the truth, maybe I'm catching some people off guard here.

But if an attorney came to see me within its past three weeks, maybe they'll have an idea of where my mind is at but right now I'm guilty. I'm not proud of it, but.

The Court: This is the first time I appoint[ ] this gentleman in particular to represent you.

Mr. Calabro: Supposedly there was somebody representing me.

The Court: The Public Defender was appointed, but the Public Defender in general, at your bond hearing. But this gentleman in particular I just appointed.

*State v. Calabro*, 957 So. 2d 1210, 1211-12 (Fla. 3d DCA 2007).

Respondent conceded that Petitioner's first statement requesting "some kind of plea agreement" was inadmissible under Fla. R. Crim. P. 3.172(h) and §90.410, Florida Statutes. Respondent argued that Petitioner's second statement admitting his guilt to the charged offense was admissible because it was an unsolicited, unilateral statement not made in connection with any plea negotiation. The trial court determined both statements were inadmissible offers for a plea agreement. Respondent appealed, challenging only the admissibility of Petitioner's second statement. On April 18, 2007, the district court reversed in a written opinion. *Calabro*, 957 So. 2d 1210.

In its opinion, the district court followed this court's cases employing a two-tiered analysis to determine whether a statement is made in connection with plea negotiations and therefore inadmissible against the accused. First, a court must

determine whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion. Second, a court must determine whether the accused's expectation was reasonable under the totality of the objective circumstances. The district court found Petitioner failed to meet either prong of the test. The court noted that Petitioner's statement was made at his arraignment when he had just met his appointed counsel, who knew nothing about the case. The prosecutor had not indicated any willingness to enter a plea bargain and there were no plea negotiations taking place between the prosecution and the defense. Petitioner made his statement without any prompting or inducement and it was not in response to any preliminary questions. The court held "[c]learly, Calabro's unsolicited, unilateral statement was not made during a free and open discussion between the prosecution and the defense in an attempt to reach any compromise. Therefore, we conclude that given the totality of the objective circumstances, Calabro could not have had a reasonable subjective belief that his statement was a part of any plea negotiation." *Calabro*, 957 So. 2d at 1213. Petitioner now seeks discretionary review in this Court.

### **SUMMARY OF THE ARGUMENT**

There is no basis upon which discretionary review can be granted in this case. The Third District Court's opinion does not conflict with any case of this Court or of any other district court in Florida. Consequently, conflict jurisdiction

does not exist for the exercise of this Court's discretionary jurisdiction to review the decision below. This Court should therefore deny Petitioner's petition to review the decision of the district court.

### ARGUMENT

#### **PETITIONER'S APPLICATION FOR DISCRETIONARY REVIEW MUST BE DENIED BECAUSE THE THIRD DISTRICT COURT OF APPEAL'S DECISION DOES NOT DIRECTLY OR EXPRESSLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OR THIS COURT.**

Petitioner contends that this Court should invoke its discretionary review power to review the Third District Court of Appeal's decision in the instant case. Petitioner claims that the district court's decision conflicts with the opinions of this and other courts in *Davis v. State*, 842 So. 2d 989 (Fla. 1st DCA 2003); *Debiasio v. State*, 789 So. 2d 1061 (Fla. 4th DCA 2001); *McCray v. State*, 760 So. 2d 988 (Fla. 2d DCA 2000); and *Russell v. State*, 614 So. 2d 605 (Fla. 1st DCA 1993). Respondent submits that this Court does not have any jurisdiction to review the Third District Court's opinion.

The jurisdiction of this Court is limited to a narrow class of cases enumerated in the Florida Constitution. As this Court explained in *The Florida Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988), the state constitution creates two separate concepts regarding this Court's discretionary review. The first concept is



the broad general grant of subject-matter jurisdiction. The second more limited concept is a constitutional command as to how this Court may exercise its discretion in accepting jurisdiction. 530 So. 2d at 288. This Court noted it lacked jurisdiction to review district court opinions that fail to expressly address a question of law. *Id.* Further, this Court lacks jurisdiction over district court opinions that contain only citation to other case law unless the case cited as controlling authority is pending before this Court, or has been reversed or receded from by this Court, or explicitly notes a contrary holding of another district court or this Court. 530 So. 2d at 288 n.3, citing, *Jollie v. State*, 405 So. 2d 418 (Fla. 1981).

Article V, Section 3(b)(3), Fla. Const. (1980) and Fla. R. App. P. 9.030(a)(2)(A)(iv), provide that the discretionary jurisdiction of the Supreme Court of Florida may be sought to review a decision of a district court of appeal which expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court of Florida on the same question of law. Decisions are considered to be in express and direct conflict when the conflict appears within the four corners of the majority decisions. “Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.” *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986).

The rationale for limiting this Court’s jurisdiction is the recognition that district courts “are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.” *Jenkins v. State*, 385 So. 2d 1356, 1358 (Fla. 1980).

This Court cannot exercise its discretionary jurisdiction to review the decision below because, contrary to Petitioner’s claim, the decision below is not in express or direct conflict with *Davis*, *Debiasio*, *McCray*, or *Russell*, or any decision from this Court or any other district court on the same questions of law.

Petitioner first distinguishes the facts of the cases cited by the district court in its opinion. (Petitioner’s Brief on Jurisdiction, p. 47). Petitioner then argues that *Debiasio*, *McCray* and *Russell* all involve unsolicited letters to the State Attorney’s Office requesting leniency and including admissions of guilt. (Petitioner’s Brief on Jurisdiction, p. 7). Finally, Petitioner argues the district court’s opinion ignores the fact that his initial statement included an express request for a plea agreement, leaving the holding in conflict with *Davis*, *Debiasio*, *McCray*, or *Russell*. Petitioner claims “by holding or suggesting that no defendant could have a reasonable expectation that he could be plea bargaining at Arraignment or at any other pre-trial proceeding where his attorney is not prepared

to go to trial or there has not been adequate communication between them adds an additional element to the issue not contained in *Davis*.” (Petitioner’s Brief on Jurisdiction, p. 9).

The district court’s opinion does not conflict with the four cases cited by Petitioner. The district court correctly cited and followed this Court’s cases requiring the use of a two-tiered analysis to determine if a statement is made in connection with plea negotiations, and therefore, inadmissible. The court examined the circumstances surrounding Petitioner’s statement, concluding that “given the totality of the objective circumstances, Calabro could not have had a reasonable subjective belief that his statement was part of any plea negotiation.” 957 So. 2d at 1213. The district court’s opinion, in which it articulated and applied the proper analysis, does not conflict with Petitioner’s cited cases.

Further, Petitioner’s cited cases are distinguishable. The courts in *Davis* and *Russell* concluded that the statements at issue were clearly part of **ongoing** plea negotiations. In contrast, Petitioner’s statements were not part of **ongoing** plea negotiations and the district court concluded he could not reasonably have believed they were part of **any** plea negotiation. *McCray* and *Debiasio* each involve a letter from the defendant offering to plead guilty in exchange for some concession from the state. As the district court found, the statement at issue in the instant case is merely an unsolicited admission of guilt not made in connection with any plea

negotiation. The factual distinctions between the instant case and the four cases cited by Petitioner cannot form the basis of this Court's discretionary jurisdiction. *Reaves*, 485 So. 2d 829.

Further, in the decision below, the Third District Court of Appeal did not certify conflict with any of the four cases cited by Petitioner, or with any other case, and did not certify a question to this Court. Petitioner's cases are not pending review in this Court, have not been reversed or receded from by this Court, and do not note a contrary holding. Therefore, the Third District Court's opinion does not give rise to any express conflict and this petition to invoke discretionary review must be denied.

### CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Respondent respectfully requests that this Court decline jurisdiction to review this cause.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was mailed to Charles G. White, Counsel for Petitioner, 1031 Ives Dairy Road, Suite 228, Miami, FL 33179 this \_\_\_\_ day of October, 2007.

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ANGEL L. FLEMING  
Assistant Attorney General

**CERTIFICATE OF TYPEFACE COMPLIANCE**

I HEREBY CERTIFY that the foregoing Response was written using 14 point Times New Roman in compliance with Fla. R. App. P. 9.210(a)(2).

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ANGEL L. FLEMING  
Assistant Attorney General

