IN THE SUPREME COURT OF FLORIDA

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

RODNEY CALABRO,

Petitioner,

-vs-

STATE OF FLORIDA

Respondent.

APPEAL FROM
THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE FACTS AND THE CASE

On November 25, 2002, Calabro was charged by information with one count of second degree murder. (R. 17-19). The arraignment was held on November 26, 2002. (R. 34-40). During the arraignment, the trial court reviewed Calabro's financial affidavit and appointed a public defender to represent Calabro. (R. 36-37). Immediately thereafter, the following colloquy ensued:

> [THE PUBLIC DEFENDER]: Stand mute, demand discovery, trial by jury. Is it murder second degree?
>
> [THE PROSECUTOR]: Is that in a - - right now, it is. I have discovery and I also amended discovery will [sic] all the reports that I have at this time.
>
> THE COURT: Set for trial.
>
> CLERK: March 10th.
>
> 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.
>
> [PROSECUTOR]: No.
>
> THE COURT: Just report regarding status.
>
> [PROSECUTOR]: That's fine, Judge.

> CALABRO: I know this is unusual but unfortunately, I'm guilty of this. And the police up there, what they say up there is; this 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.
>
> 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.
>
> * * *
>
> THE COURT: I'll see him on December 18th, Wednesday; does that give you sometime to speak to him?
>
> [PUBLIC DEFENDER]: Sure.
>
> THE COURT: And we will see what his mind set is at that time....

(R. 37-39). (Emphasis added).

On November 30, 2005, Calabro filed a motion to exclude the statements emphasized above, alleging that the statements were offers to plead guilty or made in connection with plea negotiations, and therefore, inadmissible under section 90.410 of the Florida Statutes and Florida Rule of Criminal Procedure 3.172(h). (R. 143-161). The state filed a response. (R. 170-75). The state conceded that the

first statement uttered by Calabro, "I will like to avoid the trial and have some kind of plea agreement," is inadmissible under section 90.410, Florida Statutes, and Rule 3.172(h) of the Florida Rules of Criminal Procedure. As to the second statement, "I know this is unusual but unfortunately I'm guilty of this .... right now I'm guilty," the state argued that it was a separate and distinct, unsolicited and unilateral utterance, which did not satisfy the two-prong test required by the Florida Supreme Court in characterizing a statement or discussion as an inadmissible plea negotiation.

On January 11, 2006, the trial court entered an order excluding both statements, concluding that the statements made by Calabro "were offers for a plea agreement and are inadmissible pursuant to § 90.410, Fla. Stat. (2005) and Fla. R.Crim. P. 3.172(h)." (R. 186). The state appealed the trial court's order, challenging only the exclusion of the second statement by Calabro. The Third District Court of Appeal determined that the second statement is admissible as an unsolicited, unilateral utterance not made in connection with any plea negotiation and reversed the trial court. State v. Calabro, 957 So.2d 1210 (Fla. 3d DCA 2007). On November 29, 2007, this Court accepted jurisdiction of this case.

SUMMARY OF ARGUMENT

For more than twenty-five (25) years, this Court has clearly and consistently held that, to determine whether a statement is made in connection with plea negotiations, a court should first determine whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion. Whether a defendant's subjective expectation of negotiating a plea is reasonable depends on whether the state has indicated a willingness to plea-bargain and has in fact solicited the statement in question from the defendant. Second, a court should determine whether the accused's expectation was reasonable given the totality of the objective circumstances. Unsolicited, unilateral utterances are not statements made in connection with plea negotiations.

Accordingly, this Court has determined that an incriminating statement is inadmissible if made by a defendant during ongoing bilateral plea negotiations while the defendant is actively seeking to negotiate a plea agreement where the defendant would plead guilty in return for a concession by the state. On the other hand, this Court has determined that a spontaneous, unilateral, unsolicited statement made without any prompting or inducement is admissible. Such a statement is admissible even if the defendant and the state had previously engaged

in bilateral plea negotiations and the defendant had agreed to plead guilty in return for concessions by the state.

Here, the district court determined as follows:

> Calabro fails to meet either prong of the test.
>
> > At the time Calabro uttered the statement admitting his guilt neither side was in any position to negotiate a plea. Calabro had just been appointed a public defender, whom he met for the first time at the arraignment hearing. Calabro's counsel did not know the facts of the case nor the evidence against his client. The State never indicated a willingness to enter into a plea bargain with Calabro nor were negotiations taking place between the State and Calabro. Calabro's statement admitting his guilt was not made in response to any preliminary questions or in exchange for any concession from the State. Calabro, instead, made the statement without any prompting or inducement. Clearly, 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.

State v. Calabro, 957 So.2d 1210, 1213(Fla. 3d DCA 2007). The district court's decision is correct and perfectly consistent with this Court's decisions.

Calabro contends that the district court's decision is in conflict with Davis, Russell, McCray and Debiasio. However, the Court in Davis determined that the defendant's statement was inadmissible because it was made as part of ongoing plea negotiations where the defendant was seeking to induce a concession from the state. This determination is perfectly consistent with this Court's decisions. It is

also consistent with the decision of the district court in this case because the facts are clearly distinguishable. Calabro's statement was not made as part of ongoing plea negotiations and never sought any concession from the state.

Russell, McCray, and Debiasio, are distinguishable from this case because they involved the admissibility of offers by defendants to plead guilty in return for sentencing concessions by the state; rather than the admissibility of incriminating statements made by defendants. Such offers are plainly inadmissible, regardless of whether there were ongoing negotiations, regardless of whether the offer was unsolicited, and regardless of whether the defendant made an incriminating statement or admission of guilt. These cases do not conflict with the district court's decision in this case, and are clearly distinguishable from this case. Calabro never asked for any concession from the state in return for his admission of guilt. Obviously, any expectation to negotiate a plea by offering an unconditional admission of guilt without seeking any concession in return, is neither subjectively nor objectively reasonable. Nonetheless, Respondent conceded that Calabro's first statement, "I will like to avoid the trial and have some kind of plea agreement set earlier than March or whatever that was," was an inadmissible offer for a plea agreement and did not seek the admission of this

statement. Thus, the cases determining whether an offer to plead guilty is admissible are inapposite.

ARGUMENT

THE DISTRICT COURT CORRECTLY DETERMINED THAT CALABRO'S STATEMENT RELATING TO HIS ADMISSION OF GUILT WAS AN UNSOLICITED, UNILATERAL UTTERANCE NOT MADE IN CONNECTION WITH ANY PLEA NEGOTIATION, AND IS THEREFORE ADMISSIBLE.

Fla. Stat. § 90.410 provides:

> Offer to plead guilty; nolo contendere; withdrawn pleas of guilty.
>
> Evidence of a plea of guilty, later withdrawn; a plea of nolo contendere; or an offer to plead guilty or nolo contendere to the crime charged or any other crime is inadmissible in any civil or criminal proceeding. Evidence of statements made in connection with any of the pleas or offers is inadmissible, except when such statements are offered in a prosecution under chapter 837.

Respondent notes that this statute has not been amended since 1979.

Fla.R.Crim.P. 3.172(h) provides:

> Except as otherwise provided in this Rule, evidence of an offer or a plea of guilty or nolo contendere, later withdrawn, or of statements made in connection therewith, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

Rule 3.172(h) is simply a judicial restatement of the provisions of section 90.410. Richardson v. State, 706 So.2d 1349, 1356, fn. 12 (Fla. 1998). Respondent notes that as of September 2006 3.172(h) became 3.172(i). See In re Amendments to Fla. Rules of Crim. Pro. 3.170 and 3.172, 938 So.2d 978, 983 (Fla. 2006)**Error! Bookmark not defined.**. However, there has been no substantive change to this provision since Rule 3.172 was adopted in 1977. See The Florida Bar re Florida Rules of Criminal Procedure, 343 So.2d 1247, 1254-55 (Fla. 1977).

Thus, these rules provide that evidence of an offer to plead guilty, or of statements made in connection therewith, is inadmissible.

a. THIS COURT'S DECISIONS REGARDING THE ADMISSIBILITY OF STATEMENTS.

In Stevens v. State, 419 So.2d 1058 (Fla. 1982), this Court adopted a two-tiered process for determining whether a discussion should be characterized as a plea negotiation so as to render it inadmissible in evidence. To determine whether a statement is made in connection with plea negotiations, a court should determine, first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances. Id. at 1062. Whether a defendant's subjective expectation of negotiating a plea is reasonable

depends on whether the state has indicated a willingness to plea-bargain and has in fact solicited the statement in question from the defendant. Id. Unsolicited, unilateral utterances are not statements made in connection with plea negotiations. Id.

In Stevens, the state indicated a willingness to allow the defendant to plead guilty in exchange for a recommended sentence of life imprisonment rather than death, or to plead guilty to a lesser, non-capital offense. As a condition precedent to such a plea bargain, the state demanded a polygraph examination for the purpose of determining the extent of the defendant's participation in the criminal episode leading to the murder. The defendant agreed to submit to the polygraph test. Before being connected to the machine, the defendant spontaneously made a statement concerning his participation in the crime. This Court concluded that the statement was not made in connection with plea negotiations. This Court explained:

> Although the polygraph examination was arranged so that appellant's version of the criminal episode could be substantiated and although this was agreed to so that the parties could proceed to reach a negotiated plea, appellant's spontaneous, unilateral statement was not connected to those negotiations in the sense contemplated by the rule of exclusion we are applying. The statement was not made during an actual polygraph examination nor was it made in response to any preliminary questions. Appellant made the statement spontaneously without any prompting or inducement. Appellant had no reasonable

> subjective belief that his statement was a part of the plea negotiations.

Stevens v. State 419 So.2d at 1062. [Emphasis added.]

Thus, in Stevens, the defendant and the state had engaged in bilateral plea negotiations and the defendant had agreed to plead guilty in return for a concession by the state, i.e, a recommended sentence of life imprisonment rather than death, or a plea to a lesser offense than that charged. Despite the bilateral negotiations and the defendant's offer to plead guilty in return for a concession by the state, this Court held that the defendant's spontaneous, unilateral statement was admissible because it was made without any prompting or inducement, and was therefore not made in connection with the plea negotiations.

Here, there were no negotiations between the state and Calabro, and the state never even indicated a willingness to enter into negotiations for a plea bargain with Calabro. As in Stevens, Calabro made the spontaneous, unilateral statement admitting his guilt without any prompting or inducement. Further, Calabro never asked for any concession from the state in return for his admission of guilt. Obviously, any expectation to negotiate a plea by offering an unconditional admission of guilt without seeking any concession in return, is neither subjectively nor objectively reasonable. Accordingly, the district court correctly determined

that Calabro fails to meet either prong of the two-tiered analysis adopted by this Court. Moreover, in Stevens, the fact that the defendant had offered to plead guilty did not preclude this Court from finding his subsequent spontaneous, unilateral statement admissible. Similarly, here, even if this Court determines that the first statement uttered by Calabro, "I will like to avoid the trial and have some kind of plea agreement," is an inadmissible offer for a plea agreement, Calabro's subsequent spontaneous, unilateral statement admitting guilt is admissible. Accordingly, the district court properly determined:

> We also conclude that whether the statements are viewed as two separate statements or the continuation of a single statement, is of no consequence. The State's agreement not to introduce the initial statement made by Calabro does not constitute a waiver nor does it preclude the introduction of the remainder of Calabro's statement, which we have found was not made in connection with plea negotiations.

State v. Calabro, 957 So.2d 1210, 1213, fn. 1 (Fla. 3d DCA 2007).

In Anderson v. State, 420 So.2d 574 (Fla. 1982), the defendant was being transported by police officers from Minnesota to Florida to face murder charges and made an incriminating statement to them during the trip. This Court applied the two-tiered test it adopted in Stevens and, in ruling that the statement was inadmissible because it was made during plea negotiations, this Court declared:

> The state argues that the discussion during which Anderson offered to plead guilty if the state would forego seeking the death penalty did not constitute plea bargaining because the deputies did not have the authority to negotiate a plea. Testimony at the suppression hearing, however, established that both Anderson and his attorney believed that they were bargaining for a plea and that the senior deputy had spoken with the state attorney by telephone regarding talking with Anderson. In his testimony at the hearing, the other deputy referred to the February discussion as "plea negotiations." On the totality of the circumstances the deputies' disavowal to Anderson and his Minnesota attorney that they could finalize a plea bargain on the spot does not remove the February statement from the process of plea negotiations. The facts of this case demonstrate that Anderson actively sought to negotiate a plea agreement and did not merely make an admission.

Id. at 576-77. [Emphasis added.]

Thus, this Court determined that the statement was inadmissible because it was made by the defendant during bilateral plea negotiations while the defendant was actively seeking to negotiate a plea agreement where he would plead guilty in return for a concession by the state.

Here, as previously noted, there were no negotiations between the state and Calabro, and the state never even indicated a willingness to enter into negotiations for a plea bargain with Calabro. Calabro made the spontaneous, unilateral statement admitting his guilt without any prompting or inducement. Further,

Calabro never asked for any concession from the state in return for his admission of guilt. Obviously, any expectation to negotiate a plea by offering an unconditional admission of guilt without seeking any concession in return, is neither subjectively nor objectively reasonable.

In Bottoson v. State, 443 So.2d 962 (Fla. 1983), cert. denied, 469 U.S. 873, 105 S.Ct. 223, 83 L.Ed.2d 153 (1984), the defendant requested that two ministers visit him at the jail. When they arrived he handed them two written statements confessing to the murder and requesting leniency. This Court determined that "unsolicited, unilateral statements are [not] under the aegis of [Fla. Stat. § 90.410]." Id. at 965. This Court explained:

> appellant's expectation that he was involved in a plea negotiation was not reasonable. The ministers were not agents for the state nor did they pretend to be. Appellant gave them his statements before there was any discussion as to the role they would play in helping him to obtain leniency. Thus we fail to find any error in the admission of these statements into evidence.

Id. [Emphasis added.]

Here, as in Bottoson, Calabro gave his statement before discussing or requesting any concession from the state.

In Groover v. State, 458 So.2d 226 (Fla. 1984) and Wainwright v. State, 704 So.2d 511 (Fla. 1998), this Court held that incriminating sworn statements made in fulfillment of a negotiated plea bargain-as opposed to statements made to

induce or to enhance negotiations-are not statements made in connection with a plea. This Court explained that when an agreement has been reached, further statements cannot be made in the expectation of negotiating a plea.

In Richardson v. State, 706 So.2d 1349 (Fla. 1998), this Court elaborated on the application of the first step of the two-tiered analysis adopted by this Court: "In applying the first prong, the trial court must carefully distinguish between the accused's admissions and the accused's attempts to negotiate a plea bargain. In other words, the trial court must appreciate the tenor of the conversation." Id. at 1353. This Court concluded that Richardson's statement was inadmissible because "the statement was given during the repeated and ongoing plea negotiations between Richardson and the government." Id. at 1356.

This Court noted as follows:

> The record reflects, without dispute, that Richardson was engaged in plea negotiations and that Ladwig was acting as the negotiator between Richardson and the State Attorney prosecuting the case, David Damore. In fact, at the time when Richardson is alleged to have confessed, an agreement already signed by the State Attorney was actually presented to him by Ladwig, based upon their previous negotiations, that essentially provided that if Richardson confessed he would be allowed to plead guilty to second-degree murder, thereby eliminating any risk of the death penalty. Further, at the same time plea negotiations were going on in this case, Richardson successfully negotiated a plea agreement with the State in another case.

Id. at 1351. [Emphasis added.]

This Court further explained:

> it is undisputed that the statement took place during the process of ongoing plea negotiations when a written plea agreement predicated upon prior plea discussions, and already fully executed by the State Attorney, was presented to Richardson for consideration. Clearly, as in Roberts, the State's offer here contemplated that as a quid pro quo, Richardson would "give a full and complete proffer (statement) admitting his murdering Mrs. Carrie Lee on or about February 14, 1991." Hence, the circumstances support both a "subjective expectation" on Richardson's part to negotiate a plea, and a reasonable basis for the expectation, evidenced by the State's obvious desire to negotiate a plea, which included repeated oral offers conditioned upon a statement and a written offer including the same condition.
>
> As in Anderson, we reject any suggestion that the police officer, Ladwig, was not authorized to negotiate or that the plea negotiations ended when, because the defendant objected to some of the terms of a written agreement, no final agreement was concluded on the day in question. Here the officer conceded that he was negotiating in order to secure a statement, and, indeed, he came to the negotiations armed with a written and signed agreement from the State. Further, as in Anderson, the undisputed facts demonstrate that Richardson also repeatedly and consistently "actively sought to negotiate a plea agreement" and his actions were not "unilateral offers" but were part of bilateral negotiations between the parties. 420 So.2d at 577. Further, as noted above, at the same time these negotiations were going on Richardson successfully negotiated a plea agreement with the State in another pending case, and the parties were obviously close to an agreement here. It is undisputed that the entire purpose of Ladwig's meeting with Richardson was for the

> continuing purpose of negotiating an agreement to get Richardson's confession. Ladwig was the State's negotiator while the defendant was negotiating for himself. The "tenor of the conversation" between Ladwig and Richardson leads to no other conclusion. Robertson, 582 F.2d at 1367.

Id. at 1354. [Emphasis added.]

Thus, in Richardson, this Court determined that the defendant's statement, i.e., confession, was inadmissible because it was made while the defendant was engaged in ongoing bilateral plea negotiations with the state wherein the defendant was actively seeking to negotiate a plea agreement with the state which contemplated the defendant's confession in return for a concession by the state, i.e., that the defendant be allowed to plead guilty to a lesser offense to eliminate the risk of the death penalty.

In Owen v. Crosby, 854 So.2d 182 (Fla. 2003), this Court determined that the defendant had failed to meet either prong of the two-tiered test. This Court explained:

> Owen claims that because he had previously negotiated a plea with Detective Marc Woods in 1982, this led him to believe that he was negotiating a plea with the State in the instant case. Owen also contends that numerous statements made by Officer Kevin McCoy (McCoy) led him to actually and reasonably believe that the officers had the power to negotiate which charges he would face. However, Owen fails to acknowledge that McCoy told him prior to the interview and repeatedly throughout the interview that he could not make any

promises. Further, after a dinner break, McCoy read Owen his Miranda rights, which included the statement: "I can make no threats or promises to induce you or force you to make a statement. It must be of your own free-will." Owen indicated that he understood his rights. Moreover, McCoy told Owen that he was not prepared to "dwindle down" the charges to get him to talk. In fact, McCoy told Owen that he could not even tell him what the charges against him would be: "I have to sit down with the attorney and review it, pal. I can't-I can't tell you what it's going to be." Owen acknowledged that he knew if he confessed there was a possibility that he could receive a death sentence because McCoy could not "guarantee promises." Owen also stated that he knew the State Attorney was the only person that could "give guarantees." Thus, it appears that Owen has misrepresented the record with respect to his actual, subjective expectation; clearly the record shows that Owen knew that the officers could not negotiate a plea in this case.

The instant case differs from the situation this Court considered in Richardson v. State, 706 So.2d 1349 (Fla.1998). In Richardson, the defendant's confession took place during ongoing plea negotiations, where a written plea agreement predicated upon prior plea discussions was fully executed by the State Attorney and presented to the defendant for consideration. See id. at 1354. The officer in Richardson, unlike the officers here, repeatedly told the defendant "that the State would negotiate with him if he would give a statement." Id. at 1355. Since the facts show that Owen could not have had a reasonable subjective belief that his statement was a part of any plea negotiations, Owen fails to show how appellate counsel's failure to raise this claim was deficient conduct.

Id. at 189-90. [Emphasis added.]

Therefore, in Owen, this Court determined that the defendant's statement was admissible because he could not have had a reasonable belief that the statement was a part of any plea negotiations.

Thus, for more than twenty-five (25) years, this Court has clearly and consistently held that, to determine whether a statement is made in connection with plea negotiations, a court should first determine whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion. Whether a defendant's subjective expectation of negotiating a plea is reasonable depends on whether the state has indicated a willingness to plea-bargain and has in fact solicited the statement in question from the defendant. Second, a court should determine whether the accused's expectation was reasonable given the totality of the objective circumstances. Unsolicited, unilateral utterances are not statements made in connection with plea negotiations.

Accordingly, this Court has determined that an incriminating statement is inadmissible if made by a defendant during ongoing bilateral plea negotiations while the defendant is actively seeking to negotiate a plea agreement where the defendant would plead guilty in return for a concession by the state. See Anderson and Richardson, supra. On the other hand, this Court has determined that a spontaneous, unilateral, unsolicited statement made without any prompting or

inducement is admissible. See Stevens, Bottoson, Groover, Wainwright, and Owen, supra. Such a statement is admissible even if the defendant and the state had previously engaged in bilateral plea negotiations and the defendant had agreed to plead guilty in return for concessions by the state. See Stevens, Groover, and Wainwright, supra.

Here, the district court determined as follows:

> Calabro fails to meet either prong of the test.
>
> > At the time Calabro uttered the statement admitting his guilt neither side was in any position to negotiate a plea. Calabro had just been appointed a public defender, whom he met for the first time at the arraignment hearing. Calabro's counsel did not know the facts of the case nor the evidence against his client. The State never indicated a willingness to enter into a plea bargain with Calabro nor were negotiations taking place between the State and Calabro. Calabro's statement admitting his guilt was not made in response to any preliminary questions or in exchange for any concession from the State. Calabro, instead, made the statement without any prompting or inducement. Clearly, 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.

State v. Calabro, 957 So.2d 1210, 1213(Fla. 3d DCA 2007). The district court's decision is correct and perfectly consistent with this Court's decisions.

b. DISTRICT COURT CASES RELIED UPON BY CALABRO.

Calabro contends that the district court's opinion in this case is in conflict with Davis v. State, 842 So.2d 989 (Fla. 1st DCA 2003), where the Court explained the facts of the case as follows:

> Davis, charged with robbery and theft, made the statement at issue while he was in court for a pretrial "rocket docket" arraignment hearing. Defense counsel, the prosecutor, and the judge discussed with Davis the question of a negotiated plea:
>
> MRS. BELLER [defense counsel]: Mr. Davis. Your Honor, Mr. Davis was offered a robbery, second degree, and also a ...
>
> MR. GRAMMER [prosecutor]: Grand theft.
>
> MRS. BELLER: Third degree for retail theft. He was offered two years community control, three years probation. He's declined that plea. We would transfer him to the trial division, and that would be Ann Riehle.
>
> THE COURT: Let me make sure you understand what's happening, Mr. Davis. The, at this point in time the State and you can negotiate back and forth. It's still up to the Court to agree to go along with whatever you negotiate, but once it gets past the point of that, then the issue becomes the jury determining your guilt or innocence of the charge, and if they come back and say you're guilty, then I tell you what your sentence is because I do not negotiate. All right?
>
> MRS. BELLER: Okay, do you understand that if you were found guilty at trial of the robbery, you could receive 15 years in prison?
>
> THE DEFENDANT: Oh, I already told you I was guilty of that, but the grand theft, no, no, no.

Id. at 990. [Emphasis added.] The Court concluded that the statement was improperly admitted at trial because:

> the judge, at the very least, revived the plea negotiations by telling Davis this was the time to negotiate. Just prior to the judge's statement that "at this point in time the State and you can negotiate back and forth," defense counsel indicated that the State had offered Davis two years of community control and three years of probation. Davis's statement was directly responsive to the judge's invitation to negotiate, and his expression of guilt is completely consistent with his desire to induce the State to negotiate a sentence involving some jail time but no probation. Davis thus made the statement at issue as part of ongoing plea negotiations.

Id. at 991. [Emphasis added.]

Therefore, the Court in Davis determined that the defendant's statement was inadmissible because it was made as part of ongoing plea negotiations where the defendant was seeking to induce a concession from the state. This determination is perfectly consistent with this Court's decisions. It is also consistent with the decision of the district court in this case because the facts are clearly distinguishable. As already explained, Calabro's statement was not made as part of ongoing plea negotiations and never sought any concession from the state.

Respondent notes that all of the cases discussed herein thus far have determined the admissibility of incriminating statements made by defendants, and are therefore analogous to this case. On the other hand, the following cases

determined the admissibility of offers to plead guilty in return for concessions by the state, and are therefore distinguishable from this case.

In Russell v. State, 614 So.2d 605 (Fla. 1st DCA 1993), the day before trial the state attorney received a letter from the defendant which stated: "If I could be sentenced under the regular offense and you agree to give me three years and all my county time I will take it and won't go to trial. If you agree to do this. I look forward to hearing from you soon." Id. at 606. [Emphasis added.] The Court explained:

> Appellant points out that plea negotiations had been ongoing, noting that on the Monday before the trial on Thursday, the state had offered a five-year prison sentence in return for a plea of guilty. The state, on the other hand, contends that it did not solicit the pro se letter from appellant to Grimm; that appellant could not have reasonably believed that his gratuitous, unilateral letter, written one day before the scheduled trial date-after plea negotiations had broken off-mentioning a prison term two years less than that offered by the prosecutor, was made "in connection with plea negotiations."

Id. at 607.

> We tend to agree that under the circumstances appellant's letter could, and very probably should be considered a part of ongoing plea negotiations. However, we find it unnecessary to dwell at length upon whether the letter was "unilateral," or "unsolicited," terms which apply to and perhaps have greater significance in cases involving "statements" made in connection with plea offers or negotiations. Importantly, we note that none of the cases relied upon by the state, in which evidence was

> ruled admissible, involve simply offers to plead guilty in return for some concession as was sought by appellant in this case. In fact, all of the cases relied upon by the state are concerned with statements in the form of admissions or confessions of incriminating facts, and are thus to be examined under the "statements" component of the statute, rather than the "offer to plead guilty" provision.

Id. at 608. [Emphasis added.]

> By contrast, the letter admitted against appellant here was nothing more nor less than an offer not to go to trial (in other words, plead guilty), in return for concessions by the state regarding the sentence to be imposed. Other than the unfavorable inferences to be drawn from any defendant's indication that he would be willing to plead guilty to a charge, **there was no admission of any fact or any other statement in the nature of an admission or confession which would tend to establish appellant's guilt of the crime charged**.

Id. at 609. [Emphasis added.]

Therefore, in Russell, the Court held that the defendant's letter was inadmissible because it was clearly an offer to plead guilty in return for concessions. The Court also noted that plea negotiations had been ongoing, and the state had already offered the defendant a concession in return for a guilty plea. Under these circumstances, it was not significant whether the letter was unilateral or unsolicited. The Court also noted that the defendant made no incriminating statement or admission of guilt.

Similarly, in McCray v. State, 760 So.2d 988 (Fla. 2d DCA 2000), the defendant contended that the trial court erred by admitting into evidence the following letter written by him and sent to the state attorney shortly before trial: "Yes! I would like to make a change of plea, I'll plea guilty to both counts, only if you grant me a furlow [sic] to see my (mother) who is dieing [sic] of (bone cancer) before I am set [sic] to prison? I understand by this plea I am giving up all my right to a trial.... Please contact me as soon as possible." Id. at 988-89. [Emphasis added.]

In holding that the letter was no more than an offer to negotiate a plea in return for concessions, the Court explained:

> In Russell v. State, 614 So.2d 605 (Fla. 1st DCA 1993), the First District held that even an unsolicited and self-initiated communication inviting the state attorney to accept a plea offer could not be used against the offering defendant pursuant to section 90.410 and Florida Rule of Criminal Procedure 3.172(h). The First District concluded that the defendant's offer to plead guilty in return for concessions fell under the rule prohibiting the admission of such statements and should have been excluded from evidence. See Russell, 614 So.2d at 612.

Id. at 989.

Respondent notes that in McCray there was no incriminating statement or admission of guilt by the defendant, and there was no indication of any plea negotiations.

In Debiasio v. State, 789 So.2d 1061 (Fla. 4th DCA 2001), a letter from the defendant to the state attorney stated, in pertinent part:

> As per my previous letter that I sent to your office, my clear intentions are outlined in that letter. Again, the reason for that letter was not to merely mask the seriousness of the offenses to which I am charged. It is an attempt to clear the air so to speak, of my ugly drug and alcohol addictions. My new found strenght [sic] orginates [sic] from God, and doing what is right, facing the truth and accepting responsibility for what I've done, was a giant step for me.
>
> My intentions outlined in my previous letter to you are in order to preserve my well being, and that of my family. I wrote to you in confidence, with the hopes of arriving at some sort of resolution, without neglecting the facts of the seriousness of these offenses.
>
> What I want to arrive at, as far as agreement, is that I completely cooperate with the State of Florida and its investigation of the previously named individuals, in return for a sentence that is to be served concurrently with the sentence I'm already serving in Ohio, and to protect myself while in the custody of Florida law enforcement officers, and protecting the name and location of my family. (emphasis in original).

Id. at 1062.

The Court, citing to Russell and McCray, held that the letter, which "amounted to a confession by [the defendant]," was an inadmissible offer to plead guilty. Id. at 1063.

Therefore, Russell, McCray, and Debiasio, involved offers by defendants to plead guilty in return for sentencing concessions by the state. Such offers are

plainly inadmissible, regardless of whether there were ongoing negotiations, regardless of whether the offer was unsolicited, and regardless of whether the defendant made an incriminating statement or admission of guilt.

These cases do not conflict with the district court's decision in this case, and are clearly distinguishable from this case. Here, Calabro never asked for any concession from the state in return for his admission of guilt. Obviously, any expectation to negotiate a plea by offering an unconditional admission of guilt without seeking any concession in return, is neither subjectively nor objectively reasonable. Nonetheless, Respondent conceded that Calabro's first statement, "I will like to avoid the trial and have some kind of plea agreement set earlier than March or whatever that was," was an inadmissible offer for a plea agreement and did not seek the admission of this statement. Thus, the cases determining whether an offer to plead guilty is admissible are inapposite.

Further, as already explained, in Stevens, the fact that the defendant had offered to plead guilty did not preclude this Court from finding his subsequent spontaneous, unilateral statement admissible. Similarly, here, even if this Court determines that the first statement uttered by Calabro, "I will like to avoid the trial and have some kind of plea agreement," is an inadmissible offer for a plea

agreement, Calabro's subsequent spontaneous, unilateral statement admitting guilt is admissible. Accordingly, the district court properly determined:

> We also conclude that whether the statements are viewed as two separate statements or the continuation of a single statement, is of no consequence. The State's agreement not to introduce the initial statement made by Calabro does not constitute a waiver nor does it preclude the introduction of the remainder of Calabro's statement, which we have found was not made in connection with plea negotiations.

State v. Calabro, 957 So.2d 1210, 1213, fn. 1 (Fla. 3d DCA 2007).

In his Initial Brief on the Merits, Calabro cites to Fla.R.Crim.P. 3.160(c) and contends that the district court "appears to have ignored" this rule. However, Calabro fails to explain this contention and failed to raise this contention before the district court.

CONCLUSION

WHEREFORE, the State of Florida respectfully requests an Order of this Court affirming the judgment of the district court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing RESPONDENT'S BRIEF ON THE MERITS was mailed this _____ day of _____, 2008, to Charles G. White, P.A., 1031 Ives Dairy Road, Suite 228, Miami, Florida 33179.

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CERTIFICATE OF COMPLIANCE WITH TYPE AND FONT

I hereby certify that this brief is typed in compliance with the requirements set forth in Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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