IN THE
SUPREME COURT OF FLORIDA

CASE NO. SC07-1105

LOWER TRIBUNAL NO. 3D06-199

RODNEY CALABRO,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.
_____/

APPEAL FROM THE COURT OF APPEALS
FOR THE THIRD DISTRICT, FLORIDA

INITIAL BRIEF ON THE MERITS OF PETITIONER **RODNEY CALABRO**

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INTRODUCTION

This is an appeal from a decision by the Third District Court of Appeal

reversing a Circuit Court of the Eleventh Judicial Circuit in Miami-Dade County's decision to suppress a statement made by the Defendant at his Arraignment.

STATEMENT OF THE CASE

RODNEY CALABRO was arrested on November 4, 2002, for second-degree murder, in violation of Florida Statute Section 782.04(2) (R. 1). He was subsequently charged by Information with second-degree murder (R. 17-19). On November 26, 2002, CALABRO appeared before Judge Cecilia Altonago in the Circuit Court for the Eleventh Judicial Circuit in Miami-Dade County for his Arraignment. During the course of a very brief proceeding, CALABRO made some incriminating remarks. After the State provided notice of its intention to introduce those remarks at CALABRO's trial, he filed a Motion to Suppress alleging the only remarks he made at his Arraignment were suppressible as an offer to plea bargain. Prior to the suppression hearing, the State came to the realization that CALABRO had been making an offer to plea bargain, and conceded the point, but only to the first of two remarks. There was another remark

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made by CALABRO, however, which the State did not feel was covered by the initial offer to plea bargain. The Circuit Court granted the Motion to Suppress, and

the State took an appeal.

The Third District Court of Appeal reversed. State v. Calabro, 957 So.2d 1210 (Fla. 3d DCA 2007). It found that CALABRO did not have a reasonably objective expectation that he would be able to plea bargain his case at Arraignment regardless of his subjective intent. It described the circumstances as follows:

> 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 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.

947 So.2d at 1213.

A timely Motion for Rehearing was denied. This Court accepted jurisdiction in response to CALABRO's contention that the Third District's Opinion ignored or refused to follow the cases of Davis v. State, 842 So.2d 989 (Fla. 1st DCA 2003); Dobiasio v. State, 789 So.2d 1061 (Fla. 4th DCA 2001);

McCray v. State, 760 So.2d 988 (Fla. 2nd DCA 2000); and Russell v. State, 614 So.2d 605 (Fla. 1st DCA 1993).

As a threshold issue, this Court needs to decide whether an unsolicited offer to plead guilty constitutes an offer to plea bargain which would be inadmissible in any context. If the decision as to this threshold issue follows Dobiasio, McCray and Russell, then the second issue is whether an unsolicited offer to plea bargain could be made at any pretrial proceeding in open court such as occurred in Davis or is it limited to certain proceedings and precluded in others. If the Court follows Davis, then CALABRO should prevail.

STATEMENT OF FACTS

On November 26, 2002, when CALABRO appeared for Arraignment, it was determined that he was still indigent and the Public Defender was reappointed. The Public Defender had previously been appointed to represent CALABRO during his Initial Appearance (R. 22). The Public Defender had filed an executed by CALABRO Notice of Defendant's Invocation of the Right to Counsel (R. 21). After the reappointment, CALABRO was arraigned and a trial date was set for

March 10, 2003, which was almost four months in the future (R. 158). It was at that point that CALABRO issued an unsolicited offer to commence plea bargaining. He stated:

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.

MS. SEITCHIK: No.

THE COURT: Just Report regarding status.

MS. SEITCHIK: 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; this is what you are getting. And you are getting the truth, maybe I'm catching some people off guard here.

MR. CALABRO: (Cont.) 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.

(R. 158-159).

The Court finally addressed CALABRO to inform him that although he had

been appointed a Public Defender earlier, he now had a specific lawyer to handle his case. CALABRO responded, and the hearing was concluded.

As indicated above, the State attempted to separate the two remarks for purposes of analysis. As it conceded that the unsolicited offer to plea bargain made by CALABRO initially was suppressible, it claimed that the second statement made mere seconds later was separate. CALABRO took the position that the State's concession extended to the so-called second statement. The Third District developed a new and different analysis which went further than the State had been willing to go: That the whole statement was admissible because CALABRO did not have an objectively reasonable expectation that his offer to plea bargain would be taken seriously. It addressed the sub-issue of the two versus one statement in a footnote:

> 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.

957 So.2d at 1213, n. 1.

CALABRO does not believe that this footnote communicates accurately the notion it claims to articulate. CALABRO never asserted any waiver theory. If the State's concession had no consequence, then deciding that the second statement was

admissible appears to accept the State's notion that there were two statements and not one continuous statement as argued by CALABRO. This would, of course, make the issue "of consequence". The Third District was attempting to articulate the notion that any unsolicited offer to plea bargain at Arraignment was unreasonable when viewed objectively. The Third District's Opinion conflicts with all of the jurisprudence which preceded the decision and is not supported by the very cases cited therein to support it.

SUMMARY OF ARGUMENT

Petitioner clearly made an unsolicited offer to plea bargain at his Arraignment. This occurred in the context of the Court soliciting a plea to the felony charges filed against him. In that context, his remarks not only were subjectively intended to offer a plea bargain, but could be objectively reasonably calculated to receive one.

ARGUMENT

THAT AN UNSOLICITED OFFER TO PLEA BARGAIN MADE AT ARRAIGNMENT CANNOT BE ADMITTED AGAINST A DEFENDANT WHO LATER ENTERS A NOT GUILTY PLEA IF (1) THE DEFENDANT SUBJECTIVELY BELIEVED HE WAS OFFERING THE PLEA BARGAIN, AND (2) THAT BELIEF WAS OBJECTIVELY REASONABLE.

Florida Statute Section 90.410 and Rule 3.172(h) both prohibit the

admission into evidence of guilty pleas and statements made in connection with guilty pleas when the defendant later pleads not guilty and proceeds to trial. The reason underlying this rule is to encourage negotiations between defendants and the State by removing the penalty which would normally adhere to an admission made to a State agent such as a police officer or prosecutor. The Defendant can stand before the Court and admit his guilt to the charges during a plea colloquy, and not suffer to hear his words recited to a jury if he decides not to go through with or withdraw his guilty plea.

Rule 3.160(c) contemplates a situation where the desire to plead guilty manifests itself before the Arraignment. The rule states in pertinent part:

> If a person who has been indicted or informed against for an offense, but who has not been arraigned, desires to plead guilty thereto, the person may so inform the court having jurisdiction of the offense, and the court shall, as soon as convenient, arraign the defendant and permit the defendant to plead guilty to the indictment or information.

In rendering its decision, the Third District appears to have ignored Rule 3.160(c).

As any Judge who has sat on the criminal bench in any county in Florida, but particularly in Miami-Dade County can attest, many cases are resolved by no contest or guilty pleas at arraignment. Defendants waiting to call their case can observe the Court occasionally soliciting the State for a plea offer or defendants alone or through their respective attorneys casting the waters to see if a disposition to the case can be quickly concluded. Frequently, either privately retained counsel

or, in some cases, Assistant Public Defenders have already consulted with their clients, interviewed witnesses, and interceded with the State in the hopes of obtaining a speedy disposition of the case at or around the time of arraignment. The Circuit Court which suppressed the admissions in this case after a hearing was clearly aware of the mixture of hope, frustration, chaos, and anxiety which characterize a typical arraignment calendar in the Circuit Court in Miami-Dade County. Most defendants are not sophisticated. After spending three weeks in the Dade County Jail, they go to Court expecting momentous things to happen. Many indigent defendants who have the Public Defender to represent them at their initial appearance may feel unprepared and unready to proceed to arraignment because of the lack of consultation. This appears to have been one of CALABRO's issues on November 26, 2006. In order to understand whether CALABRO's offer to plea bargain and the admissions he made attendant to it were objectively reasonable, this context must be taken into account. The Third District failed to do so in this case.

The Third District created a new rule or an amendment to Section 90.410 and Rule 3.172(h): If the charge is serious enough, then no defendant could entertain a reasonably objective view that his case could be resolved at

arraignment. Such a distinction does not exist in the law. There is no reason why a second-degree murder case could not be plea bargained away at arraignment as opposed to any other felony. After all, the specific purpose of an arraignment is to solicit a plea from the defendant. There is no rule which prevents the defendant from pleading guilty or no contest. That is what happened in this case, but the Third District was not willing to acknowledge it.

Revealingly, the Third District was unable to cite any case in support of its holding with anything close to a factually similar scenario. The Third District relied upon Owens v. Crosby, 854 So.2d 182 (Fla. 2003); Richardson v. State, 706 So.2d 1349 (Fla. 1998); Groover v. State, 548 So.2d 226 (Fla. 1984); Bottoson v. State, 443 So.2d 962 (Fla. 1983); and Stevens v. State, 419 So.2d 1058 (Fla. 1982). None of these cases involved proceedings in open court. In other ways, they are factually and legally distinguishable from the case at bar.

In Owens, the defendant was attempting to plea bargain with a police officer at the time of his arrest and before he appeared in Court. Despite his clear subjective intent, the police officer made it clear that there would be no plea bargaining by him, only the State Attorney's Office. The defendant's subsequent confession was admitted.

In Richardson, a fully executed plea agreement was honored, and the defendant's inculpatory statements suppressed. In Owens, there was also a formal plea agreement in place, and the defendant maintained that the incriminating statement in question was coerced by it. The Court rejected Owens' claim ruling that the prior plea agreement did not cover the subsequent statement. Owens distinguished its facts from those in Richardson. Obviously, there was no executed plea agreement in this case, and CALABRO never said there was.

In Groover, the issue before the Court was whether the statement in question was made to induce the plea bargain or as a consequence of it. The defendant had entered into a cooperation agreement which was dependent upon him giving a truthful sworn statement. Since the agreement had already been reached, and the defendant in question had been warned that any false statements would result in the revocation of the plea agreement, his inculpatory remarks were admissible. In reaching that conclusion, the Florida Supreme Court suggested that had the facts been different, and the defendant had made the statements in order to induce a plea bargain, they would have been inadmissible.

In Bottoson, a jailhouse informant had suggested to the defendant that he plea bargain his case. The defendant summoned two ministers to the jail, and gave them letters to present to the State Attorney's Office. These letters contained

confessions. The letters were delivered, and used by the State at trial. Clearly, the defendant in that case had nothing upon which to base his belief he was plea bargaining but his own subjective intent. There was nothing in the Opinion suggesting that he had had the State contacted in advance of the delivery of the letters to render them anymore than gratuitous confessions.

In Stevens, the defendant agreed to submit to a polygraph examination as a condition of a plea bargain. When he failed the polygraph, and the State ended the negotiations, the inculpatory remarks he made during the polygraph examination were excluded from being introduced in the State's case-in-chief. The issue on appeal was whether they were admissible on cross-examination to impeach a testifying defendant. In rejecting that argument, the Court noted that the statements in question were uttered spontaneously at a time unrelated to the polygraph examination.

On the other hand, CALABRO cited the Third District to Davis v. State, 832 So.2d 898 (Fla. 1st DCA 2003). Davis involved a pre-trial hearing where there was a discussion in open court about the defendant's case. Although the Court proceeding in question was not an arraignment, it was a pre-trial hearing intended to

determine whether a guilty or no contest plea was contemplated. The Court held that Davis was entitled to feel that his intentions on pleading were of interest to the Court and he possessed an objectively reasonable view that his remarks were in the context of a plea bargaining session. The severity of the charge or degree to which his attorneys were prepared for trial did not enter into the calculation, nor should they have. Legally and factually, Davis is indistinguishable from the case at bar. The Third District did not consider it in its Opinion.

To the extent that the Third District has held that an unsolicited offer to plead guilty is not covered by Section 90.410 or Rule 3.172(h), that decision conflicts with Dobiasio v. State, 789 So.2d 1061 (Fla. 4th DCA 2001); McCray v. State, 760 So.2d 988 (Fla. 2nd DCA 2000); and Russell v. State, 614 So.2d 605 (Fla. 1st DCA 1993). All three of these cases involved unsolicited letters written by defendants to the State Attorney's Office requesting leniency and, in the process, contained their admissions of guilt. In order to arrive at its holding, the Third District ignored these cases, which were included in CALABRO's briefs.

Whether through frustration or the inattentiveness of his Public Defender or for some other reason, CALABRO was in Court on November 26, 2002, to enter a plea to second-degree murder when he made an unsolicited offer to plea bargain.

Perhaps he believed that the case was weak, and he would be unjustly incarcerated for the four months until trial. Perhaps he believed that the State's case was strong, and a quick offer to plead guilty would get the most lenient treatment from the State. Whatever his motivations, there is no doubt that he subjectively intended to offer a plea bargain. The fact that it was in the context of the Court requesting his plea at Arraignment made that subjective belief objectively reasonable. CALABRO's remarks of November 26, 2002, should be suppressed.

CONCLUSION

Upon the arguments and authorities aforementioned, Petitioner requests this Court reverse the ruling of the Third District Court of Appeal, suppress the statements made by the Petitioner at his Arraignment, and remand the case to the Circuit Court for trial.

Respectfully submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was

mailed this 3rd day of January, 2008, to: ANGEL FLEMING, ASST. ATTORNEY GENERAL, Office of the Attorney General, 444 Brickell Avenue, Miami, FL 33131.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Initial Brief on the Merits of Petitioner was typed in Times New Roman 14.

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