IN THE SUPREME COURT OF FLORIDA

JAMES RICHARD COOPER, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC09-1169

ON APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of Case and Statement of Facts presented by Petitioner for purposes of this Petition.

SUMMARY OF THE ARGUMENT

Contrary to Petitioner's assertion, the decision in this case does not directly and expressly conflict with State v. Diguilio, 491 So. 2d 1129 (Fla. 1986), State v. Lee, 848 So. 2d 133 (Fla. 1988), or Knowles v. State, 848 So. 2d 1055 (Fla. 2003). Furthermore, the decision below properly applied this Court's precedent in conducting the harmless error analysis in this case.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT OR OF THIS COURT; THEREFORE, THIS COURT SHOULD NOT GRANT DISCRETIONARY REVIEW.

The jurisdiction of this Court is limited to a narrow class of cases enumerated in the Florida Constitution. For example, this Court may review any decision of a district court of appeal that "expressly and directly conflicts with the decision of another district court of appeal, or with the Supreme Court on the same question of law." Fla. Const.Art.V, §3(b)(3). The issue of the Court's jurisdiction is a "threshold matter that must be addressed" before the Court can reach the merits of the issue. In Re Holder, 945 So. 2d 1130, 1134 Fla. 2006).

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).

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.

In order for this Court to exercise its discretionary jurisdiction based on *express or direct* conflict, the conflict must appear on the face of the allegedly conflicting opinions. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). The standard is direct and express conflict; not misapplication of the law. See, Knowles v. State, 848 So. 2d 1055, 1059 (Fla. 2003)(Wells, J. dissenting)(neither the concept nor words "misapplication jurisdiction" appear in Article V, Sec. 3(b), Fla. Const.) In order for a misapplication of the law to provide review jurisdiction, the misapplication must result in direct and express conflict with the decision of another district or this Court.

Contrary to Petitioner's assertion, the decision in this case does not directly and expressly conflict with State v. Diguilio, 491 So. 2d 1129 (Fla. 1986), State v. Lee, 848 So. 2d 133 (Fla. 1988), or Knowles v. State, 848 So. 2d 1055 (Fla. 2003). Furthermore, even if misapplication of the law were a proper basis for this Court's review, the decision below properly applied this Court's precedent in conducting the harmless error analysis in this case. See, Robertson v. State,

829 So. 2d 901 (Fla. 2002).

In DiGuilio, this Court set forth the standard for a harmless error analysis. This Court stated:

> The harmless error test, as set forth in *Chapman*[1] and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. *See Chapman*, 386 U.S. at 24. Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

DiGuilio, 491 So. 2d at 1135.

This Court reiterated the standard in Knowles and Lee.

The Second District Court of Appeal properly applied the standard in this case. This Court has stated that an examination of the admissible evidence is not only permitted, but required. Furthermore, contrary to Petitioner's argument, the Second District Court of Appeal did not "omit the beyond a reasonable doubt standard . . . ." (IB, p.5). Rather, the district court held:

> . . . the jury heard a taped statement where Cooper admitted engaging in sexual acts with

[1] Chapman v. California, 386 U.S. 18 (1967).

> the victim. Because the taped statement is strong evidence of Cooper's guilt, *we conclude that the error of allowing the State to present evidence of multiple sexual acts did not affect the verdict and was harmless in this case*.

Cooper v. State, (Fla. Dist. Ct. App. 2d Dist. June 10, 2009).

Although the court did not use the words "beyond a reasonable doubt," there can be no doubt that the court applied the correct standard in stating "we conclude that the error of allowing the State to present evidence of multiple sexual acts *did not affect the verdict* and was harmless in this case." This case is unlike Knowles in that the court did not reduce the state's burden by finding the verdict was not "substantially influenced" by the error. Rather, the court found the alleged error did not affect the jury's verdict *at all*.[2]

Petitioner has failed to establish a basis upon which this court can exercise its discretionary jurisdiction.

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[2] The state maintains there was no error and Wightman v. State, 982 So. 2d 74 (Fla. 2d DCA 2008), rev. granted, SC08-1240, rev. dismissed, (July 2, 2009), upon which Petitioner and the district court relied was incorrectly decided.

CONCLUSION

Appellee respectfully requests that this Court deny jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to WILLIAM L. SHARWELL, Assistant Public Defender, Office of the Public Defender, P.O. Box 9000 – Drawer PD, Bartow, Florida 33831 this 27TH day of July, 2009.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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