

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1881

DCA NO. 3D07-2761

DAVON FRANCIS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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**BRIEF OF RESPONDENT ON JURISDICTION**

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

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## **INTRODUCTION**

The Petitioner, DAVON FRANCIS, was the Appellant in the district court of appeal, and the Defendant in the Circuit Court. Respondent, the State of Florida, was the Appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the parties will be referred to as they appear before this Court.

## STATEMENT OF THE CASE AND FACTS

Petitioner appealed his judgment and sentence to the Third District Court of Appeal. On November 18, 2009, the lower court entered a per curiam affirmance. Francis v. State, 22 So.3d 788 (Fla. 3<sup>rd</sup> DCA 2009). The lower court's per curiam affirmance cited to Zeigler v. State, 2D07-5300 (Fla. 2d DCA Oct. 9, 2009), now Zeigler v. State, 18 So.3d 1239 (Fla. 2d DCA 2009).

On October 6, 2010, the Court granted Petitioner's petition belatedly seek the Court's discretionary review.

**QUESTION PRESENTED**

WHETHER THE DECISION OF THE LOWER COURT'S CITATION TO Zeigler v. State, WHICH IS PRESENTLY PENDING JURISDICTION BEFORE THE COURT, CONSTITUTES EXPRESS CONFLICT FOR THE PURPOSE OF ALLOWING THE COURT TO EXERCISE ITS DISCRETIONARY JURISDICTION IN THE SUBJECT CASE. (REPHRASED)?

## SUMMARY OF THE ARGUMENT

The Supreme Court of Florida does not have jurisdiction to review the Third District Court of Appeal's decision in the instant case. The Petitioner claims that express conflict exists because the lower court cited to Zeigler v. State, 18 So.3d 1239 (Fla. 2d DCA 2009), in its per curiam affirmance, and Zeigler is presently pending review before the Court. However, Zeigler is before the Court based on the second district's certified conflict with Montgomery, and the Court has not yet made its determination as to whether or not to accept jurisdiction of the case. Accordingly, Zeigler is not pending review before this Court for the purpose of providing the basis for jurisdiction in the instant case, as jurisdiction would only exist if the petition for jurisdictional review was been granted and the case was pending for disposition on the merits. Thus, this Court lacks jurisdiction and the petition to invoke discretionary jurisdiction should be denied.

## ARGUMENT

THE DECISION OF THE LOWER COURT'S CITATION TO Zeigler v. State, WHICH IS PRESENTLY PENDING JURISDICTION BEFORE THE COURT, DOES NOT CONSTITUTE EXPRESS CONFLICT FOR THE PURPOSE OF ALLOWING THE COURT TO EXERCISE ITS DISCRETIONARY JURISDICTION IN THE SUBJECT CASE. (REPHRASED) .

Petitioner claims that the Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv), Fla. R. App. P., which provides for this Court's discretionary review of decisions of district courts of appeal that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law.

The Petitioner claims that conflict exists because the lower court cited to Zeigler v. State, 18 So.3d 1239 (Fla. 2d DCA 2009), in its per curiam affirmance, and Zeigler is presently pending before the Court in Case No. SC09-2082. In Zeigler, the second district court of appeal held that the standard jury instruction on the lesser included offense of manslaughter by act was not erroneous and certified conflict with the first district court of appeal decision in Montgomery v. State. This court later accepted jurisdiction in Montgomery and held that the instruction constituted fundamental error in Montgomery's case. Montgomery v. State, 39 So.3d 252 (Fla. 2010).



Petitioner cites to Jollie v. State, 405 So.2d 418 (Fla. 1981) for the proposition that a district court of appeal opinion which cites as controlling authority a decision that is either pending review in or has been reversed by the Florida Supreme Court constitutes prima facie express conflict and allows the Court to exercise its discretionary jurisdiction. However, at the present time, Zeigler is not actually "pending" review in this Court. Instead, the status of Zeigler's jurisdiction is presently pending review before the Court. In Harrison v. Hyster Company, 515 So.2d 1279 (Fla. 1987), the Court held that .."Jollie's reference to the 'controlling authority ... that is ... **pending review**' refers to a **case in which the petition for jurisdictional review has been granted and the case is pending for disposition on the merits.**" (Emphasis added).

Thus, as Zeigler is before the Court based on the second district's certified conflict with Montgomery, it is still within the Court's discretion, pursuant to Rule 9.030(a)(2)(A)(vi), Fla. R. App. P., to determine whether or not to exercise its jurisdiction. As such a determination has not yet been made by the Court, Zeigler is not "pending review" before this Court for the purpose of providing the basis for jurisdiction in the instant case. Accordingly, this Court lacks jurisdiction and the petition to invoke discretionary jurisdiction should be denied.

**CONCLUSION**

As indicated by the foregoing facts, authorities and reasoning, the Court does not have jurisdiction in the instant case due to the fact that the Court has not yet accepted jurisdiction in Zeigler v. State, thus it is not pending review before the Court.

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 Marti Rothenberg, Assistant Public Defender, 1320 N.W. 14th Street, Miami, FL 33125, on this 15th day of November 2010.

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LINDA S. KATZ  
Assistant Attorney General

**CERTIFICATION OF TYPE SIZE AND STYLE**

Pursuant to the Court's Administrative Order regarding the type size of briefs filed in the Supreme Court of Florida, Respondent hereby certifies that the subject brief was typed in font Courier New, 12 point.

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Assistant Attorney General