

IN THE SUPREME COURT OF FLORIDA

CASE NO: 10-1881

**DAVON FRANCIS,**

Appellant,

vs.

**THE STATE OF FLORIDA,**

Appellee.

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APPEAL FROM THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA  
IN AND FOR MIAMI DADE COUNTY

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**JURISDICTIONAL BRIEF OF APPELLANT**

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## INTRODUCTION

This is a petition for discretionary review by the petitioner/defendant Davon Francis based on conflict jurisdiction, Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, from the decision of the Third District Court of Appeal issued on November 18, 2009. Citations are to the Appendix containing the decision attached hereto.

## STATEMENT OF THE CASE AND FACTS

The facts relevant to a determination of whether discretionary review is warranted are set forth in the decision of the Third District as follows:

The decision of the Third District involved an appeal by the petitioner of his judgment of conviction and sentence entered following a jury trial, and in the decision, the Third District affirmed per curiam the conviction and sentence, citing as authority the case of Zeigler v. State, 2D07-5300 (Fla. 2d DCA Oct. 9, 2009), current citation Zeigler v. State, 18 So.3d 1239 (Fla. 2d DCA 2009). (A: 1)

On October 6, 2010, this Court granted the petitioner's petition to file for a belated discretionary review in this Court.

## SUMMARY OF ARGUMENT

The petitioner submits that discretionary jurisdiction is established to review the decision of the Third District Court of Appeal where the decision cites as controlling authority the case of Zeigler v. State, 2D07-5300 (Fla. 2d DCA Oct. 9, 2009), current citation Zeigler v. State, 18 So.3d 1239 (Fla. 2d DCA 2009), which is currently pending in this Court as Case No: SC09-2082, on the issue whether the standard jury instruction on the lesser included offense of manslaughter by act was fundamental error pursuant to State v. Montgomery, 39 So.3d 252 (Fla. 2010). A district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or had been reversed by the Florida Supreme Court constitutes prima facie express conflict and allows this Court to exercise its discretionary jurisdiction. Jollie v. State, 405 So.2d 418 (Fla. 1981).

## ARGUMENT

THE DECISION OF THE THIRD DISTRICT CITES AS CONTROLLING AUTHORITY THE DECISION OF ZEIGLER v. STATE, WHICH IS CURRENTLY PENDING REVIEW IN THIS COURT, AND CONSEQUENTLY THERE IS PRIMA FACIE EXPRESS CONFLICT THAT ALLOWS THIS COURT TO EXERCISE ITS DISCRETIONARY JURISDICTION OF THIS CASE.

Discretionary jurisdiction in this Court is established because the decision of the Third District cites as controlling authority the case of Zeigler v. State, 2D07-5300 (Fla. 2d DCA Oct. 9, 2009), current citation Zeigler v. State, 18 So.3d 1239 (Fla. 2d DCA 2009), which is currently pending in this Court as Case No: SC09-2082, from the Second District, on the issue whether giving the standard jury instruction on the lesser included offense of manslaughter by act was fundamental error pursuant to State v. Montgomery, 39 So.3d 252 (Fla. 2010).

Zeigler v. State, 18 So.3d 1239 (Fla. 2d DCA 2009), held that the standard jury instruction on the lesser offense of manslaughter by act was not erroneous and affirmed a conviction for second degree murder. The Zeigler court certified conflict with Montgomery on this issue and Zeigler is currently pending in this Court. In the instant case, the Third District rested its affirmance on Zeigler on the

same issue, whether the standard jury instruction on manslaughter by act as a lesser included offense was erroneous.

In Jollie v. State, 405 So.2d 418 (Fla. 1981), this Court held that a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or had been reversed by the Florida Supreme Court constitutes prima facie express conflict and allows this Court to exercise its discretionary jurisdiction.

Consequently, the Third District's decision in this case establishes direct conflict and this Court should accept jurisdiction of this case.



CONCLUSION

Based upon the foregoing, the petitioner requests that this Court exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal in this case on direct conflict, Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FONT COMPLIANCE

I hereby certify that this brief was prepared using Times New Roman 14 point font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

I hereby certify that a copy of the foregoing was mailed to Assistant Attorney General Linda Katz, Office of the Attorney General, Criminal Division, 444 Brickell Ave., #650, Miami, Florida 33131, this \_\_\_\_ day of October, 2010.

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