1-16

IN THE SUPREME COURT OF FLORIDA

HECTOR Z. LUCIO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 92,066

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
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ATTORNEY FOR PETITIONER

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	)	
Respondent.	)	
	)	

STATEMENT OF THE CASE AND FACTS

The petitioner, HECTOR Z. LUCIO, was charged with felony driving while license suspended or revoked, pursuant to Section 322.34(1), Florida Statutes (1995). He filed a motion to dismiss in the trial court contending that the statute unconstitutionally permits the trial court to determine whether the offense is a misdemeanor or a felony. The court denied the motion to dismiss, prompting the defendant to enter a plea of nolo contendere reserving the right to appeal the denial of his dismissal motion.

On appeal, the defendant argued to the district court that whether an accused has been "convicted" under Section 322.34(1)(c), Florida Statutes (1995), depends upon whether or not the trial court exercised its discretion to withhold an adjudication of guilt. In this regard, the appellant maintained, if the trial court withholds defendant's adjudication of guilt following either a guilty verdict or plea on the charge of violating section 322.34(1) on the predicate offenses, then that charge would not constitute a prior "conviction" for purposes of

enhancement under the statute. The appellant further asserted that since the trial court is vested with discretion pertaining to the decision whether to withhold an adjudication of guilt, the statute must be struck down as unconstitutional because the delegation of such legislative power to the trial court violates Article 2, Section 3 of the Florida Constitution. The District Court of Appeal, Fifth District, rejected the argument, issuing a per curiam affirmance, citing its prior decision of ***Raulerson v. State***, 699 So.2d 339 (Fla. 5th DCA 1997) (discretionary review pending in this Court), as controlling authority for the affirmance. ***Lucio v. State***, 22 Fla. L. Weekly D2591 (Fla. 5th DCA November 14, 1997) ***Raulerson*** holds that the term "conviction" of an earlier offense means simply "a determination of a defendant's guilt by way of plea or verdict," rather than an adjudication. ***Id.*** Thus, the court held, the appellant's argument must fail.

The defendant, relying on ***Jollie v. State***, 405 So.2d 418 (Fla. 1981) (conflict jurisdiction lies where the district court has issued a per curiam affirmance citing, as controlling authority, a case pending discretionary review before the Supreme Court), filed his Notice to Invoke the Discretionary Jurisdiction of this Court on December 12, 1997. This brief on jurisdiction follows.

SUMMARY OF ARGUMENT

The decision of the district court, by citing as controlling authority a case pending review in this Court, directly and expressly conflicts with decisions of this Court or other district courts of appeal on the same issue of law.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, IN ***LUCIO v. STATE***, 22 Fla. L. Weekly D2591 (Fla. 5th DCA November 14, 1997), EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT OF FLORIDA OR OTHER DISTRICT COURTS OF APPEAL.

The opinion of the Fifth District in the instant case cited as controlling authority the case of ***Raulerson v. State***, 699 So.2d 339 (Fla. 5th DCA 1997), which case is currently pending review by this Court (Fla. Sup. Ct. Case No. 91,611). ***Raulerson*** holds that Section 322.34, Florida Statutes (1995), is constitutional against an attack of improper delegation of power to the trial court to determine whether prior offenses will count to reclassify a subsequent driving while license suspended as a felony. ***Raulerson v. State***, ***supra***, is currently pending review by this Court. Therein, the petitioner has argued that this Court's discretionary jurisdiction is invoked since that decision expressly held valid a Florida Statute.

Pursuant to ***Jollie v. State***, 405 So.2d 418 (Fla. 1981), where a case is cited by the district court as controlling authority and that case is currently pending review by the Supreme Court, conflict jurisdiction will lie.

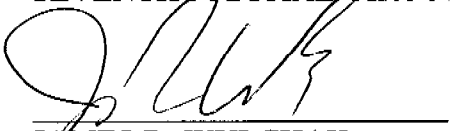
Thus, this Court's discretionary review should be exercised and the decision of the Fifth District Court of Appeal reversed.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the petitioner requests that this Honorable Court accept jurisdiction of this cause, vacate the decision of the District Court of Appeal, Fifth District, and find Section 322.34(1), Florida Statutes (1995) is unconstitutional.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Mr. Hector Z. Lucio, Inmate # U 02086, P.O. Box 3411, Belleview, FL 34421, this 22nd day of December, 1997.

JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

JOHNATHAN JEFFRIES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO.
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

APPENDIX

Lucio v. State
22 Fla. L. Weekly D2591 (Fla. 5th DCA November 14, 1997)

mit the new offense. The trial court denied the motion concluding that the defendant's early release did not constitute newly discovered evidence within the meaning of rule 3.850, because the defendant's knowledge of the controlled release program had nothing to do with whether the defendant committed the crimes for which he was convicted. In other words, the defendant's claim of newly discovered evidence did not justify 3.850 relief because, even if the defendant had known about the controlled release program at the time of his pleas, such knowledge would not have resulted in the defendant's acquittal or retrial. I agree.

I also agree with the trial court's conclusion that neither the defendant's trial counsel nor the trial court had a duty to advise the defendant of DOC's controlled release program because the program is exclusively a function of the DOC and works only to the benefit of the defendant. Florida Rule of Criminal Procedure 3.172 requires that the trial court ensure that a defendant is advised of the maximum penalty for the crime committed. The rule is silent with regard to notifying the defendant of the possibility of early release. Furthermore, the controlled release program is collateral to the sentence imposed and not a consequence of the defendant's plea; therefore, the trial court had no obligation to advise the defendant of its possibility. *State v. Coban*, 520 So. 2d 40 (Fla. 1988).

The defendant raised two additional grounds for relief and the trial court properly disposed of these claims. First, the defendant alleged that his defense counsel was ineffective in not explaining that, by entering his no contest pleas, he was waiving his right to direct appeal. This claim of ineffective counsel was not timely raised because it was not raised within two years following the imposition of the defendant's sentences. Second, citing to *State v. Gray*, 654 So. 2d 552 (Fla. 1995), the defendant contended that his conviction for solicitation to commit second-degree murder was illegal because the crime does not exist. The trial court properly ruled that, while the *Gray* court determined that there was no such crime as attempted felony murder, the court did not address the crime of solicitation to commit second-degree murder.

* * *

PATTERSON v. STATE. 5th District. #97-2605. November 14, 1997. 3.850 Appeal from the Circuit Court for Orange County. REVERSED and REMANDED. *See Edwards v. State*, 648 So. 2d 326 (Fla. 5th DCA 1995).

BROWN v. STATE. 5th District. #97-2350. November 14, 1997. 3.800 Appeal from the Circuit Court for Brevard County. AFFIRMED. *See Vaughn v. State*, 671 So. 2d 299 (Fla. 5th DCA 1996).

CARSTENSEN v. STATE. 5th District. #97-2074. November 14, 1997. 3.800 Appeal from the Circuit Court for Orange County. AFFIRMED. *See Brown v. State*, 689 So. 2d 1280 (Fla. 5th DCA 1997) and *Chaney v. State*, 678 So. 2d 880 (Fla. 5th DCA 1996).

LUCIO v. STATE. 5th District. #97-168. November 14, 1997. Appeal from the Circuit Court for Marion County. AFFIRMED. *See Raulerson v. State*, 699 So. 2d 339 (Fla. 5th DCA 1997).

* * *

Criminal law—Counsel—Public defender—Motion to withdraw in which public defender certified that its office had earlier represented victim of defendant's crime and that adverse and hostile interests existed between defendant and victim—Trial court was required to grant motion without reweighing facts giving rise to public defender's determination that conflict existed

KENNETH CROWE, Petitioner, v. STATE OF FLORIDA, Respondent. 5th District. Case No. 97-2426. Opinion filed November 14, 1997. Petition for Certiorari Review of Order from the Circuit Court for Orange County, Belvin Perry, Jr., Judge. Counsel: Joseph W. DuRocher, Public Defender, and Patricia A. Cashman, Assistant Public Defender, Orlando, for Petitioner. Robert A. Butterworth, Attorney General, Tallahassee, and Carmen F. Corrente, Assistant Attorney General, Daytona Beach, for Respondent.

ON PETITION FOR WRIT OF CERTIORARI

(ANTOON, J.) We grant the public defender's petition for certiorari and quash the trial court's order denying the public defender's motion to withdraw from its representation of the defendant. In its motion to withdraw, the public defender certified that it was required to withdraw because its office had earlier represented the victim of the defendant's crime and that adverse and hostile interests existed between the defendant and the victim. The trial court was required to grant the motion to withdraw without reweighing the facts giving rise to the public defender's determination that a conflict existed. *See Guzman v. State*, 644 So. 2d 996 (Fla. 1994).

Petition for Writ of Certiorari GRANTED; order QUASHED. (HARRIS, J., concurs. DAUKSCH, J., concurs specially, with opinion.)

(DAUKSCH, J., concurring specially.) I concur with the result because the public defender, in boilerplate language, says that she is privy to confidential information "by way of verbal, nonverbal and written communications" with the victim in this murder case. Obviously her previous client will not testify so it is not exactly true "That the Public Defender is privy to confidential information and a vigorous cross-examination would require discrediting him with this information in contravention of the attorney-client privilege." *Guzman v. State*, 644 So. 2d 996, 999 (Fla. 1994) holds:

> The law is well established that a public defender should be permitted to withdraw where the public defender certifies to the trial court that the interests of one client are so adverse or hostile to those of another client that the public defender cannot represent the two clients without a conflict of interest. *Babb v. Edwards*, 412 So. 2d 859 (Fla. 1982). Moreover, once a public defender moves to withdraw from the representation of a client based on a conflict due to adverse or hostile interests between the two clients, under section 27.53(3), Florida Statutes (1991), a trial court *must* grant separate representation. *Nixon v. Siegel*, 626 So. 2d 1024 (Fla. 3d DCA 1993). As the district court stated in *Nixon*, a trial court is not permitted to reweigh the facts considered by the public defender in determining that a conflict exists. This is true even if representation of one of the adverse clients has been concluded. *Id.* at 1025. Consequently, in this case, once the public defender determined that a conflict existed regarding Guzman, the principles set forth in those cases required the trial judge to grant the motions to withdraw.

Were I to review this case without the "benefit" of *Guzman*, I would affirm the trial judge based upon his reasoning.

The Court requested Assistant Public Defender Cashman to reveal in camera what they learned because of her office['s] representation of the late Mr. Jordan that would cause this conflict. Ms. Cashman declined the Court's request for an in camera review of the information received.

The issue presented by this case is whether the Office of the Public Defender is entitled to withdraw[ ] from the representation of the defendant in this case because of their previous representation of the victim without having to show to the Court an actual conflict in this case?

In the case at bar the former client is dead and is the victim of this homicide. It is to be noted that the former assistant public defenders who represented the victim are not the attorneys who represents the defendant in this case.

There was no evidence present to show that victim's death in this case was by any means related to any of the prior cases in which the Office of the Public Defender represented him nor was there any evidence presented to show that the homicide had any relationship to prosecution or defense of the victim. There was [no] evidence presented in court in camera to indicate what confidential information was obtained by the prior representation or in order to assist this new client, nor was there any evidence presented that would show that the Office of the Public Defender would be forced to choose between discrediting the former client through information learned in confidence, or foregoing vigorous cross-examination in an attempt to preserve the former client's attorney-client privilege since the client is dead.

The Office of the Public Defender has failed to demonstrate that an actual conflict exist or in this case and that this is a case of the interest of one client that is so adverse or hostile to the interest