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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

Case Number: SC14-1341

v.

REUBEN ALEXIS

Respondent.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, Mr. Alexis, will be referred to by name in this brief. Petitioner, The State of Florida, will be referred to as the state. Citations to the trial transcripts will be made by the letter "T", followed by the appropriate page number or numbers.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set forth in the First District Court of Appeal's decision below which is attached to the Petitioner's Brief as an appendix. A statement of additional facts relevant to the instant proceedings is as follows.

Mr. Alexis testified that he was unarmed and had no knowledge of any firearms being in the vehicle in question. (T-207-16). Excluding Mr. Alexis and his codefendant, Terry Gurrier, six (6) defense witnesses testified that Mr. Alexis was not armed. (T-145, 158, 173, 185, 196, 202). The purported victim, Clendon Melton, testified that Mr. Guerrier pointed a firearm at him, but that Mr. Alexis did not do so. (T-40). Furthermore, the victim's cousin, and the state's only other eyewitness, Charles Caine, testified that he did not see Mr. Alexis in possession of a firearm, but did see Mr. Guerrier point a firearm at Mr. Melton. (T-54, 59-60).

SUMMARY OF THE ARGUMENT

The trial court knew or reasonably should have known of Mr. Alexis's trial counsel's conflict of interest. Accordingly, the trial court was required to obtain a waiver through a *Larzelere* inquiry, and the trial court's failure to obtain a knowing and intelligent waiver is reversible per se. Consequently, the First District's decision in Mr. Alexis's case should be approved in its entirety.

Alternatively, because the face of the record demonstrates that Mr. Alexis's trial counsel had an actual conflict of interest that adversely affected his performance, this Court should approve the First District's granting of a new trial to Mr. Alexis.

ARGUMENT AND CITATION TO AUTHORITY

I. WHETHER THE TRIAL COURT'S FAILURE TO OBTAIN A KNOWING INTELLIGENT WAIVER OF MR. ALEXIS'S TRIAL COUNSEL'S CONFLICT OF INTEREST IS PER SE REVERSIBLE, AND THE FIRST DISTRICT'S DECISION IN MR. ALEXIS'S CASE SHOULD BE APPROVED? (RESTATED).

STANDARD OF REVIEW

"[M]ixed questions of law and fact that ultimately determine constitutional rights should be reviewed by appellate courts using a two-step approach, deferring to the trial court on questions of historical fact but conducting a de novo review of the constitutional issue." *Connor v. State*, 803 So. 2d 598, 605 (Fla. 2001)(citations omitted).

ARGUMENT ON THE MERITS

In its Initial Brief, the state attempts to muddle the issue before this Court, and turn this Court's review into one of actual and potential conflict and resulting prejudice. However, that is not the issue before this Court. Instead, the issue is simply whether the trial court had a duty to inquire as to trial counsel's conflict of interest, and if so, whether Mr. Alexis validly waived the conflict, regardless of whether the conflict was potential or actual. As the trial court had a duty to inquire into the conflict issue, and failed to obtain a waiver of the conflict, the error is per se reversible, and the First District's decision below should be approved.

The First District has recognized that "[w]hen defense counsel makes a

pretrial disclosure of a possible conflict of interest with the defendant, the trial court must either conduct an inquiry to determine whether the asserted conflict of interest will impair the defendant's right to the effective assistance of counsel or appoint separate counsel." *Lee v. State*, 690 So. 2d 664, 667 (Fla. 1st DCA 1997) (citing, *Holloway*, 435 U.S. at 484, 98 S.Ct. at 1178-79). The First District has further observed that "[f]or a waiver to be valid, the record must show that the defendant was aware of the conflict of interest, that the defendant realized the conflict could affect the defense, and that the defendant knew of the right to obtain other counsel." *Lee v. State*, 690 So. 2d 664, 667 (Fla. 1st DCA 1997) (quoting, *Larzelere v. State*, 676 So. 2d 394, 403 (Fla. 1996)). The First District's decisions in *Lee* and Mr. Alexis's case are in line with this Court's decision in *Larzelere* as well as United States Supreme Court precedent, and should be approved.

In her dissenting opinion in *Schwartz v. State*, 653 So. 2d 1060 (Fla. 4th DCA 1995), which predated this Court's decision in *Larzelere*, Justice Pariente succinctly set forth the United States Supreme Court's precedent on the issue of a conflict waiver as follows:

> In *Cuyler*, the United States Supreme Court explained that a trial court has a duty, though limited, to avoid potential conflicts of interest. 446 U.S. at 346, 100 S.Ct. at 1717. That duty requires a court to initiate an inquiry into a potential conflict if it knows or reasonably should know that a potential conflict exists. *Id.* at 347, 100 S.Ct. at 1717. While making this inquiry, the Supreme Court has noted that the "essential aim of the [Sixth]

> Amendment is to guarantee an effective advocate," not a lawyer inexorably preferred by the defendant. *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140 (1988).
>
> In *Holloway v. Arkansas*, 435 U.S. 475, 483 n. 5, 98 S.Ct. 1173, 1178 n. 5, 55 L.Ed.2d 426, 433 n. 5 (1978), the Supreme Court stated that "a defendant may waive his right to the assistance of an attorney unhindered by a conflict of interests." Waiver must be knowing and intelligent. Nevertheless, the Supreme Court held in *Wheat* that although the trial court must recognize a presumption in favor of the defendant's choice of counsel, "that presumption may be overcome not only by a demonstration of actual conflict, but also by a showing of a serious potential for conflict." 486 U.S. at 154, 108 S.Ct. at 1694.

Schwartz, 653 So. 2d at 1061-62 (Pariente, J, dissenting).

Importantly, and as noted by Justice Pariente, the Supreme Court observed in *Cuyler*, that "[u]nless the trial court knows *or reasonably should know* that a particular conflict exists, the court need not initiate an inquiry." *Cuyler*, 446 U.S. at 346-47 (emphasis added). Accordingly, where, as here, the trial court knows or should know that a conflict exists, the trial court must initiate an inquiry. *See, Id.*

Here, very clearly the trial court knew or should have known that a conflict existed. First, defense counsel brought the conflict to the court's attention. (T-198-99). Second, the state itself acknowledged there was a conflict issue and asked the court to initiate an inquiry. *Id.* Third, although defense counsel stated he "believed" that the conflict was resolved by Mr. Guerrier's denying that he ever

made a statement incriminating Mr. Alexis, the use of the word "believe" made his assessment of whether there remained a conflict equivocal, and signaled to the court that there remained the potential for conflict. Finally, although joint representation does not automatically create a conflict, under the circumstances of the joint representation in Mr. Alexis's case, namely that defense counsel was privately retained, the trial court should have known that a possible conflict of interest existed.

More specifically, unlike in the case of joint representation by a public defender where it can be reasonably concluded that if a conflict exists the public defender will bring it to the court's attention, in the case of privately retained counsel, the very real danger exists that counsel, in the interest of financial gain, will notify neither the jointly represented defendants, nor the trial court, of the conflict issue. Furthermore, the danger exits that counsel will "remove" a conflict issue by proceeding with a united defense, despite the fact such a defense may not be in the best interest of both clients.

In the context of private representation, the only safeguard against such impropriety is an inquiry by the trial judge, as a neutral arbiter of justice, securing a knowing, intelligent waiver from the defendant. Where the possible conflict is brought to the trial court's attention, or is otherwise obvious as it was in this case, the failure to obtain a knowing intelligent waiver of the conflict is per se reversible

because "any action the lawyer refrained from taking because of the conflict would not be apparent from the record" *Thomas v. State*, 785 So. 2d 626, 629 (Fla. 2d DCA 2001), and because "…in a case of joint representation of conflicting interests the evil…is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process." *Lee*, 690 So. 2d at 668 (citing, *Holloway*, 435 U.S. at 490, 98 S.Ct. at 1181-82). Consequently, because the trial court knew or reasonably should have known of trial counsel's conflict of interest, the trial court was required to obtain a waiver through a *Larzelere* inquiry, and the trial court's failure to obtain a knowing and intelligent waiver is reversible per se. *See*, *Id*; *See also*, *Wood v. Georgia*, 450 U.S. 261, 272 (1981) ("Nevertheless, the record does demonstrate that the *possibility* of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further." (emphasis in original)); *Wheat v. United States*, 486 U.S. 153, 159-60 (1988) ("While 'permitting a single attorney to represent codefendants ... is not *per se* violative of constitutional guarantees of effective assistance of counsel,' *Holloway v. Arkansas*, 435 U.S. 475, 482, 98 S.Ct. 1173, 1178, 55 L.Ed.2d 426 (1978), a court confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflicts warrant separate counsel." (citing, *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)).

The state attempts to avoid this result by relying on *Cuyler*. However, as explained by the Court in *Lee*:

> The decisions in *Glasser* and *Holloway* make it clear that an error in accepting a waiver of the right to conflict-free counsel cannot be excused as harmless error on direct appeal. If, as in this case, the defendant preserves the conflict issue by raising it before trial and does not validly waive the conflict, the trial court's failure to conduct an inquiry or appoint separate counsel in accordance with *Holloway* requires that the resulting conviction be reversed. We point out, however, that this rule of automatic reversal is limited to a conflict issue preserved for review on direct appeal. A different rule would apply if the validity of a waiver of the right to conflict-free counsel were first raised in a postconviction proceeding. When ineffective assistance of counsel is first asserted in a postconviction motion, the defendant must show that the conflict impaired the performance of the defense lawyer. *Cuyler v. Sullivan* 446 U.S. at 348, 100 S.Ct. at 1718. Even then, it is not necessary to show that counsel's deficient performance resulting from the conflict affected the outcome of the trial. As the Court held in *Sullivan*, prejudice is presumed. *Id*. at 349, 100 S.Ct. at 1718-19.

Lee, 690 So. 2d at 668-69. Accordingly, because the conflict issue was first brought to the attention of the trial court pre-trial, and the issue of the invalid waiver was then raised on direct appeal, the issue is governed by the decisions in *Glasser* and *Holloway*, as well as this Court's decision in *Larzelere*. Consequently, *Cuyler* is inapplicable to Mr. Alexis's case, and the decision below should be approved. *See, Id.*

Assuming, *arguendo*, that Mr. Alexis is required to demonstrate that his trial

counsel's conflict of interest adversely affected his representation under *Cuyler*, he has done so, and is nonetheless entitled to relief. As explained by the Court in *Cuyler*:

> *Glasser* established that unconstitutional multiple representation is never harmless error. Once the Court concluded that Glasser's lawyer had an actual conflict of interest, it refused "to indulge in nice calculations as to the amount of prejudice" attributable to the conflict. The conflict itself demonstrated a denial of the "right to have the effective assistance of counsel." 315 U.S., at 76, 62 S.Ct., at 467. Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. See *Holloway, supra,* 435 U.S., at 487–491, 98 S.Ct., at 1180–1182. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. See *Glasser, supra,* 315 U.S., at 72–75, 62 S.Ct., at 465–467.

Cuyler, 446 U.S. at 349-50. Accordingly, the Court in *Cuyler* concluded that "[i]n order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler,* 446 U.S. at 350, 100 S. Ct. at 1719. For the reasons that follow, Mr. Alexis has met the *Cuyler* test, and the First District's granting of a new trial should be approved.

Mr. Alexis testified that he was unarmed and had no knowledge of any firearms being in the vehicle in question. (T-207-16). Excluding Mr. Alexis and Mr. Gurrier, six (6) defense witnesses testified that Mr. Alexis was not armed. (T-

145, 158, 173, 185, 196, 202). Mr. Melton testified that Mr. Guerrier pointed a firearm at him, but that Mr. Alexis did not do so. (T-40). Furthermore, the victim's cousin, and the state's only other eyewitness, Mr. Caine, testified that he did not see Mr. Alexis in possession of a firearm, but did see Mr. Guerrier point a firearm at Mr. Melton. (T-54, 59-60). Mr. Alexis was not charged, and the jury was not instructed, on a principal theory. Under these circumstances, counsel acting without a conflict would have shifted the blame entirely to Mr. Guerrier, and argued that Mr. Guerrier was in possession of a firearm, but Mr. Alexis was not.

Given that the state called only two (2) eyewitnesses, one of which testified that he did not see Mr. Alexis in possession of a firearm, this defense would have been far more likely to succeed than the all or nothing defense counsel was forced to pursue due to his conflict. Simply put, because of his conflict, defense counsel was compelled to tie Mr. Alexis's defense to the sinking ship that was Mr. Guerrier's defense. Had counsel been unencumbered, he unquestionably would have conceded that Mr. Guerrier was in possession of a firearm and used that to the advantage of Mr. Alexis. Conflict free counsel would have argued that both state witnesses saw Mr. Guerrier in possession of a firearm, and conceded that Mr. Guerrier threatened Mr. Melton with a firearm, but argued that Mr. Guerrier's threatening of Mr. Melton with a firearm was an independent act, for which Mr. Alexis was not responsible. Conflict free counsel would have further argued that

reasonable doubt existed as to whether Mr. Alexis carried out an aggravated assault, as Mr. Melton testified that Mr. Alexis never pointed a firearm at him, and Mr. Caine testified he did not see Mr. Alexis in possession of a firearm. Simply put, conflict free counsel would have tried to pin the firearm on Mr. Guerrier to the advantage of Mr. Alexis. However, trial counsel was prohibited from even considering this strategy on behalf of Mr. Alexis due to his representation of Mr. Guerrier, and his decision to forego this line of defense therefore cannot be said to be tactical.

In sum, had counsel been acting conflict free, he could have conceded that there was a firearm involved, but the firearm was not associated with Mr. Alexis, a far more logical defense than arguing that no firearm was used during the incident, considering the state offered compelling evidence that there was a firearm used, but conflicting evidence as to whether one was used by Mr. Alexis. Accordingly, trial counsel was actively representing conflicting interests, *i.e.*, Mr. Guerrier's interest in arguing that there was no firearm involvement, and Mr. Alexis's interest in pinning the firearm involvement entirely on Mr. Guerrier. *See*, *Freund v. Butterworth*, 165 F.3d 839, 859 (11th Cir. 1999) ("An 'actual conflict' of interest occurs when a lawyer has 'inconsistent interests.'") Furthermore, counsel's representation of his clients' conflicting interest adversely affected his representation of Mr. Alexis, as it required him to refrain from the reasonable

defense strategy of shifting the blame to Mr. Guerrier. *See*, *Id.* at 860 (Observing that the "adverse effect" test is met where counsel refrained from pursuing a reasonable, alternative defense strategy because of an actual conflict).

Even more specifically, as to the adverse effect prong of *Cuyler*, in *Freund*, the Court explained as follows:

> To prove adverse effect, a habeas petitioner must satisfy three elements. First, he must point to "some plausible alternative defense strategy or tactic [that] might have been pursued." *United States v. Fahey,* 769 F.2d 829, 836 (1st Cir.1985); *see also Porter [v. Wainwright,* 805 F.2d 930, 939–40 (11th Cir.1986), *cert. denied*, 482 U.S. 918, 107 S.Ct. 3195, 96 L.Ed.2d 682 (1987)]. Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. Because prejudice is presumed, *see Strickland,* 466 U.S. at 692, 104 S.Ct. 2052, the petitioner "need not show that the defense would necessarily have been successful if [the alternative strategy or tactic] had been used," rather he only need prove that the alternative "possessed sufficient substance to be a viable alternative." *Fahey,* 769 F.2d at 836. Finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. In other words, "he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." [*Fahey,* 769 F.2d at 836].

Freund, 165 F.3d at 860. In clarifying the third prong of the *Freund* analysis, the Court in *United States v. Nicholson*, 611 F.3d 191(4th Cir. 2010) explained as follows:

> In simple terms, an alternative defense and the lawyer's other loyalties or interests are "inherently in conflict" if

> they are "inconsistent" with each other. *See United States v. Malpiedi*, 62 F.3d 465, 470 (2d Cir.1995) (recognizing that "the applicable standard requires only the demonstration of a conflict inconsistent with a plausible trial strategy or tactic"). In such a situation, it is unnecessary-and even inappropriate-to accept and consider evidence of any benign motives for the lawyer's tactics, including the lawyer's testimony about his subjective state of mind. *See id.* (observing that "after-the-fact testimony by [the conflicted] lawyer ... is not helpful," as "[e]ven the most candid persons may be able to convince themselves that they actually would not have used that strategy or tactic anyway").

Nicholson, 611 F.3d at 213 (footnotes omitted).

Applying the foregoing analysis, trial counsel's conflict of interest affected his representation of Mr. Alexis on the face of the record. First, Mr. Alexis has pointed to a plausible alternative defense strategy or tactic that might have been pursued, *i.e.*, shifting the blame to Mr. Guerrier. Second, Mr. Alexis has demonstrated that the alternative strategy or tactic was reasonable under the facts, as the alternative defense was far more plausible in light of the conflicting testimony of the state's witnesses than the defense actually pursued. Third, Mr. Alexis's alternative defense and his trial counsel's other loyalties or interests were "inherently in conflict" as they were inconsistent with each other, and therefore the decision to forego the defense cannot be justified under any circumstance, as "[e]ven the most candid persons may be able to convince themselves that they actually would not have used that strategy or tactic anyway. " *Nicholson*, 611 F.3d

at 213. Accordingly, Mr. Alexis has demonstrated that he was adversely affected by his trial counsel's actual conflict on the face of the record, and the First District's granting of a new trial should be approved. *See*, *Freund*, 165 F.3d 839; *Nicholson*, 611 F.3d 191.

Consequently, for the foregoing reasons, the First District's decision in Mr. Alexis's case should be approved in its entirety. *See*, *Holloway*, 435 U.S. 475; *Glasser*, 315 U.S. 60. Alternatively, the Fist District's granting of a new trial should be approved. *See*, *Freund*, 165 F.3d 839; *Nicholson*, 611 F.3d 191

CONCLUSION

Based upon the argument and citation to authority presented above, the First District's decision in Mr. Alexis's case should be approved in its entirety. Alternatively, the Fist District's granting of a new trial should be approved.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this jurisdictional brief has been emailed to the Office of the Attorney General at crimapptlh@myfloridalegal.com, on this the 2nd day of October, 2014.

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CERTIFICATION OF FONT SIZE

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