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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

REUBEN ALEXIS,

Appellee.

Case No. SC14-1341

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

STATE OF FLORIDA'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

This is a discretionary appeal in a criminal case based on conflict jurisdiction. The State, as Petitioner, raises a single issue.

Petitioner, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, RUEBEN ALEXIS, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Respondent or by proper name.

The record on appeal consists of two continuously-paginated volumes and a supplemental volume, which will be referenced as the Record on Appeal, followed by any appropriate page number. The record also a jury selection transcript, which is not referenced in this brief, and a three-volume, continuously paginated trial transcript, which will be referenced as "T.," followed by any appropriate page number.

STATEMENT OF THE CASE AND FACTS

This case arises from Respondent Alexis's and his co-defendant, Quincy Guerrier's, forcible removal of Clendon Melton from a vehicle, at gunpoint, in the parking lot of Chubby's night club on November 1-2, 2008, which was Florida A&M University's Homecoming weekend.[1] (R. 223-24.) Mr. Melton left the club and got into the vehicle of Respondent's friend, Shanta Fleece, and passenger Monique Range. (R. 224.) Respondent Alexis and Guerrier removed Mr. Melton from the vehicle when he was in the back seat of that vehicle, at Ms. Fleece's request. (R. 224.)

After their forcible removal of Mr. Melton, officers stopped Respondent and Guerrier's vehicle and the officers discovered a bag of marijuana, and two firearms, a Smith and Wesson .40 caliber handgun and a black Glock .40 caliber handgun, both of which had loaded magazines and a round in the chamber. (R. 224.)

The arrest report indicated that the arresting officer, Tallahassee Police Department Officer Susan Newhouse, attempted to speak with both Guerrier and Respondent post-*Miranda*. (R. 224.) According to her arrest report, Guerrier "stated that [Ms. Range] had called him because Melton would not get out of the vehicle. Guerrier stated that he went to [Ms. Range's] vehicle and plead with Melton nicely to get out of the vehicle,

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[1] In its recitation of the significant facts, the opinion below misconstrued the record facts, possibly due to erroneous statements by the parties in their briefs. Therefore, the State has provided a full statement of the facts.

but Melton began to talk trash and said that he had a weapon in his vehicle. Guerrier stated that Alexis pulled Melton out of the vehicle in an attempt to assist [Range]." (R. 224-25.) Also according to Officer Newhouse's arrest report, Respondent, "denied his involvement." (R. 225.)

Respondent was charged by Information on December 10, 2008, with Aggravated Assault with a Firearm, in violation of Sections 775.087 and 784.021(1)(a), Florida Statutes, a third-degree felony. (R. 16.)

Both Respondent and Guerrier were represented by Baya Harrison, Esq. (R. 191.) Mr. Harrison recognized that, in light of the State's aim to jointly try Respondent and Guerrier, their separate statements presented a *Bruton*[2] problem. So Mr. Harrison filed a Motion for Separate Trials. (R. 24.) At a February 25, 2009, motion hearing, Mr. Harrison and the prosecutor discussed the nature of the *Bruton* issue with the trial judge in the following relevant colloquy:

> MR. HARRISON: [M]y clients are here. They were just outside. Basically, Judge we have a classic *Bruton* situation in this case. . . . And it's my understanding that the State Attorney wants to try these two guys together. I don't know if the cases have been consolidated yet, since they have different case numbers. But it's really, I think pretty simple under Rule 3.152(b)(2).
>
> What happened was, when law enforcement showed up they talked to both young men. And Terry Guerrier allegedly told one of the officers, hey, you know, I didn't do anything. But Reuben Alexis, he did go into this car after the guy that supposedly was assaulted. In other words, Guerrier supposedly makes an incriminating statement as

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[2] *See Bruton v. United States*, 391 U.S. 123 (1968). *Bruton* ultimately was not an issue because both Respondent and Guerrier decided to testify largely in conformity with Guerrier's statement. However, the discussion of the facts related to the *Bruton* issue explains the context of how the potential conflict of interest was addressed.

to Alexis. So under the rule, Rule 3.152(b)(2) and *Bruton v. United States*, we've got an issue to deal with.

And what the Florida Supreme Court said is, under that situation, the State's got to make an election. The State can try them both together, if it moves and you give the State the permission to do that. But the State can't use the Guerrier statement in the trial. Or we can go to trial in one trial, but the State can't use the statement that Guerrier made. That would violate the Confrontation Clause, and it would force Alexis to have to waive his fifth amendment right to remain silent; to get up to deny the charge. So that's – it's just a classic *Bruton* situation.

THE COURT: Okay. What's the State say?

MR. CHOJNOWSKI: Your Honor, if I can offer the statement that the State intends to introduce. This is from the police report by Officer Susan Newhouse. And it states that post *Miranda*, Guerrier stated that Range had called him because Melton would not get out of the vehicle. Guerrier stated that he went to Range's vehicle and plead with Melton nicely to get out of the vehicle, but Melton began to talk trash and said that he had a weapon in the vehicle. Guerrier stated that Alexis pulled Melton out of the vehicle, in an attempt to assist Range. Post *Miranda* Alexis denied his involvement. So it is the statements that Guerrier made that the State intends to introduce. I understand the possible *Bruton* conflict; I was not willing to stipulate at that time. I would prefer the Court make a ruling as to whether or not this statement is sufficiently in conflict that it would invoke *Bruton*.

THE COURT: Well, it seems like it would on its face. So you want to try them together, that's your desire?

MR. CHOJNOWSKI: It would be more economical, I think for the Courts and for the State to try them together.

THE COURT: Is it such that – I mean, I don't know the case. I mean, is it real important for the State to have this statement in against? I guess what you're saying, it can't come in in the trial at all against either defendant, because it would be harmful to one and not the other?

MR. HARRISON: Well, it certainly can't come in Reuben Alexis's trial.

THE COURT: I guess another option is to try it with two juries.

(R. 192-94.)

Subsequently, counsel also identified a <u>potential</u> conflict of interest

between Respondent and Guerrier and the State sought to have the trial court address that potential conflict with Respondent and Guerrier:

> MR. HARRISON: And by the way Judge, since both young men are here, I discussed with them a possible conflict of interest here because of the facts. Terry Guerrier, though wants me to continue to be his attorney; because he emphatically denies ever making the statement to law enforcement. So I think that would take it out of the conflict. But I told him it was his call. And he's in the courtroom, but he's told me he wants me to continue to represent both of them. And Mr. Alexis says the same thing.
>
> MR. CHOJNOWSKI: And, Your Honor, for 3.850 purposes, could we inquire of the defendants to make sure that there is no conflict, and that they waive any possible conflict by being represented by the same counsel?
>
> THE COURT: Okay. Let's bring them on up, then. And which one is this?
>
> MR. HARRISON: This is Terry Guerrier, Your Honor.
>
> DEFENDANT GUERRIER: Terry Guerrier.
>
> THE COURT: Mr. Guerrier, and this then must be Mr. Alexis.
>
> DEFEDNANT ALEXIS: Reuben Alexis.
>
> THE COURT: Okay. And the State Attorney does want to make sure that you don't come back later; and file a claim and say Mr. Harrison was ineffective, because he was representing you with a conflict. But you heard what he just said, Mr. Harrison?
>
> DEFENDANT GUERRIER: Yes, sir.
>
> THE COURT: And knowing that there's that potential conflict, both of you still want him to be your attorney?
>
> DEFENDANT GUERRIER: Yes, sir.
>
> DEFENDANT ALEXIS: Yes, Your Honor.
>
> MR. CHOJNOWSKI: That should be sufficient, Your Honor.
>
> THE COURT: Okay.
>
> MR. HARRISON: Thank you, Judge.

(R. 198-99 (underline added).)

The case proceeded to a joint trial on March 17, 2009. The State's evidence regarding the actual act was presented through the victim, Clendon Melton, and his cousin, Charles Caine. That testimony showed that Mr. Melton met Monique Range while "partying" at Chubby's and she was nice to him, giving him her phone number. (T. 23-24.) Mr. Melton left the club with Ms. Range and her friends, his cousin (Mr. Caine), and Trey McCree, and proceeded to the parking lot. (T. 24.) Mr. Melton went to the vehicle Ms. Range was in, a small car, where Mr. Melton stated Ms. Range continued to talk and flirt with him. (T. 25.) Mr. Melton stated that he sat in the vehicle and continued to talk to Ms. Range. (T. 25.) Mr. Melton stated that none of the women appeared offended by his continued presence. (T. 25-26.)

Mr. Melton testified that subsequently Respondent and Guerrier walked up to the car while he was not paying attention, and Respondent reached into the car and grabbed Mr. Melton by his shirt, pulling him from the vehicle. (T. 26.) Mr. Melton testified that Guerrier had a black semi-automatic pistol pointed at him when he was yanked from the vehicle, so Mr. Melton immediately put his hands up. (T. 26-27, 32.) After he was pulled out of the car, Mr. Melton noticed that Respondent also had a black semi-automatic pistol in his right hand, but did not point it at Mr. Melton. (T. 28.) Mr. Melton testified Guerrier then told him, "We from Orange County. We don't play. . . Recognize." and similar statements. (T. 28.) Mr. Melton stated that he felt threatened and in fear. (T. 28-29.) Mr.

Melton's cousin, Mr. Caine, also testified to the presence of the firearms during the altercation. (T. 50-54.)

Mr. Melton flagged down Officer Susan Newhouse, who was working an off-duty detail in the area, and pointed out Gurrier and Respondent's vehicle saying that the people in the vehicle had just pointed guns at him. (T. 68.) Officer Newhouse stopped Guerrier and Respondent's vehicle. (T. 69.) Guerrier was in the driver's seat and Respondent was in the front passenger seat, and two other occupants were in the rear seats. (T. 70.)

Law enforcement searched the vehicle and found a .40 caliber Glock handgun in the center console in a nylon holster with the holster unsnapped, with a full magazine and a bullet in the chamber, as well as a second 29-round magazine, and two small baggies of cannabis. (T. 86-89.) Law enforcement also located a loaded Smith and Wesson handgun with a bullet in the chamber from the pocket behind the front passenger seat, with the pistol grip sticking out of it. (T. 102-04.)

During trial, the State introduced Guerrier's statement through Officer Newhouse's testimony. The portion of the testimony provides:

> Q. Okay. And after you read [Mr. Guerrier] his rights, did he . . . agree to speak with you?
> A. Yes.
> Q. And did Mr. Guerrier make any statements to you about what had occurred?
> A. He had just advised that he had gone over to help a friend, which was, if you don't mind, let me look at my reports so I can get her name right because there were a lot of witnesses.
> Q. All right, go ahead?
> A. I believe it was Ms. Range. He had gone over there to help her or talk to her, and then he said he never pointed a gun at Mr. Melton.
> Q. Okay. What the statement about him pointing a gun at Mr. Melton in response to a question from you?

> A. Yes, I basically advised him what he was being accused of, what Mr. Melton had said that he had pointed a gun at him and he had denied it and said he didn't point a gun.
> Q. Okay. Did he make any other statements to you about what had occurred that night?
> A. He said that he had gotten into a verbal argument with Mr. Melton basically because he was told by Ms. Range that he – that Mr. Melton wouldn't get out of the car where she was at and that he and a friend had gone over there to help, you know get them away from her.
> Q. Did he say which friend had gone with him to help get him out?
> A. Mr. Alexis.
> Q. Okay. And did he make any statements about what Mr. Alexis' involvement was?
> A. He basically said that Mr. Alexis pulled him out, pulled Mr. Melton out of the vehicle and that they were trying to reason with him to leave the vehicle. And that there was a verbal argument and then they had left.
> Q. Okay.
> A. And based on when he had told me that, Mr. Melton did have a scratch on the right side of his neck.
> Q. Okay. . . .

(T. 71-73.) However, neither the State nor the defense ever presented Mr. Alexis's statement denying any involvement. (T. 1-242.)[3]

The gravamen of Respondent and Guerrier's joint defense was that, while they forcibly removed Mr. Melton from the vehicle, they did so in defense of Ms. Fleece, Ms. Range and the other vehicle occupants and did not use a firearm. Ms. Fleece and Ms. Range essentially testified that Mr. Melton was following them and expressing interest in Ms. Range. (T. 138-39, 154-55.) When they left Chubby's, he went with them to their car, sitting in the back seat and talking to the intoxicated Ms. Range. (T. 139, 140-41, 156.) Ms. Fleece asked Mr. Melton to leave, but he refused to do so,

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[3] Officer Newhouse testified that she questioned Respondent, but did not testify about the substance of that questioning. (T. 75.)

resulting in a verbal argument between the two. (T. 141, 156-57.) Mr. Guerrier happened to call Ms. Fleece at that time, and Mr. Fleece told him that Mr. Melton was refusing to leave the car and asked him to come help. (T. 142-44, 157.) The women testified that Guerrier and Respondent told Mr. Melton to leave and, when he refused, they both forcibly removed him from the vehicle, after which Mr. Melton walked away. (T. 144, 157-58.) They also testified that neither Guerrier nor Respondent had a firearm in their possession when they did so. (T. 145, 158.)

Both Respondent and Guerrier testified in their defense. Respondent testified that, when he got out of the car, he did not arm himself with a firearm or any other weapon. (T. 214.) Respondent testified that he did not even know that there were weapons in the vehicle. (T. 214.) Respondent stated that he and Guerrier approached the women's vehicle and Guerrier told Mr. Melton, "Oh, get out of the car, they don't want you in here." (T. 214.) Respondent stated that, when Mr. Melton did not leave, they went to the back of the women's vehicle, grabbed him, and pulled him out of the car. (T. 214.) Respondent testified that neither he nor Guerrier ever carried a firearm during the incident. (T. 214-16.)

Guerrier testified that one of the firearms in evidence was his and that had a concealed weapon permit. (T. 220.) Guerrier testified the other firearm was one of the other passenger's (Mr. Assar Nerrellia) who also had a concealed weapon permit. (T. 222-24.) Guerrier testified he never saw Respondent with a firearm that weekend. (T. 227.) Guerrier stated that, when he exited his vehicle, he did not arm himself with either

of the firearms that were in the vehicle and that Respondent also did not arm himself either. (T. 228-29.) Guerrier said he and Respondent approached the women's car and Guerrier told Mr. Melton, "they don't want you here, so just leave." (T. 229.) Guerrier said Mr. Melton refused and that was when he and Respondent pulled Mr. Melton out of the back seat. (T. 230.)

Respondent's conviction was per curiam affirmed on direct appeal. *Alexis v. State*, 65 So. 2d 1056 (Fla. 1st DCA June 16, 2011) (Mem.). However, the First District granted Respondent a second direct appeal based on ineffective assistance of appellate counsel. *Alexis v. State*, 112 So. 3d 144 (Fla. 1st DCA 2013). After briefing, on April 14, 2014, the First District reversed Respondent's conviction for a new trial. *Alexis v. State*, 140 So. 3d 616 (Fla. 1st DCA 2014).

In the majority opinion, the First District found that there was a <u>potential</u> conflict of interest, and, while the trial court sought a waiver, the waiver failed to contain the three necessary elements: "the defendant (1) was aware of the conflict of interest, (2) realized that the conflict could affect the defense, and (3) knew of the right to obtain other counsel." *Id.* at 619. Finding that the second and third elements were not met, the First District found that the waiver was insufficient and, that the error could not be harmless, but rather was *per se* reversible. *Id.* As a result, the First District reversed and remanded the conviction.

In a concurring opinion, Judge Wolf found that, if the First District were not bound by prior panel precedent, he would affirm for two reasons:

First, that the potential conflict had been resolved, and second, that he disagreed with prior panel precedent that harmless error may never be applied in circumstances where the failure to conduct a sufficient conflict of interest inquiry, based on United States Supreme Court authority. *Id.* at 619-20 (Wolf, J., concurring). The First District denied rehearing on June 4, 2014. On August 19, 2014, this Court accepted jurisdiction.

STATEMENT OF THE ISSUE

WHETHER THE FIRST DISTRICT ERRED BY AUTOMATICALLY REVERSING A CASE WHERE THERE WAS ONLY A POTENTIAL CONFLICT OF INTERST BECAUSE THE TRIAL COURT DID NOT OBTAIN THE ADEQUATE SIXTH AMENDMENT WAIVER REQUIRED ONLY WHEN THERE IS AN ACTUAL CONFLICT OF INTEREST.

SUMMARY OF ARGUMENT

A waiver of the right to conflict-free counsel is not required unless counsel has an actual conflict of interest. Counsel's presentation of a joint, coordinated defense did not present an actual conflict of interest and did not violate the Sixth Amendment. Here, there is only a potential conflict of interest, which is insufficient to impugn a criminal conviction. Therefore, a waiver of the Sixth Amendment was unnecessary. As the United States Supreme Court has found, automatic reversal is not a proper sanction for failing to engage in a conflict inquiry or obtain a conflict waiver when there is no actual conflict of interest that violates the Sixth Amendment. Further, a defendant can have an enormous interest in being jointly represented by a single attorney, including precluding a co-defendant's cooperation with the government and presenting a uniform defense.

The First District, in reversing, failed to examine the constitutional predicate for Respondent's claim of ineffective assistance, namely, whether Respondent had shown an "actual conflict of interest": that his counsel actively represented conflicting interests. Instead, the First District's decision simply explores whether there was a valid waiver. By doing so, the First District wrongly elevated an incomplete Sixth Amendment waiver into a denial of the Sixth Amendment right to counsel when there is no constitutional violation at all. Finally, the First District continued an erroneous line of that court's panel precedent creating a false dichotomy between joint representation issues raised on direct appeal and in post-

conviction, despite that the reasoning of the panel precedent has been rejected by subsequent decisions by the United States Supreme Court. The end result of the First District's decision is that it is finding convictions *per se* reversible as unconstitutional, when there is not even an established constitutional violation.

The United States Supreme Court has found that there is no policy benefit to reversing when the Sixth Amendment was not violated, as the First District did here. In fact, public policy weighs strongly against the First District's decision, because it provides an automatic "Gotcha!" reversal for defendants who choose the ability to obstruct State cooperation and present a coordinated defense through joint representation. This Court should reverse the First District's decision, which automatically invalidates judgments with no established Sixth Amendment violation.

ARGUMENT

ISSUE: WHETHER THE FIRST DISTRICT ERRED BY AUTOMATICALLY REVERSING A CASE WHERE THERE WAS ONLY A POTENTIAL CONFLICT OF INTERST BECAUSE THE TRIAL COURT DID NOT OBTAIN THE ADEQUATE SIXTH AMENDMENT WAIVER REQUIRED ONLY WHEN THERE IS AN ACTUAL CONFLICT OF INTEREST (RESTATED)

This case raises the distinction between a potential and an actual conflict of interest of the Sixth Amendment right to counsel. A waiver of the right to conflict-free counsel is not required unless counsel has an actual conflict of interest. There was no actual conflict of interest here because counsel presented a joint, coordinated defense. The First District misapprehended controlling precedent of both the United States Supreme Court and this Court, and rejected decisions of a sister district that a potential conflict of interest is insufficient to impugn a criminal conviction. *See Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980). Rather, the First and Second Districts have wrongly reversed convictions in this and other cases involving nothing more than potential conflicts of interest.

A. Standard of Review.

"The question of whether a defendant's counsel labored under an actual conflict of interest that adversely affected counsel's performance is a mixed question of law and fact." *Hunter v. State*, 817 So. 2d 786, 791-92 (Fla. 2002) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980)). The question of whether a waiver is required in the absence of an actual conflict of interest is a pure question of law that is reviewed *de novo*. *See State v. Blair*, 39 So. 3d 1190, 1191–92 (Fla. 2010).

B. The First District Erred By Reversing For an Insufficient Waiver Without an Actual Conflict of Interest.

In this case, the First District found that where a defense attorney alerts the trial court to a potential conflict of interest, the failure to obtain the three-step waiver of an actual conflict of interest set forth by this Court in *Larzelere v. State*, 676 So. 2d 394 (Fla. 1996), constitutes inherently or "per se" reversible error. However, the First District put the cart before the horse. The First District failed to examine the seminal question of whether Respondent has pointed to record evidence of an actual conflict of interest, rather than merely a potential conflict of interest. The First District also wrongly elevated an incomplete Sixth Amendment waiver to a denial of the Sixth Amendment's right to counsel, when a waiver was not necessary.

First, the State sets forth the relevant law on the Sixth Amendment and conflicts of interest. Second, the State discusses the operation of a proper and improper Sixth Amendment waiver. Third, the State explains the significance of an absence of an objection to multiple representation. And fourth, the State explains the flaws in the First District's decision and decisions of the First and Second Districts that led to the patently incorrect decision of the case under review.

1. The Sixth Amendment Right to Counsel and Actual v. Potential Conflicts of Interest

The Sixth Amendment of the United States Constitution provides that a criminal defendant shall have the right to "the Assistance of Counsel for his defence." U.S. Const. amend. VI. Generally, "a defendant alleging a

Sixth Amendment violation must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Mickens v. Taylor*, 535 U.S. 162, 166 (2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

However, in a very limited class of cases, a defendant is spared "the need of showing probable effect upon the outcome" and such an effect is simply "presumed" under the reasoning that "the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary." *See United States v. Cronic*, 466 U.S. 648 (1984); *see also Geders v. United States*, 425 U.S. 80 (1976); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

One of those rare circumstances is when "the defendant's attorney ***actively*** represented conflicting interests." *See Mickens*, 535 U.S. at 166 (emphasis added). The Supreme Court has unambiguously held, "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an ***actual*** conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980) (emphasis added). However, "an actual conflict of interest" means "precisely a conflict *that affected counsel's performance*---as opposed to a mere theoretical division of loyalties." *Mickens*, 535 U.S at 171 (emphasis in original).[4]

[4] The prototypical example of an actual conflict is where a lawyer jointly represents two defendants in the same trial that blame one another for a crime.

However, "the possibility of a conflict is insufficient to impugn a criminal conviction." *Cuyler v. Sullivan*, 446 U.S. at 350. The Supreme Court explained the reason for this and how even a trial court's awareness of a potential conflict is insufficient for a Sixth Amendment violation: "The trial court's awareness of a potential conflict neither renders it more likely that counsel's performance was significantly affected nor in any other way renders the verdict unreliable." *Mickens*, 535 U.S. at 173. In fact, a potential conflict can work to a defendant's advantage, by, among other things, ensuring that a jointly-represented co-defendant does not cooperate with law enforcement, *Dixon v. State*, 758 So. 2d 1278, 1281 (Fla. 3d DCA 2000), and providing "[a] common defense [that] . . . gives strength against a common attack.'" *Cuyler v. Sullivan*, 446 U.S. at 348 (quoting *Glasser v. United States*, 315 U.S. 60 (1942) (Frankfruter, J., dissenting)).

So, "[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 v. Sullivan*, 446 U.S. at 350. And, while a defendant who demonstrates an actual conflict of interest is not required to show prejudice, "until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Cuyler v. Sullivan*, 446 U.S. at 350.

Unsurprisingly, a long line of this Court's precedent, relying on *Cuyler v. Sullivan* makes clear that an actual conflict of interest is

necessary to impugn a criminal conviction as well. *See, e.g., Bell v. State*, 965 So. 2d 48, 77-78 (2007); *Slinley v. State*, 944 So. 2d 270, 279-80 (Fla. 2006); *Hunter v. State*, 817 So. 2d 786, 791-92 (Fla. 2002); *Quince v. State*, 732 So. 2d 1059, 1064-65 (Fla. 1999).

This Court has also made clear that "[t]o demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were compromised." *Hunter*, 817 So. 2d at 791-92 (citing *Herring v. State*, 730 So. 2d 1264, 1267 (Fla. 1998)). Indeed, this Court looks to United States Supreme Court precedent to address the difference between a possible conflict and an actual conflict:

> In illustrating the difference between a possible conflict and an actual conflict, the Supreme Court cited its previous decision in *Glasser v. United States*, 315 U.S. 60, 62 (1942), and *Dukes v. Warden*, 406 U.S. 250 (1972). *See Cuyler*, 446 U.S. at 348-50. The Supreme Court reversed the defendant's conviction in *Glasser* because the record revealed omissions by defense counsel which were intended to diminish the jury's perception of a codefendant client's guilt. *See Cuyler*, 446 U.S. at 348-49. In contrast, the Court did not grant habeas corpus relief in *Dukes* on a claim that the lawyer's conflict of interest infected the defendant's plea because the defendant could not identify any actual lapse in representation in the record. *See Cuyler*, 446 U.S. at 349.

Quince, 732 So. 2d at 1065.

Here, Respondent has utterly failed to put forth any record facts that demonstrate Mr. Harrison represented Respondent and Guerrier under an <u>actual</u> conflict of interest. Although Guerrier had said that Respondent pulled Mr. Melton out of the vehicle in a post-*Miranda* statement, in their coordinated, joint defense, Guerrier and Respondent both testified that

they both pulled Mr. Melton out of the vehicle in defense of the women in the car.[5] (T. 214, 230.) Further, on the critical issue of whether they were armed, both Respondent and Guerrier testified that they were not armed. (T. 214-16, 228-29.) Additionally, Guerrier testified that Respondent did not have a firearm at any point that weekend. (T. 222-24.) Further, neither the State nor the defense introduced Respondent's pre-trial post-*Miranda* statement that he had no involvement in the incident.

In sum, while there was a potential for a conflict of interest, Respondent utterly failed to demonstrate that the conflict became actual. Put another way, Respondent utterly failed to demonstrate the "constitutional predicate for his claim of ineffective assistance," that his "counsel actively represented conflicting interests." *Cuyler v. Sullivan*, 446 U.S. at 350. Rather, this is exactly the type of case Justice Frankfruter referenced when he found multiple representation may present "[a] common defense . . . gives strength against a common attack.'" *Cuyler v. Sullivan*, 446 U.S. at 348 (quoting *Glasser v. United States*, 315

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[5] The only "conflict" in this case is not a "conflict of interests," but a conflict between Respondent's pre-trial statement and his trial testimony. Pre-trial, Respondent denied any involvement to law enforcement, but at trial he admitted that he pulled Mr. Melton out of the vehicle, but denied doing it at gun point. However, neither the State nor the defense presented Respondent's pre-trial statement denying any involvement. So the only defense theory presented at trial was consistent and uncontradicted between Guerrier and Respondent: that they were defending the women by removing Mr. Melton from the car, but did so without a gun or any other weapon. Guerrier and Respondent did not blame one another in this case; they presented a united defense, supporting one another, which is not an "actual conflict of interest" for counsel.

U.S. 60 (1942) (Frankfruter, J., dissenting)).

2. The *Larzelere* Waiver: Waiving an Actual Conflict of Interest When a Potential Conflict Appears.

However, an actual conflict of interest is subject to waiver. This Court properly recognized that "a defendant's fundamental right to conflict-free counsel can be waived." *See Larzelere v. State*, 676 So. 2d 394 (Fla. 1996). In *Larzelere v. State*, 676 So. 2d 394 (Fla. 1996), this Court set forth the elements of that proper waiver of conflict-free counsel: "For a waiver to be valid, the record must show that the defendant was [1] aware of the conflict of interest, that [2] the defendant realized that the conflict could affect the defense, and that [3] the defendant knew of the right to obtain other counsel." *Id.* at 403 (citing *United States v. Rodriguez*, 982 F.2d 474 (11th Cir. 1993)).

However, a *Larzelere* waiver does not exist to waive a mere potential conflict of interest. After all, "the possibility of a conflict is insufficient to impugn a criminal conviction." *Cuyler v. Sullivan*, 446 U.S. at 350. So if a *Larzelere* waiver, which is a waiver of a constitutional right, existed for waiving potential conflicts, it would be waiving nothing at all. Rather, a *Larzelere* waiver---which is a waiver of the Sixth Amendment--exists to waive an actual conflict of interest. *See Holloway v. Arkansas*, 435 U.S. 475, 483 n.5 (1978) ("[A] defendant may waive his right to the assistance of an attorney unhindered by a conflict of interests."). After all, it is the Sixth Amendment right that prohibits "the defendant's attorney [from] ***actively*** represented conflicting

interests." *See Mickens*, 535 U.S. at 166 (emphasis added).

Support for this analysis is in this Court's decision in *Gorby v. State*, 630 So. 2d 544 (Fla. 1993). In *Gorby*, this Court considered a potential conflict of interest claim on direct appeal in a capital case. This Court explained:

> Gorby listed Jerry Wyche, a former cellmate, as a possible witness, but withdrew Wyche's name as a witness after the state listed him as a witness. The morning of trial began defense counsel put the court on notice of a possible conflict because his former partner had represented Wyche in the past and Wyche's files were in Gorby's counsel's office. Counsel told the court that he had not looked at those files, and the court, finding no conflict at the present time, directed counsel not to look at Wyche's files.

Id. at 546. Counsel alerted the trial court to a potential, but not actual conflict of interest. Indeed, there was no actual conflict found by the trial court.

Yet this Court affirmed Gorby's conviction. Without any discussion of waiver, this Court found there was no actual conflict of interest at all and, therefore, no error. This Court, relying on the United States Supreme Court's decision in *Sullivan*, determined:

> We find no merit to Gorby's claim on appeal that his counsel suffered from a conflict of interest. To prevail when arguing a violation of the right to conflict-free counsel, "a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350 [] (1980); *Bouie [v. State*, 559 So. 2d 113 (Fla. 1990)]. Counsel never moved for permission to withdraw, seeking rather to inform the court of the possible conflict that the court took steps to keep from becoming an actual conflict. Moreover, counsel cross-examined Wyche extensively and called two other inmates to impeach Wyche's testimony. Gorby, therefore, has not shown an actual conflict that adversely affected his counsel's performance.

Id. at 546 (underline added). Thus, despite that counsel informed the

trial court of a potential conflict—as counsel did in this case—this Court affirmed, not because there was a valid waiver but because the potential conflict never became actual.

Further support lies in this Court's decision in *McWatters v. State*, 36 So. 3d 613 (Fla. 2010). In that case, the defendant argued that two of his attorneys violated the Sixth Amendment because they both operated under conflicts of interest. *See id.* at 635. Yet, this Court found that neither attorney violated the Sixth Amendment, albeit for different reasons. As to one attorney, this Court found that there was a sufficient *Larzelere* waiver. *Id.* at 635. That alone was a basis to find no Sixth Amendment violation.

However, as to the other attorney, this Court did not discuss whether there was a *Larzelere* waiver at all. Instead, this Court explored whether that lawyer labored under an "actual conflict," finding that he "did not labor under an actual conflict," because he did not personally participate in the case, had no personal interaction with any witnesses, and no confidential information. *Id.* at 635 (underline added).

So *McWatters* demonstrates that a proper *Larzelere* waiver immediately ends the conflict of interest inquiry. If a defendant has waived the Sixth Amendment, then there is no need to examine whether an actual conflict exists because the conflict has been knowingly waived. But, *McWatters* also shows that when there is not a proper *Larzelere* waiver, that does not constitute a Sixth Amendment violation. Even if there is no valid Sixth Amendment waiver, then a court must still examine whether there was an

actual conflict of interest, e.g., whether the Sixth Amendment was, in fact, violated.

And those decisions are correct. In *Mickens*, the Supreme Court, discussing the sufficient incentive of the *Cuyler v. Sullivan* standard, recognized, "[T]he *Sullivan*[6] standard, which requires proof of effect upon representation but (once such effect is shown) presumes prejudice, already creates an 'incentive' to inquire into a potential conflict. In those cases **where the potential conflict is in fact an actual one**, only inquiry will enable the judge to avoid all possibility of reversal by either seeking waiver or replacing a conflicted attorney." *Id.* at 173 (bold, underline and alterations added).

The Third District has also properly followed these decisions. In *Dixon v. State*, 758 So. 2d 1278 (Fla. 3d DCA 2000), the Third District considered a case involving involving jointly-represented spouses. The Third District found that the trial court's *Larzelere* waiver was deficient on the second and third prongs: "The court did not explain to defendant how the conflict with her husband might impact her defense at trial, nor did the trial court inform defendant that she had the right to be represented

[6] In *Cuyler v. Sullivan*, Cuyler was the state official, and, therefore, the Bluebook indicates the case is properly short-referenced by the defendant, Sullivan. *See* The Bluebook: A Uniform System of Citation R. 10(a)(i) (19th ed.). However, as with *Strickland v. Washington*, this Court and other courts have often short-cited *Cuyler v. Sullivan* with the name of the warden rather than the prisoner. *See, e.g., Quince v. State*, 732 So. 2d 1059, 1065 (1999)(using *Cuyler* as short-form for the case). However, the United States Supreme Court refers to the case as *Sullivan*. *See, e.g., Mickens*, 535 U.S. at 162-176.

by an independent court-appointed attorney." *Id.* at 1279.

However, the Third District properly recognized that the *Larzelere* waiver applied to waive an actual conflict of interest, not a potential conflict. Therefore, prior to considering whether the waiver was appropriate under *Larzelere*, the Third District found it "essential to determine whether an actual conflict existed." *Id.* at 1280. The Third District then found that, in conformity with the United States Supreme Court's decision in *Cuyler v. Sullivan*, absent objection "on appeal defendant 'must demonstrate that an actual conflict of interest adversely affected [her] lawyer's performance.'" *Id.* at 1280. The Third District affirmed finding that no actual conflict of interest was present or arose. *Id.* at 1281. So no *Larzelere* waiver was necessary. *See also Alessi v. State*, 969 So. 2d 430 (Fla. 2007) (assuming applicability of *Cuyler v. Sullivan* to conflict at issue, and finding record demonstrated a "potential conflict fully matured into an active conflict," but there was not a proper *Larzelere* waiver, mandating reversal).

Certainly, as a matter of practice, it is wise for a trial court to obtain a *Larzelere* waiver when a mere potential conflict arises. This is because, if the conflict later becomes actual, the trial court can be assured that the defendant has knowingly waived any Sixth Amendment violation that could arise from the actual conflict of interest.[7] However,

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[7] As stated above, the Supreme Court recognized this practical incentive: "the *Sullivan* standard, which requires proof of effect upon representation

what constitutes a wise practice to protect from unforeseen contingencies and what is necessary to avoid impugning a criminal conviction with constitutional error are two different things.

3. The Absence of an Objection to Multiple Representation: Why It Matters.

In this case, neither defense counsel nor the various co-defendants objected to Mr. Harrison's joint representation and presentation of a coordinated defense. In order to understand why that matters, a discussion of the United States Supreme Court's decision in *Holloway v. Arkansas*, 435 U.S. 475 (1978), and the Court's explanation of the holding in *Holloway* in *Mickens*, is helpful.

In *Holloway*, the United States Supreme Court considered a circumstance where the trial court forced counsel to represent multiple defendants who blamed one another, over objections of the codefendants and the objection of counsel. Despite counsel's objection "as an officer of the court," the trial court "failed to either appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel." *Id.* at 484. The Supreme Court found those failures, "in the face of the representation made by counsel weeks before trial and against before the jury was empaneled," violated the Sixth Amendment. *Id.* at 484.

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but (once such effect is shown) presumes prejudice, already creates an 'incentive' to inquire into a potential conflict. In those cases where the potential conflict is in fact an actual one, only inquiry will enable the judge to avoid all possibility of reversal by either seeking waiver or replacing a conflicted attorney." *Mickens*, 535 U.S. at 173.

The *Holloway* Court found that "whenever a trial court improperly requires joint representation over timely objection reversal is automatic." *Id.* at 488 (underline added).

However, the *Holloway* Court noted the importance of counsel's objection and representations. First, the Supreme Court found "[a]n attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in a course of a trial." *Id.* at 485. Second, the Supreme Court recognized, "defense attorneys have an obligation, upon discovering a conflict of interests, to advise the court at once of the problem." *Id.* at 485-86. Third, "attorneys are officers of the court, and when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath." *Id.* at 486.

In *Mickens*, the Supreme Court recognized the limited nature of *Holloway*'s holding. The Supreme Court found that "*Holloway* . . . creates an automatic reversal rule only where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict." 535 U.S. at 168 (underline added). *Holloway*, the *Mickens* Court reiterated, was a case where "counsel protested his inability simultaneously to represent multiple defendants." *Id.* at 173.

Here, neither counsel nor the defendants protested counsel's multiple representation. Addressing the potential for a conflict, counsel stated:

> MR. HARRISON: And by the way Judge, since both young men are here, I discussed with them a possible conflict of interest here because of

> the facts. Terry Guerrier, though wants me to continue to be his attorney; because he emphatically denies ever making the statement to law enforcement. So I think that would take it out of the conflict. But I told him it was his call. And he's in the courtroom, but he's told me he wants me to continue to represent both of them. And Mr. Alexis says the same thing.

(R. 178 (underline added).) Counsel's statement to the trial court merely alerted the trial court to the potential for a conflict, but, in the same statement, indicated that he did not view the presence of an actual conflict and was not objecting, on his or his clients' behalf, to his continued joint representation. This is not a case where the trial court forced counsel to continue joint representation over a timely protest of his inability to simultaneously represent conflicting interests.

4. *Lee* and its Mistake and Its Misapplication Here and By Other Districts

Before addressing the specific flaws in the First District's analysis below and in several other decisions, it is necessary to discuss the First District's prior decision in *Lee v. State*, 690 So. 2d 664 (Fla. 1st DCA 1997) and cases from the Second District following that decision.

Lee was an actual conflict of interest case. In *Lee*, the attorney, Lovelace, previously represented Kyles, a key witness against the defendant. *Id.* at 665. When the conflict initially arose, counsel stated that he had no memory of his prior personal representation of Kyles and indicated that he did not believe it created a conflict of interest. *Id.* at 665. The trial court inquired about whether the protection of Kyles's attorney-client privilege, but counsel indicated the State was going to stipulate as to Kyles's prior convictions so there would be no need to any

cross-examination on that issue. *Id.* at 665. The trial court then conducted an insufficient *Larzelere* colloquy and waiver. *Id.* at 665-66. The defendant then had a change-of-heart and tried to obtain new counsel, but the trial court, based on the insufficient waiver, refused. *Id.* at 666.

Both before and at trial, it quickly became apparent that counsel had an actual conflict. Kyles was a jailhouse informant and counsel waivered at various times on whether to file a motion to suppress his testimony, ultimately deciding not to. *Id.* at 666-67. Kyles then testified that while he and the defendant were sharing a cell, the defendant confessed to murder, that he informed authorities, that authorities provided him a recording device, and that he then obtained a recorded incriminating statement from the defendant. *Id.* at 667.

Addressing the existence of an actual conflict of interest, the First District in *Lee* properly found:

> In this case, there can be no doubt that [counsel] and the defendant had an actual conflict of interest. [Counsel] had personally represented a primary witness against the defendant in the past and his office had also represented that witness about the time he was assisting law enforcement officers in their effort to obtain a confession from the defendant.

Lee, 690 So. 2d at 667. The First District then went on to determine that the *Lazalere* waiver was inadequate and, therefore, the conviction was properly reversed. The State has no quarrel to this Court with this portion of the *Lee* opinion.

However, the *Lee* court then created a false dichotomy between the consideration of a Sixth Amendment "actual conflict" claim that is

considered on direct appeal and one that is considered on post-conviction. The First District found:

> 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. <u>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 the 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.</u> *Cuyler v. Sullivan*, 446 U.S. at 348.

Lee, 690 So. 2d at 669 (underline added, footnote omitted). Thus, in *Lee*, the First District found that, on direct appeal, a defendant must show an "actual conflict." But, in post-conviction, the First District found that, in addition to an "actual conflict," a defendant must <u>also</u> show "that the conflict impaired the performance of the defense lawyer."

This is wrong. The United States Supreme Court clarified this point and subsequently indicated, "an actual conflict of interest" means "precisely a conflict *that affected counsel's performance*---as opposed to a mere theoretical division of loyalties." *Mickens*, 535 U.S. at 171 (emphasis in original). A defendant who shows an actual conflict of interest "shows that a conflict of interest *actually affected the adequacy of his representation* . . . ." *Id.* at 171 (emphasis in original). The United States Supreme Court was unambiguous on this point:

> [T]he *Sullivan* standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse

> effect. An "actual conflict," for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance.

Mickens, 535 U.S. 172 n.5. Therefore, United States Supreme Court itself has held that the distinction between direct appeal and postconviction that the First District made in *Lee* is no distinction at all.

And the Supreme Court's reasoning makes sense. A Sixth Amendment violation is a Sixth Amendment violation. Whether presented on direct appeal or postconviction, if a defendant makes a showing that his counsel was representing him with an "actual conflict," that is "a conflict of interest that adversely affects counsel's performance," <u>and</u> that actual conflict has not been knowingly and voluntarily waived, then his conviction is properly reversed because prejudice in that circumstance is presumed. *See Mickens*, 535 U.S. at 166. However, anything less than that is insufficient to impugn a criminal conviction.

This critical error in *Lee* has spawned a series of erroneous district court decisions. In *Thomas v. State*, 785 So. 2d 626 (Fla. 2d DCA 2001), the Second District, relying on *Lee*, reversed a conviction because of an invalid waiver, without examining whether or not counsel had an actual conflict of interest. There, although the trial court found there was "no conflict because of the past representation," the Second District, relying on *Lee* determined that the potential of a conflict was brought to the trial court's attention, but the trial court did not engage in a sufficient inquiry. Rather, the Second District's analysis was:

> Here, the conflict regarding defense counsel's prior representation of witness Pontoon was brought to the trial court's attention prior to trial, but the trial court did not address Thomas

> at all regarding the conflict. Neither did the court determine whether Pontoon had given defense counsel privileged information.
>
> We note that the harmless error rule is not applied when a defendant is deprived of conflict-free counsel because "any action the lawyer refrained from taking because of the conflict would not be apparent from the record." *Lee*, 690 So. 2d at 668. Here, the trial court never obtained from Thomas a knowing, intelligent, and voluntary waiver of Thomas's right to conflict-free counsel; thus, we must reverse Thomas's convictions and remand for a new trial.

Thomas, 785 So. 2d at 629.

In *Forsett v. State*, 790 So. 2d 474 (Fla. 2d DCA 2001), the Second District reversed a conviction because the defense counsel informed the court that he had previously represented a prosecution witness on a violation of probation, but that he did not believe a conflict existed. The trial court did not conduct any further inquiry. The Second District, relying on *Lee* and *Thomas* found that reversal was necessary solely because the trial court had not obtained a valid waiver, even characterizing the conflict as merely "potential":

> In this case, as in *Thomas* and *Lee*, the trial court failed to ascertain whether Forsett understood that she had the right to obtain other counsel. In fact, the trial court failed to address Forsett at all regarding the <u>potential conflict</u>. Therefore, the court did not obtain a voluntary waiver of Forsett's right to conflict-free counsel under *Larzelere*. Accordingly, we reverse and remand for a new trial.

Forsett, 790 So. 2d 474 (Fla. 2d DCA 2001) (underline added).[8]

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[8] As the Fifth District recognized in *Alessi*, there is serious question about whether *Thomas* and *Forsett* were correct to apply *Cuyler v. Sullivan* at all, since, in *Mickens*, the United States Supreme Court indicated that the *Cuyler v. Sullivan* exception is only properly applied to joint representation. *Alessi*, 969 So. 2d at 436-37. The Fifth District recognized the absence of discussion of *Mickens* in this Court's caselaw since its issuance. *See Alessi*, 969 So. 2d at 437. Obviously, in such

This case is even more egregious example of such a decision. Below, the First District unambiguously indicated that they were considering only a "potential conflict of interest," framing the issue as "whether Alexis validly waived his trial attorney's potential conflict of interest due to the joint representation of Alexis and a codefendant." *Alexis*, 140 So. 2d at 618 (underline added). However, the First District engaged in no analysis and did not even summarily state that the potential conflict had become actual. As set out above, the potential conflict never became an actual conflict. In fact, the First District went beyond even *Forsett*'s error by expressly elevating the potential conflict of interest into a Sixth Amendment violation, finding: "In this case, when defense counsel disclosed his possible conflict of interest the trial court became legally obligated to either conduct an inquiry or appoint separate counsel." *Id.* at 619 (underline added).

The First District, with the erroneous assumption that a potential conflict of interest alone is a Sixth Amendment violation, analyzed whether the *Larzelere* Sixth Amendment waiver was sufficient, finding that it was not under the second and third prongs. *Id.* at 618-19. And, because the *Larzelere* waiver was insufficient, the First District determined that this

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cases, if *Sullivan* does not apply, then a defendant is also required to demonstrate "prejudice" under *Strickland. See Mickens*, 535 U.S. at 166 (recognizing that "[a]s a general matter, a defendant alleging a Sixth Amendment violation must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'" and noting *Sullivan* is an exception to that general rule.) (citing *Strickland*, 466 U.S. at 694.)

"error" could not be excused "as harmless error on direct appeal" and reversed a case with no actual conflict of interest established and, therefore, no constitutional violation. *Id.* at 619. Boiled down to its essence, the First District found an insufficient waiver for a constitutional right that was not violated merited *per se* reversal.

The most obvious and basic flaw in the First District's, *Thomas*'s, and *Forsett*'s analyses is that they utterly fail to examine the "constitutional predicate for [Respondent's] claim of ineffective assistance," namely, whether Respondent had shown "that his counsel actively represented conflicting interests . . . ." *Cuyler v. Sullivan*, 446 U.S. at 350. Instead, these cases proceed to examine a waiver (as thought it were dispositive) after only determining that there is a potential conflict of interest. However, as the United States Supreme Court has made unambiguous, "the possibility of a conflict is insufficient to impugn a criminal conviction." *Cuyler v. Sullivan*, 446 U.S. at 350.

However, First District's and *Forsett*'s analyses fail on another significant point: they wrongly elevate an incomplete *Larzelere* waiver to a denial of the Sixth Amendment's right to counsel. Indeed, relying on *Lee*'s false dichotomy between conflicts on direct appeal and post-conviction, the First District applied the *per se* reversibility of an unwaived, actual conflict of interest's Sixth Amendment violation to an insufficient waiver without an actual conflict mandated reversal. This, of course, is wrong. A *Larzelere* waiver is a waiver of a Sixth Amendment right to counsel free of an actual conflict. The Sixth Amendment is not violated until the

potential conflict matures into an actual conflict of interest. When a court finds that a *Larzelere* waiver is insufficient, but there is no actual conflict of interest, there is no Sixth Amendment violation to be waived.

In fact, the First District's reasoning on this point is directly contradicted by the United States Supreme Court in *Mickens*. The First District held: "In this case, when defense counsel disclosed his possible conflict of interest the trial court became legally obligated to either conduct an inquiry or appoint separate counsel." *Id.* at 619. However, the United States Supreme Court held the opposite in *Mickens*: "In those cases where the potential conflict is in fact an actual one, only inquiry will enable the judge to avoid all possibility of reversal by either seeking waiver or replacing a conflicted attorney." 535 U.S. at 173. Thus, the entire lynchpin of the First District's analysis is incorrect and has been expressly held by the United States Supreme Court to apply only when a potential conflict of interest matures into an actual conflict of interest.

5. Undercutting the System: Why Public Policy Demonstrates the First District's Decision is Incorrect.

In *Mickens*, the United States Supreme Court expressly addressed the policy implications of the First District's decision: a rule of automatic reversal where there is an insufficient inquiry and waiver but without establishing an actual conflict of interest. The Supreme Court found, "Petitioner's proposed rule of automatic reversal when there existed a conflict that did not affect counsel's performance [not an "actual conflict of interest"], but the trial judge failed to make the *Sullivan*-mandated

inquiry [a preliminary *Larzelere* inquiry], makes little policy sense. . . . The trial court's awareness of a potential conflict neither rendered it more likely that counsel's performance was significantly affected nor in any other way rendered the verdict unreliable." *Mickens*, 535 U.S. at 172-73. The Supreme Court also determined, "Nor does the trial judge's failure to make the *Sullivan*-mandated inquiry often make it harder for reviewing courts to determine conflict and effect, particularly since those courts may rely on evidence and testimony whose importance only becomes established at trial." *Id.*

The Supreme Court also found that, what the First District did here, "automatic reversal[, is] simply [not] an appropriate means of enforcing *Sullivan*'s mandate of inquiry." *Mickens*, 535 U.S. at 173. The Supreme Court found the trial court already has an incentive to follow *Cuyler v. Sullivan* and engage in an inquiry when a potential conflict appears: automatic reversal if a potential conflict of interest becomes a demonstrable actual conflict, and neither a waiver nor conflict-free counsel have been obtained. As the United States Supreme Court recognized, "[S]ince the trial court's failure to make the *Sullivan*-mandated inquiry does not reduce the [defendant's] burden of proof; it was at least necessary, to void the conviction, for [the defendant] to establish that the conflict of interest adversely affected his counsel's performance." *Id.* at 173-74.

However, the other side of the policy calculus falls strongly against the First District's automatic reversal rule in this context: where there

is no actual conflict of interest, but only an insufficient waiver when a mere potential conflict of interest appears. As the Third District recognized in *Dixon*, "a possible conflict inheres in almost every instance of multiple representation." *Dixon*, 758 So. 2d at 1281 (quoting *Sullivan*, 446 U.S. at 346). The Third District further recognized "joint representation of criminal defendants is inherently suspect, and is a tactic sometimes employed to obstruct potential cooperation with law enforcement." *Id.* Permitting per se reversal for potential conflicts that never become actual, based on failure to meet a waiver requirement for actual conflicts would only facilitate obstruction of cooperation and reward defendants who choose joint representation with a possible "Gotcha" reversal for convictions that entirely comply with the Sixth Amendment.

This case is a particularly egregious example. Respondent and his co-defendant presented a coordinated, joint defense: that they removed Mr. Melton from the vehicle in defense of the women who were in the vehicle, but they did not have a gun or any other type of weapon. They presented witnesses in support of their defense, including both of their testimony supporting one another. This was clearly a case where "Joint representation [was] a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack." *Holloway*, 435 U.S. at 482-83 (quoting *Glasser*, 315 U.S. at 92 (Frankfruter, J., dissenting)).

Yet, after receiving the benefit from the strength of this unified front to the State's charges, the First District has provided Respondent

with a mandatory "Gotcha" reversal: the waiver of an actual conflict of interest was deficient, even though Respondent demonstrated no actual conflict of interest.[9] The First District's decision requires reversal where the trial court's insufficient Sixth Amendment waiver "neither rendered it more likely that counsel's performance was significantly affected nor in any other way rendered the verdict unreliable" because, since no actual conflict was demonstrated, there was no Sixth Amendment violation. *Mickens*, 535 U.S. at 172-73.

6. Harmlessness and Harmless Error: How Importing The Harmless Error Rule Confuses the Inquiry

One other point of the First District's opinion deserves mention. The majority of the First District panel and the concurring judge dispute whether an insufficient waiver for a potential conflict of interest is *per se* reversible or subject to harmless error. Neither is correct. Where there is only a potential conflict of interest, an insufficient waiver is not error at all. This is because a waiver is only necessary for an actual conflict of interest. Therefore, there is no *per se* basis to reverse, nor is there any error to find harmless. Similarly, where a defendant demonstrates there is an actual conflict of interest that adversely affected counsel's performance and there is not a sufficient waiver, then a

[9] The State is not insinuating that Respondent's counsel in this case was executing a "Gotcha!" strategy, but merely that embracing the First District's rule creates the prospect for "Gotcha!" strategies under similar facts.

defendant need not show prejudice from the Sixth Amendment violation and reversal is required.

Judge Wolf, in concurrence, indicated that he would have found the flawed *Larzelere* waiver as "harmless" if he were free to do so. In a sense, a flawed *Larzelere* waiver is "harmless" when there is no actual conflict of interest; the trial court's incomplete waiver was "harmless" because it did not matter without an actual conflict. However, the State would caution against using the term "harmless" because it creates confusion with the "harmless error" standard. Without an actual conflict of interest, there was no constitutional violation and, therefore, no error at all. Use of the phrase "harmless error" and even "harmless" in this context implies that the State must prove something beyond a reasonable doubt.[10] In reality, an improper waiver simply doesn't matter when a defendant does not establish an actual conflict of interest adversely affected counsel's performance. As the First District's opinion demonstrates, the use of "harmless error" or "harmless" to discuss a *Larzelere* waiver only engenders confusion when combined with *Cuyler v. Sullivan*'s standard that prejudice need not be proved. The State suggests that it would be wise to avoid the terms "harmless" and "harmless error" in

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[10] *Cf. State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986)("The harmless error test, as set forth in *Chapman* 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.").

this context.

CONCLUSION

Because the United States Supreme Court and this Court have properly recognized that a potential conflict of interest is insufficient to impugn a criminal conviction, the State respectfully requests this Court reverse the decision of the First District Court of Appeal reported at 140 So. 3d 616, disapprove of *Thomas v. State*, 785 So. 2d 626 (Fla. 2d DCA 2001), and *Forsett v. State*, 790 So. 2d 474 (Fla. 2d DCA 2001), disapprove the above-mentioned reasoning of *Lee v. State*, 690 So. 2d 664 (Fla. 1st DCA 1997), and affirm the judgment and sentence of the trial court.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by electronic mail on September 15, 2014: Dane K. Chase, Esq., Chase Law Florida, P.A., dane@chaselawfloridapa.com, Counsel for Respondent.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

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