

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

Case Number: SC14-1341

v.

REUBEN ALEXIS

Respondent.

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

JURISDICTIONAL BRIEF OF RESPONDENT

Dane K. Chase, Esq.
Chase Law Florida, P.A.
111 2nd Ave NE
Suite 334
Saint Petersburg, FL 33701
Direct: (727) 350-0361
Email: dane@chaselawfloridapa.com

Attorney for the Petitioner

TABLE OF CONTENTS

	<u>PAGE NO.</u>
Table of Citations.....	ii
Statement of The Case and Facts.....	1
Summary of the Argument.....	1
Argument and Citation to Authority.....	3
Point One.....	3
 WHETHER THIS COURT HAS JURISDICTION TO REVIEW THE FIRST DISTRICT COURT OF APPEAL’S DECISION WHICH DOES NOT DIRECTLY OR EXPRESSLY CONFLICT WITH ANY DECISION OF THE OTHER DISTRICT COURTS NOR ANY DECISION OF THIS COURT? (RESTATED) 	
A. The decision below does not directly or expressly conflict with the Third District Court of Appeal’s decision in <i>Dixon v. State</i> , 758 So. 2d 1278 (Fla. 3d DCA 2000).....	3
B. The decision below does not directly or expressly conflict with this Court’s decision in <i>Gorby v. State</i> , 630 So. 2d 544 (Fla. 1993).	5
Conclusion.....	8
Certificate of Service.....	I
Certificate of Compliance.....	I
Appendix.....	II

TABLE OF CITATIONS

<u>Cases</u>	<u>PAGE NO.</u>
<i>Cuyler v. Sullivan</i> , 446 U.S. 335, 348, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).....	4
<i>Department of Revenue v. Johnston</i> , 442 So.2d 950 (Fla. 1983)	5,6
<i>Dixon v. State</i> , 758 So. 2d 1278 (Fla. 3d DCA 2000)	1,2,3,4
<i>Gorby v. State</i> , 630 So. 2d 544 (Fla. 1993)	1,2,3,5,6
<i>Holloway v. Arkansas</i> , 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).....	2,3,4,6
<i>Larzelere v. State</i> , 676 So. 2d 394 (Fla. 1996)	2,3
<i>Lee v. State</i> , 690 So.2d 664 (Fla. 1st DCA 1997).....	3
 <u>Rules</u>	
Fla. R. App. P. 9.210(a)(2).....	I

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.

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 this Brief as Appendix A.

SUMMARY OF THE ARGUMENT

The First District Court of Appeal's decision in Mr. Alexis's case does not directly or expressly conflict with the Third District Court of Appeal's decision in *Dixon v. State*, 758 So. 2d 1278 (Fla. 3d DCA 2000), as in *Dixon* the conflict issue was raised by the defense for the first time on appeal, whereas in Mr. Alexis's case the issue was first brought to the court's attention by the defense prior to trial. Accordingly, the decisions are materially distinguishable, and as such, the decisions do not directly or expressly conflict.

Furthermore, the First District's decision below does not directly or expressly conflict with this Court's decision in *Gorby v. State*, 630 So. 2d 544 (Fla. 1993), as in *Gorby* the trial court took steps to address the conflict issue, and in any event, the issue of waiver, which is the heart of First District's decision, is not even discussed in *Gorby*. Accordingly, the decisions are materially distinguishable, and as such, the decisions do not directly or expressly conflict.

Instead, the First District's decision below conforms in every respect with this Court's decision in *Larzelere v. State*, 676 So. 2d 394 (Fla. 1996) and the United States Supreme Court's decision in *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), which are the controlling decisions on the matter. Consequently, because the First District's decision does not directly or expressly conflict with the Third District's decision in *Dixon*, nor this Court's decision in *Gorby*, and instead conforms with the controlling decisions in *Larzelere* and *Holloway*, this Court is without jurisdiction to review the state's Petition. Accordingly, the state's Petition for Review should be dismissed.

ARGUMENT AND CITATION TO AUTHORITY

I. WHETHER THIS COURT HAS JURISDICTION TO REVIEW THE FIRST DISTRICT COURT OF APPEAL'S DECISION WHICH DOES NOT DIRECTLY OR EXPRESSLY CONFLICT WITH ANY DECISION OF THE OTHER DISTRICT COURTS NOR ANY DECISION OF THIS COURT? (RESTATED).

In its Jurisdictional Brief, the state argues that the First District Court of Appeal's decision below directly and expressly conflicts with the Third District Court of Appeal's decision in *Dixon v. State*, 758 So. 2d 1278 (Fla. 3d DCA 2000), as well as this Court's decision in *Gorby v. State*, 630 So. 2d 544 (Fla. 1993). The state's argument is devoid of any merit, and as such, the state's Petition for Review should be dismissed.

- A. The decision below does not directly or expressly conflict with the Third District Court of Appeal's decision in *Dixon v. State*, 758 So. 2d 1278 (Fla. 3d DCA 2000).

Contrary to the state's argument, the decision below does not directly or expressly conflict with the Third District Court of Appeal's decision in *Dixon v. State*, 758 So. 2d 1278 (Fla. 3d DCA 2000). More specifically, in Mr. Alexis's case, prior to trial, defense counsel brought the conflict issue to the Court's attention. However, the trial court failed to conduct a proper colloquy regarding the conflict issue, and therefore Mr. Alexis's waiver of the conflict was invalid and on the basis of the decisions of *Lee v. State*, 690 So.2d 664 (Fla. 1st DCA 1997), *Larzelere v. State*, 676 So.2d 394 (Fla.1996), and *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct.

1173, 55 L.Ed.2d 426 (1978), the First District Court of Appeal found that Mr. Alexis was entitled to relief.

In contrast to Mr. Alexis' case, where defense counsel brought the conflict issue to the Court's attention prior to trial, in *Dixon*, defense counsel did not bring the conflict of interest issue to the court's attention prior to trial, and instead raised the issue for the first time on appeal. *Dixon*, 758 So. 2d at 1280. The court concluded that because the issue was being raised for the first time on appeal, that the defendant was required to demonstrate that an actual conflict of interest adversely affected her lawyer's performance, and ultimately denied relief on the basis of *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

Accordingly, the First District Court of Appeal's decision below does not directly or expressly conflict with the Third District Court of Appeal's decision in *Dixon*, because in Mr. Alexis's case the conflict issue was raised by defense counsel prior to trial and thereby governed by *Holloway*, whereas in *Dixon* the issue was raised for the first time on appeal and thereby governed by *Cuyler*, thus subjecting the conflict issue in the two cases to completely different standards of review. Consequently, because the First District Court of Appeal in Mr. Alexis's case and the Third District Court of Appeal in *Dixon* were faced with different issues, *i.e.* a preserved vs. unpreserved conflict issue, the two decisions are not directly or expressly in conflict with one another. As such, this Court is without jurisdiction to

review the First District Court of Appeal's decision in Mr. Alexis's case, and the state's Petition for Review should be dismissed. *See, Department of Revenue v. Johnston*, 442 So.2d 950, 950 (Fla. 1983) ("Because we find this cause distinguishable on its facts from those cited in conflict, we discharge jurisdiction.")

B. The decision below does not directly or expressly conflict with this Court's decision in *Gorby v. State*, 630 So. 2d 544 (Fla. 1993).

The decision below likewise does not directly or expressly conflict with this Court's decision in *Gorby v. State*, 630 So. 2d 544 (Fla. 1993). More specifically, in *Gorby v. State*, 630 So. 2d 544 (Fla. 1993) the trial court took steps to keep the potential conflict from becoming an actual conflict, and accordingly the defendant was not entitled to relief. *Gorby*, 630 So. 2d at 546. Unlike in *Gorby*, in Mr. Alexis's case no steps were taken by the trial court to address the conflict issue. Accordingly, the decisions are materially distinguishable. Furthermore, this Court's decision in *Gorby* did not make even a single reference to the waiver issue which is the issue at the heart of the First District's decision below. Accordingly, the First District's decision does not directly or expressly conflict with this Court's decision in *Gorby*, as the issue of waiver was not even addressed by this Court in said decision.

Consequently, because the First District Court of Appeal in Mr. Alexis's case and the *Gorby* Court were faced with different issues, *i.e.* no steps taken by the trial court to address the conflict issue vs. the trial court taking affirmative steps to address the conflict issue, and the waiver issue was not even addressed by the *Gorby*

Court, the two decisions are not directly or expressly in conflict with one another. As such, this Court is without jurisdiction to review the First District Court of Appeal's decision in Mr. Alexis's case, and the state's Petition for Review should be dismissed. *See, Johnston*, 442 So.2d at 950. ("Because we find this cause distinguishable on its facts from those cited in conflict, we discharge jurisdiction.")

Further still, the decision in *Gorby*, wherein this Court addressed the conflict issue in passing, predates this Court's decision in *Larzelere v. State*, 676 So. 2d 394 (Fla. 1996) wherein this Court addressed the conflict issue head on, and in conformity with the United States Supreme Court's controlling decision in *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), established that for a waiver of conflict to be valid that the record must show the defendant (1) was aware of the conflict of interest, (2) realized the conflict could affect the defense, and (3) knew of the right to obtain other counsel (Mr. Alexis notes that the state in a footnote maintains that the *Larzelere* decision applies only to an actual rather than possible conflict of interest, however, it is clear that *Larzelere* in fact applies whenever a potential conflict is raised, as this Court in examining *Larzelere's* claim noted that "the trial judge specifically advised appellant of the possible conflict", and in any event, per the decision in *Holloway*, the same rule applies in both circumstances). *Larzelere*, 676 So.2d at 403. Accordingly, because *Larzelere* and *Holloway* are the controlling cases on the issue, and the decision below conforms in

every respect with those decisions, the decision below does not directly or expressly conflict with this Court's controlling decision on the matter, and as such, the state's Petition for Review should be dismissed.

CONCLUSION

Based upon the argument and citation to authority presented above, this Court does not have jurisdiction to review the decision below, and the state's Petition for Review should be dismissed.

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 31st day of July, 2014.

By: /s/ Dane K. Chase
Dane K. Chase, Esquire
Florida Bar No.: 0076448

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Times New Roman 14-point font in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

By: /s/ Dane K. Chase
Dane K. Chase, Esquire
Florida Bar No.: 0076448
Chase Law Florida, P.A.
111 2nd Ave NE
Suite 334
Saint Petersburg, Florida 33701
Direct: (727) 350-0361
Facsimile: (866) 284-1306
Email: dane@chaselawfloridapa.com

Attorney for the Petitioner

APPENDIX

1. *Alexis v. State*, - - So. 3d - -, 2014 WL 1415185, Case No. 1D13-2489 (Fla. 1st DCA 2014).

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

REUBEN ALEXIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

CASE NO. 1D13-2489

CORRECTED PAGES: pg 1
CORRECTION IS UNDERLINED IN RED
MAILED: April 15, 2014
BY: THA

Opinion filed April 14, 2014.

An appeal from the Circuit Court for Leon County.
Terry P. Lewis, Judge.

Dane K. Chase of Chase Law Florida, P.A., Saint Petersburg, for Appellant.

Pamela Jo Bondi, Attorney General, and Meredith Clark Hinshelwood, Assistant
Attorney General, Tallahassee, for Appellee.

CLARK, J.

Reuben Alexis appeals his conviction of aggravated assault with a firearm. The sole issue before the Court is whether Alexis validly waived his trial attorney's potential conflict of interest due to the joint representation of Alexis and a codefendant. Based upon this Court's holding in Lee v. State, 690 So. 2d 664 (Fla. 1st DCA 1997), we conclude that because the trial court's inquiry was legally

insufficient, Alexis' waiver of his attorney's potential conflict was invalid. Such a finding requires reversal and remand for a new trial.

Subsequent to their arrests, both Alexis and his codefendant were tried together and represented by the same attorney. The issue of a potential conflict of interest due to the joint representation was raised at a pretrial hearing.

DEFENSE COUNSEL: And by the way Judge, since both young men are here, I discussed with them a possible conflict of interest here cause 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.

PROSECUTOR: And, Your Honor, for 3850 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?

COURT: Okay. Let's bring them on up, then. And which one is this?

DEFENSE COUNSEL: This is Terry Guerrier, Your Honor.

MR. GUERRIER: Terry Guerrier.

COURT: Mr. Guerrier, and this then must be [sic] Mr. Alexis.

MR. ALEXIS: Reuben Alexis.

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?

MR. GUERRIER: Yes, sir.

COURT: And knowing that there's that potential conflict, both of you still want him to be your attorney?

MR. GUERRIER: Yes, Sir.

MR. ALEXIS: Yes, Your Honor.

COURT: Okay. Is that okay?

PROSECUTOR: That should be sufficient, Your Honor.

COURT: Okay.

DEFENSE COUNSEL: Thank you, Judge.

Alexis now argues his waiver was invalid. We agree.

“When 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, 690 So. 2d at 667 (citing Holloway v. Arkansas, 435 U.S. 475, 484 (1978)). A defendant may however validly waive a conflict by “clear, unequivocal, and unambiguous language.” Id. Our supreme court has mandated three requirements to show a waiver of conflict: the record must show the defendant (1) was aware of the conflict of interest, (2) realized the conflict could affect the defense, and (3) knew of the right to obtain other counsel. Id. (quoting Larzelere v. State, 676 So. 2d 394, 403 (Fla. 1996)). Each of these requirements is independent of the others and essential. Id. Without each, a defendant’s waiver of his right to conflict-free counsel is not voluntary. Id.

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. Here, the court made an attempt at an inquiry. Yet it was not

sufficient. The trial court’s inquiry must address the three requirements of Lee: the defendant (1) was aware of the conflict of interest, (2) realized the conflict could affect the defense, and (3) knew of the right to obtain other counsel. It is the trial judge’s responsibility to conduct this three-part inquiry.

The record here shows the court failed to inquire into the second and third requirements—whether Alexis knew his defense could be affected by his attorney’s potential conflict or that he had the right to obtain other, conflict-free counsel. Further, an examination of the rest of the record does not reveal that Alexis had independent knowledge of these prior to making his waiver. As such, because the inquiry here was legally insufficient, Alexis’ resulting waiver was invalid. Therefore, the trial court erred in determining that Alexis voluntarily waived his right to conflict-free counsel.

“[E]rror in accepting a waiver of the right to conflict-free counsel cannot be excused as harmless error on direct appeal.” Id. at 668. When, as here, Alexis “preserve[d] the conflict issue by raising it before trial and [did] not validly waive the conflict, the trial court’s failure to conduct an inquiry . . . requires that the resulting conviction be reversed.” Id. at 668-69. Due to the trial court’s error in accepting his invalid waiver of conflict-free counsel, Alexis’ conviction is REVERSED and the case is REMANDED for a new trial.

VAN NORTWICK, J., CONCURS, and WOLF, J., CONCURRING WITH
OPINION.