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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

REUBEN ALEXIS,

Respondent.

Case No. SC14-1341

L.T. No. 1D13-2489

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

JURISDICTIONAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

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, REUBEN 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.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, attached in slip opinion form [hereinafter referenced as "slip op."] as Appendix A. However, briefly summarized, counsel alerted the trial court to a potential conflict of interest in his joint representation of Petitioner and another individual, Gurerrier, in the same trial. (Slip. Op. 2-3.) One of the officers was going to testify that Gurerrier made a statement that incriminated Petitioner, but the conflict was only a potential conflict because Gurerrier emphatically denied making the statement incriminating Petitioner. (Slip Op. 2-3.) The First District determined 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 constitutes inherently reversible error. (Slip. Op.)

SUMMARY OF ARGUMENT

Misconstruing controlling case law and rejecting correct decisions of sister districts, the First District determined below that the failure to obtain a waiver for an actual conflict of interest, when there was merely a potential conflict of interest, required per se reversal. Besides being shockingly incorrect, the decision of the First District establishing this proposition expressly and directly conflicts with both an almost identical decision of the Third District and at least one decision of this Court, providing this Court with jurisdiction. Further, because joint representation has been recognized to be a tool that can obstruct potential cooperation with law enforcement, allowing a "Gotcha" per se reversal for doing so, such as the First District's decision creates, merits this Court's immediate attention and the acceptance of express and direct conflict jurisdiction.

<u>ARGUMENT</u>

<u>ISSUE:</u> WHETHER THE DISTRICT COURT'S DECISION DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISION OF THE THIRD DISTRICT IN *DIXON V. STATE*, 758 SO. 2D 1278 (FLA. 3D DCA 2000), OR THIS COURT'S DECISION IN *GORBY V. STATE*, 630 SO. 2D 544 (FLA. 1993)? (RESTATED)

A. *The First District's Decision Directly and Expressly Conflicts With the Decision of the Third District in Dixon v. State, 758 So. 2d 1278 (Fla. 3d DCA 2000), and This Court's Decision in Gorby v. State, 630 So. 2d 544 (Fla. 1993).*

This case raises the distinction between a <u>potential</u> and an <u>actual</u> conflict of interest and the First District's misapprehension of controlling precedent and rejection of a decision of its sister circuit that a <u>potential</u> conflict of interest is insufficient to impugn a criminal conviction, while an <u>actual</u> conflict of interest that has not been knowingly and intelligently waived violates the Sixth Amendment. *See Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980).

<u>1. Jurisdictional Criteria</u>

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides:

> The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions is "express and direct" and "appear[s] within the four corners of the majority decision." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). *Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc.*, 498 So. 2d 888, 889 (Fla.

1986)(rejected "inherent" or "implied" conflict; dismissed petition).

Accordingly, the District Court's decision reached a result opposite to Third District in *Dixon v. State*, 758 So. 2d 1278 (Fla. 3d DCA 2000), and this Court's decision in *Gorby v. State*, 630 So. 2d 544 (Fla. 1993), thereby bestowing conflict jurisdiction upon this Court. The State elaborates.

2. The First District's decision expressly and directly conflicts with *Dixon v. State*, 758 So. 2d 1278 (Fla. 3d DCA 2000).

In this case, counsel alerted the trial court to a potential conflict of interest in his joint representation of Petitioner and another individual, Gurerrier, in the same trial. (Slip. Op. 2-3.) One of the officers was going to testify that Gurerrier made a statement that incriminated Petitioner, but the conflict was only a potential conflict because Gurerrier emphatically denied making the statement incriminating Petitioner. (Slip Op. 2-3.) The First District determined 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),[1] constitutes inherently reversible error. (Slip. Op.)

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[1] *Larzelere* clearly discussed waiver necessary to waive an actual conflict of interest, since that was what the appellant alleged in her motion, reasoning:

> An actual conflict of interest that adversely affects counsel's performance violates the Sixth Amendment of the United States Constitution. *Barclay v. Wainwright*, 444 So. 2d 956 (Fla. 1984).

Unsurprisingly, this extraordinary proposition is contrary to an almost identical decision of the Third District in both result and reasoning.

In *Dixon v. State*, 758 So. 2d 1278 (Fla. 3d DCA 2000), the Third District considered an almost identical set of facts involving jointly-represented spouses. As with this case, 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 by an independent court-appointed attorney." *Id.* at 1279. The Third District came to the opposite result as the First District through different—and correct—reasoning.

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

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> Nevertheless, a defendant's fundamental right to conflict-free counsel can be waived. *United States v. Rodriguez*, 982 F.2d 474 (11th Cir.), *cert. denied*, 510 U.S. 901, 114 S. Ct. 275, 126 L. Ed. 2d 226 (1993); *Woseley v. State*, 590 So. 2d 979 (Fla. 1st DCA 1991). For 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. 982 F.2d [] at 477.

676 So. 2d at 403.

Cuyler, 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.

This result and reasoning lie in stark contrast to the First District, which reversed where there was a potential conflict of interest and an insufficient *Larzelere* waiver (on the same two prongs), without ever examining whether an actual conflict of interest arose. (Slip Op. at 3-4.) In fact, the First District found that insufficient *Larzelere* waiver, even when only a potential conflict of interest is present, is *per se* reversible. (Slip Op. at 4.) In fact, concurring, Judge Wolf recognized the direct and express conflict with *Dixon*, finding "[t]he Third District affirmed in similar circumstances in *Dixon*[]. Absent the decision in *Lee*, I would affirm based on *Dixon*." (Slip Op. at 6 (Wolf, J., concurring).) This direct and express conflict with *Dixon* is sufficient to provide this Court with jurisdiction.

3. The First District's decision expressly and directly conflicts with this Court's decision in *Gorby v. State*, 630 So. 2d 544 (Fla. 1993).

The First District's decision also directly and expressly conflicts with at least one decision of this Court. In *Gorby v. State*, 630 So. 2d 544 (Fla. 1993), 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.

As in this case, counsel alerted the trial court to a potential, but not actual conflict of interest. As in this case, 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 *Cuyler*, 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)]. <u>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.</u> 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. This Court clearly did not determine that the presence of a mere <u>potential</u> conflict without a sufficient waiver was

per se reversible error, as the First District did below. The First District's decision therefore expressly and directly conflicts with at least one decision of this Court.

B. As the Dixon Court Recognized, the Conflict Issue Affects Every Case Involving Joint Representation, Meriting This Court's Exercise of Discretionary Jurisdiction.

The First District's per se reversible determination for potential conflicts that lack the *Larzelere* waiver for actual conflicts plainly merits this Court's attention. At the Third District recognized in *Dixon*, "a possible conflict inheres in almost every instance of multiple representation." *Dixon*, 758 So. 2d at 1281 (quoting *Cuyler*, 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 arise, 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. Resolution of this express and direct conflict merits this Court's immediate attention.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court determine that it has jurisdiction and accept discretionary jurisdiction.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by electronic mail on July 18, 2014: Dane K. Chase, Esq., at dane@chaselawfloridapa.com, Counsel for Respondent.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted and certified,
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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. REUBEN ALEXIS, Respondent.	 Case No. SC14-1341 L.T. No. 1D13-2489

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A. *Alexis v. State*, -- So. 3d --, 2014 WL 1415185, Case No. 1D13-2489 (Fla. 1st DCA April 14, 2014) (Slip Op.)

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

REUBEN ALEXIS,

Appellant,

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

v.

CASE NO. 1D13-2489

STATE OF FLORIDA,

Appellee.

_______________________________/

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 by [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.

WOLF, J., Concurring.

Were we not bound by this court's decision in Lee v. State, 690 So. 2d 664 (Fla. 1st DCA 1997), I would affirm for two reasons. The trial court conducted a sufficient inquiry concerning a potential conflict based on the circumstances, and the failure to conduct a more thorough inquiry in this case should constitute harmless error.

First, at the time the trial court was made aware of a potential conflict, counsel represented that the issue had been resolved. Any potential conflict of interest arose out of a statement made by appellant's co-defendant in this case. It was revealed that the co-defendant now disavowed the statement, and both defendants wished to pursue compatible defenses that neither committed the crime. In fact, the State never sought to introduce the statement at trial. No conflict existed. The Third District affirmed under similar circumstances in Dixon v. State, 758 So. 2d 1278 (Fla. 3d DCA 2000). Absent the decision in Lee, I would affirm based on Dixon.

Second, I disagree with the reasoning in Lee that the harmless error analysis may never be applied in cases upon failure to conduct a sufficient conflict of interest inquiry because of the holding in Holloway v. Arkansas, 435 U.S. 475 (1978). In Mickens v. Taylor, 535 U.S. 162 (2002), the U.S. Supreme Court said

Holloway's holding means automatic reversal is only necessary where counsel is required to conduct joint representation over a specific objection asserting that a conflict exists which precludes adequate representation. In the instant case, exactly the opposite occurred. Counsel specifically represented that any conflict no longer existed. In light of counsel's representations, and the fact that any potential conflict was totally alleviated by the State's decision not to introduce the co-defendant's statement, along with the overwhelming evidence of guilt, I would find any error to be harmless were I free to do so. This is another case that demonstrates the folly in applying a per se reversible error rule in too many circumstances. I have no doubt that the result in this case was not effected by the alleged error. A reversal in this case does not promote either justice or judicial economy.

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR WAKULLA COUNTY, FLORIDA.

STATE OF FLORIDA

CASE NO. 02-012CFA

vs.

TRAVIS MCKINNEY.

Defendant.

______________________________/

ORDER DENYING DEFENDANTS MOTION TO CORRECT SENTENCE

THIS CAUSE having come on for consideration, and the Court having reviewed the Defendant's Motion, ~~and~~ the State's Response, the defendant's reply and the Court being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Defendant's Motion to correct illegal sentence is DENIED. Defendant's motion fails to facially demonstrate how any portion of the sentence is illegal. Furthermore, the Court finds that the Defendant's sentences are lawful pursuant to Florida Statute Sections 948.06 and 921.16.

DONE AND ORDERED in Chambers at Crawfordville, Wakulla County, Florida, this 10th day of ~~July~~ August, 2009.

N. Sanders Sauls
Circuit Judge

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