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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. REUBEN ALEXIS, Respondent.	Case No. SC14-1341

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

STATE OF FLORIDA'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

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. Respondent's Answer Brief on the Merits will be referred to as "AB.," followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The State relies upon the statement of case and facts within its Initial Brief.

ARGUMENT

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

A. *Respondent's Claim that* Per Se *Reversal is Required In the Absence of a Sixth Amendment Waiver With A Mere Potential Conflict of Interest is Without Merit.*

Respondent seeks to defend the First District's decision by engaging in the same flaw of analysis as the First District. Respondent wants to shift the issue presented to whether the trial court should have obtained a Sixth Amendment waiver. However, that is not the issue because the analysis does not reach that question. The issue is not whether the trial court should have obtained a Sixth Amendment waiver; rather, the issue is whether it is *per se* reversible when the trial court fails to secure a Sixth Amendment waiver and there is only a potential conflict of interest.

Certainly, when a potential conflict of interest appears, the court can engage in an inquiry and the better practice is to obtain a Sixth Amendment waiver in case the potential conflict becomes actual later. The State so indicated in the Initial Brief. However, the flaw in Respondent's reasoning is the assumption that the failure to engage in that inquiry *and* secure a Sixth Amendment waiver means that the trial court was properly *per se* reversed. This is wrong. In fact, as indicated in the Initial Brief, the United States Supreme Court expressly rejected this argument in *Mickens v. Taylor*, where it found reversal was not proper where a trial court fails to engage in the *Cuyler v. Sullivan/Larzelere* inquiry. There, when Mickens

argued, as Respondent does here, that reversal is required where a trial court does not engage in that inquiry, the Supreme Court rejected Respondent's argument, finding that the prospect of reversal where a conflict becomes actual is sufficient incentive for a trial court to engage in the inquiry: "[T]he *Sullivan* 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." *Mickens v. Taylor*, 535 U.S. 162, 173 (2002) (bold, underline and alterations added).

In addition to the First District's decision in *Lee*, which is addressed at length in the Initial Brief, Respondent relies on two United States Supreme Court cases, neither of which help him. Respondent's reliance on *Wood v. Georgia*, 450 U.S. 261 (1981), does not support his *per se* reversal rule because that case merely involved the Supreme Court remanding a case on another question that was not within the certiorari petition based on a prudential concern that an actual conflict of interest between the petitioners and the petitioners' employer (who was paying for their attorney) may have been the result of a conflict and should be addressed first by the state courts.[1] The other case, *Wheat v. United States*, 486

[1] Of course, to the extent *Wood* could be read to support a claim of *per se* reversal, it is clearly contradicted by the more recent *en banc* decision of

U.S. 153 (1988), actually supports the State's argument. There, the United States Supreme Court examined whether a federal trial court had discretion to impose separate counsel when there is an actual conflict of interest, even in the face of a Sixth Amendment waiver. The *Wheat* Court held, "[W]here a court justifiably finds an ***actual*** conflict of interest, there can be no doubt that it ***may*** decline a proffer of waiver, and insist that defendants be separately represented." 486 U.S. at 162 (alterations added). The *Wheat* Court also gave the federal trial courts the same discretion in potential conflict cases. *See id.* at 163. *Wheat* does not mandate *per se* reversal where a Sixth Amendment waiver is not secured where there is a potential conflict of interest. Rather, it only indicates that a trial court is not forced to accept a Sixth Amendment waiver.

Respondent also asserts "in the case of privately retained counsel, the very real danger exits that counsel, in the interests of financial gain, will notify neither the jointly represented defendants, nor the trial court, of the conflict issue." (AB. 6.) In other words, Respondent contends that a *per se* reversal rule is necessary because the private bar will do anything at all---including risk disbarment---to "make a buck," including shirk their fiduciary duties to their clients, ignore their ethical responsibilities to the court, and violate their oath to this Court. (AB. 6-7.) The State has more faith in the members of the Florida Bar. And evidently, so does the United States Supreme Court. *See Holloway*

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the United States Supreme Court in *Mickens*.

v. Arkansas, 435 U.S. 475, 485-86 (1978) (discussing the importance of counsel's representations about conflicts of interest, particularly in open court). Further, here, Mr. Harrison's conduct of bringing a potential conflict to the trial court's attention, contradicts Respondent's claim. (R. 192-94.)

B. Respondent's Belated Claim of an Actual Conflict of Interest that Adversely Affected His Lawyer's Performance is Without Merit.

Respondent also asserts his trial attorney, Mr. Harrison, had an actual conflict of interest that adversely affected counsel's performance. This is without merit and Respondent cannot meet his burden to demonstrate that on this record.

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. *Quince v. State*, 732 So. 2d 1059, 1064 (Fla. 1999) (citing *Sullivan*, 446 U.S. at 342). To prove an ineffectiveness claim premised on an alleged conflict of interest, the defendant must "establish that an actual conflict of interest adversely affected his lawyer's performance." *Brown v. State*, 894 So. 2d 137, 157 (Fla. 2004) (quoting *Sullivan*, 446 U.S. at 350). A court must first determine whether an actual conflict of interest existed, and then whether the conflict adversely affected the lawyer's representation. *Herring v. State*, 730 So. 2d 1264, 1267 (Fla. 1998). A defendant must demonstrate both prongs to be entitled to relief. *See Mungin v. State*, 932 So. 2d 986, 1002 (Fla. 2006). "A lawyer suffers from an actual conflict of interest when he 'actively

represent[s] conflicting interests.'" *Brown*, 894 So. 2d at 157. To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests his interests were impaired or compromised for the benefit of the lawyer or another party. *See id.* (citing *Herring*, 730 So. 2d at 1267).

In order to make this showing, Respondent attempts to retry his case, claiming that counsel *could have argued* a different theory absent joint representation. That does not meet his burden. Respondent must show counsel "***actively*** represent[s] conflicting interests." *Brown*, 894 So. 2d at 157 (emphasis added). What Respondent has argued was that there was a potential alternative defense. Respondent has not pointed to a place in the record where Mr. Harrison actively represented conflicting interests by having divided loyalties, such as presenting a defense where both Mr. Gurrier and Mr. Alexis actually blamed one another. Presenting a unified defense is not a record demonstration that counsel is actively representing conflicting interests.

Second, Respondent cannot show that even this potential conflict of interest adversely affected his lawyer's performance. Respondent's newfound "pin-the-gun-on-Guerrier" defense is exceedingly weaker than the unified front presented at trial. Respondent asserts that Mr. Melton and Mr. Caine's testimony about the presence of a firearm was "compelling evidence." (AB. 11.) That is an intriguing assertion in light of the fact that through their unified, joint defense Respondent and Mr. Guerrier had four witnesses (Ms. Fleece, Ms. Range, Mr. Guerrier, and Respondent)

testify that there was no firearm involved in the altercation at all. Had Respondent sought to pin the firearm on Guerrier, he would have been contradicting not only Guerrier, but Ms. Range and Ms. Fleece's testimony as well.

And contradicting Ms. Range and Ms. Fleece is particularly dangerous in the context of this case. These were young women who testified that they were seeking the aid of Respondent and Guerrier to stop Mr. Melton from harassing them. It would be a particularly poor strategy to label the most sympathetic individuals in the facts of this case as liars.

Respondent also seems to overlook that, had he presented through his own testimony that Guierrer was the only person in possession of a firearm, Guierrer could have impeached Respondent with his prior inconsistent statement (that the State did not use in its case) that he was not involved at all, particularly in light of Guerrier's testimony, Ms. Range's testimony, Ms. Fleece's testimony, Mr. Melton's testimony and Mr. Caine's testimony, that Respondent was "involved" since he pulled Mr. Melton from the vehicle. (T. 26, 144, 157-58, 230.)

Contrary to being the "sinking ship" that Respondent now thinks the "no one had a gun" defense to be, this case was extremely close. Four witnesses testified that there was no firearm, including the two women who were emphatic that they refused to even be around guns. The State's witnesses were hardly ideal, including the victim and rather shaky testimony by his cousin. While this was enough to present a jury question, the unified defense, which also ensured that Mr. Guerrier would not seek to

take a deal and cooperate with the State to Respondent's detriment, not only had no adverse effect his Mr. Harrison's performance, but the strongest defense Respondent could have asserted. So even if Respondent could show that counsel actively represented conflicting interests---which he cannot---his attempt to show any such conflict adversely affected counsel's performance is also meritless.

CONCLUSION

Based on the foregoing and the arguments set forth in the Initial Brief, 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 reasoning of *Lee v. State*, 690 So. 2d 664 (Fla. 1st DCA 1997), discussed in the Initial Brief, 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 October 22, 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.

Respectfully submitted and certified,
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