IN THE

DISTRICT COURT OF APPEAL

FIRST APPELLATE DISTRICT OF FLORIDA

CHARLES ADELSON, Appellant, v. STATE OF FLORIDA, Appellee.	Case No. 1D2024-0004 Direct Criminal Appeal Second Circuit/Leon County L.T. No. 2016-CF-3036

MOTION TO RELINQUISH JURISDICTION TO THE TRIAL COURT

The Appellant, CHARLES ADELSON, by and through undersigned counsel, moves the Court to relinquish jurisdiction in this case to the trial court, and alleges:

1. Appellant Adelson is appealing his convictions (following a jury trial) for murder, conspiracy to commit murder, and solicitation to murder. Appellant Adelson was sentenced to life in prison.

2. Appellant Adelson is one of several persons charged with

the murder of Dan Markel. Prior to Appellant Adelson's trial, three other people were convicted of the murder of Mr. Markel (Sigfredo Garcia, Luis Rivera, and Katherine Magbanua). After Appellant Adelson's trial, but before his sentencing, another alleged co-conspirator – Donna Adelson (Appellant Adelson's mother) – was indicted and arrested for murder.

3. At his trial, Appellant Adelson was represented by attorney Daniel Rashbaum, Esquire. After Appellant Adelson's sentencing, Mr. Rashbaum appeared as counsel of record for Donna Adelson in her case.

4. On September 11, 2024, the State issued a subpoena on Appellant Adelson for him to be a State witness at Donna Adelson's upcoming trial. Shortly thereafter (on September 17, 2024), Mr. Rashbaum withdrew from Donna Adelson's case after the trial court (the Honorable Stephen Everett[1]) questioned him about the conflict of interest that existed due to his current representation of Donna Adelson and his previous representation of Appellant Adelson – who

[1] Judge Everett also presided over Appellant Adelson's trial.

was now a witness in Donna Adelson's trial. Then, on October 7, 2024, the trial court disqualified Donna Adelson's other defense lawyers from her case on the basis of Mr. Rashbaum's conflict of interest:

> The withdrawal of attorney Daniel Rashbaum became necessary when he engaged in a conflicted representation falling short of the ethical obligations for members of the Florida Bar. Upon further consideration of the September 17, 2024 record and the in-camera proceedings with attorneys Daniel Rashbaum and Robert A. Morris, a sufficient ethical wall was not established. Thus, the conflict of interest involving privileged information or communications has been imputed to Robert A. Morris. Additionally, this case "is rife with the potential" for the same conflict as to Adam Komisar. *See Kolker v. State*, 649 So. 2d 250, 252 (Fla. 3d DCA 1994); *see also Canta v. Phillip Morris USA, Inc.*, 245 So. 3d 813, 821 (Fla. 3d DCA 2017) ("'Unimputing' a conflict seems as implausible as unringing a bell, unscrambling an omelette, or pushing toothpaste back into the tube.").
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> Fla. R. Regulating Fla. Bar 4-3.5(c) and 4-8.4(d) impose on all Florida attorneys an ethical responsibility to refrain from engaging in conduct intended to disrupt a tribunal and conduct which is prejudicial to the administration of justice. While the defendant retains a presumptive right under the Sixth Amendment to her counsel of choice, the right is not absolute. *See Wheat v. United States*, 486 U.S. 153 (1988). The presumptive right under the Sixth Amendment to counsel of choice cannot interfere with the fair and orderly administration of justice or the Court's authority to monitor and control the pace of litigation. *See* Fla. R. Gen. Prac. & Jud. Admin. Rule

2.545.

Both federal and state courts have "repeatedly made clear that the right to counsel cannot be manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice." *Bowman v. United States*, 409 F.2d 225, 226 (5th Cir. 1969); *see also Bundy v. State*, 455 So. 2d 330, 347 (Fla. 1984) (Florida Supreme Court holding there is no absolute right to a particular counsel where there is a "countervailing public interest in the fair and orderly administration of justice.") *The fair and orderly administration of justice cannot be maintained when conflicted counsel or counsel with the potential of conflict cannot meet the standard of serving as constitutionally effective counsel. See Kolker*, 649 So. 2d at 252 (explaining trial courts have "an institutional interest in protecting the truth-seeking function of the proceedings over which [they] presid[e] by considering whether the defendant has effective assistance of counsel, regardless of any proffered waiver.").

Furthermore, the danger to conflict free proceedings was not cured by Daniel Rashbaum's withdrawal. Prior to the selection of the jury, Charles Adelson filed a notice indicating his nonwaiver of any conflict of interest with Daniel Rashbaum. Robert A. Morris then filed a response in which he advised that third party counsel had been retained to resolve any actual or potential conflict of interest. In a reply to this response, Charles Adelson objected to Morris or a third-party counsel cross-examining him.

The Third District Court of Appeal when reviewing the disqualification of counsel in *Kolker*, disagreed with the proposition that an "actual or potential conflict could be avoided by having substitute counsel conduct the cross-examination of [a] former client." 649 So. 2d at 252 n.3. The *Kolker* court further explained, "[t]he conflict arises

> from the past relationship, and cannot be avoided by sectioning off portions of the trial. . . [t]he potential for conflict would remain, as would the appearance of impropriety." *Id.* Absent judicial intervention, at this point, delay to the fair and orderly administration of justice will be at risk of repeating itself.
>
> Without the establishment of a sufficient ethical wall and the fact that even third-party counsel cannot avoid the potential for conflict, the Court cannot permit Robert A. Morris or Adam Komisar to remain as counsel of record. Nor will the Court permit this untenable situation to continue. Accordingly, for the above reasons, attorneys Robert A. Morris and Adam Komisar are disqualified from further representation of the defendant.

(A-102-104) (emphasis added) (exhibits and footnote omitted).[2]

5. Against this backdrop, undersigned counsel believe that Mr. Rashbaum's conflict of interest also infected Appellant Adelson's trial. During the course of their representation of Appellant Adelson, undersigned counsel learned that Mr. Rashbaum represented Donna Adelson *prior to the arrest of Appellant Adelson*. Stated another way, Mr. Rashbaum previously represented a co-conspirator – in the same or substantially related matter – and he had an actual conflict of

[2] References to the documents included in the appendix to this motion will be made by the designation "A" followed by the appropriate page number.

interest during the course of his representation of Appellant Adelson.

6. Notably, *Donna Adelson was listed by the State as a Category A witness in Appellant Adelson's case*. (A-25). Subsequently, Donna Adelson was listed as a *defense witness* for trial. Ultimately, Donna Adelson was not presented as a witness during Appellant Adelson's trial because she was removed from the defense witness list days before trial was to begin – after the State sought to interview her. Undersigned counsel assert that Donna Adelson's removal from the witness list was done in order to protect *Donna Adelson's interests* (i.e., in not being interviewed by the State) – and *against* Appellant Adelson's interests (i.e., a witness that could have corroborated Appellant Adelson's testimony was not called by Mr. Rashbaum). Hence, Mr. Rashbaum's representation of Appellant Adelson at trial – after having previously represented Donna Adelson – constituted an actual conflict of interest.[3] As explained by the Eleventh Circuit Court

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[3] Rule 4-1.9 of the Rules Regulating The Florida Bar – entitled "Conflict of Interest; Former Client" – states the following:

> A lawyer who has formerly represented a client in a matter must not afterwards:
>
> (a) represent another person in the same or a

of Appeals in *Porter v. Singletary*, 14 F.3d 554, 561 (11th Cir. 1994), "[a]n attorney who cross-examines a former client inherently encounters divided loyalties." Given the recent finding by the trial court in Donna Adelson's case regarding Mr. Rashbaum "engag[ing] in a conflicted representation falling short of the ethical obligations for members of the Florida Bar," Appellant Adelson asserts that the same principle applies to Mr. Rashbaum's representation of Appellant Adelson at his trial – because Attorney Rashbaum was operating under a conflict of interest based on duties owed to his former client Donna Adelson, whose attorney-client relationship pre-dated Appellant Adelson's.

> substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent;
>
> (b) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known; or
>
> (c) reveal information relating to the representation except as these rules would permit or require with respect to a client.

R. Regulating Fla. Bar 4-1.9(b)-(c).

7. Documents supporting the statements set forth in the previous paragraph are included in the appendix to the motion, and the documents establish the following:

- The murder of Dan Markel occurred in July 2014. In 2016, the probable cause affidavit naming Sigfredo Garcia, Luis Rivera, Katherine Magbanua, Appellant Adelson, and Donna Adelson as co-conspirators was released. (A-3).

- In 2016, attorney Daniel Rashbaum was Donna Adelson's attorney for purposes of the investigation into the murder of Mr. Markel, as evidenced by his signature on the "Adelson Family Statement." (A-22).

- In 2022, Appellant Adelson was charged with the murder of Mr. Markel. Mr. Rashbaum filed a notice of appearance on May 9, 2022. (A-23).

- Appellant Adelson did not validly waive the conflict of interest involving Mr. Rashbaum's representation of him at trial and Mr. Rashbaum's prior representation of Donna Adelson – who was listed as a witness by both the State and the defense. A review of the record on appeal establishes that a conflict waiver inquiry was *not* conducted by the trial court.[4]

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[4] In *Lee v. State*, 690 So. 2d 664, 667 (Fla. 1st DCA 1997), this Court articulated the requirements of a valid waiver of the right to conflict-free counsel:

> For a waiver [of conflict-free counsel] 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

- On September 22, 2023, Donna Adelson (Mr. Rashbaum's former client) was listed as a State witness for Appellant Adelson's trial. (A-25).

- Also on September 22, 2023, Donna Adelson (Mr. Rashbaum's former client) was listed as a witness for the defense for Appellant Adelson's trial. (A-27).

- In October 2023, Mr. Rashbaum withdrew Donna Adelson from the defense witness list in Appellant Adelson's case, after a hearing in which the State sought to compel Donna Adelson's interview. (A-38-43, A-45).

- In October-November 2023, Appellant Adelson was tried and convicted, while represented by Mr. Rashbaum.

- In November 2023, Donna Adelson was indicted and arrested for the murder of Mr. Markel. (A-47). In a

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> the defense, and that the defendant knew of the right to obtain other counsel.

(Quoting *Larzelere v. State*, 676 So. 2d 394, 403 (Fla. 1996)). Notably, in *Lee*, the Court found that the defendant and defense counsel had an "actual conflict of interest" because defense counsel had recently represented one of the State's witness:

> Defense counsel had an actual conflict of interest resulting from his own prior representation of a key witness against the defendant and the Public Defender's recent representation of that witness.

Lee, 690 So. 2d at 669.

November 2023 recorded conversation leading to Donna Adelson's arrest, Donna Adelson discussed advice she had received from Mr. Rashbaum regarding whether she would be able to leave the country undetected prior to being arrested for the murder of Mr. Markel: "Look, we have to make a decision at some point. After speaking to Dan this morning, and knowing what they're thinking up there, I don't know if we'll make it out in time. I really don't, because Dan said, you might, or, you might do all of this, get to the airport, and they'll stop us. And that could happen. It could happen, I don't know. But it's worth a try." *See* https://www.youtube.com/watch?v=QwsH8D2KGGk.

- In December 2023, Appellant Adelson, represented by Mr. Rashbaum, was sentenced. (A-50).

- In January 2024, Mr. Rashbaum appeared as Donna Adelson's defense counsel for trial. (A-70).

- In September 2024, Appellant Adelson was subpoenaed as a witness for the State for Donna Adelson's trial. (A-72).

- In September 2024, Mr. Rashbaum withdrew and/or was removed from Donna Adelson's case by the trial court on the eve of jury selection, on the basis of Mr. Rashbaum's conflict with Appellant Adelson. (A-73-100).

- In October 2024, the trial court on its own motion removed the remaining defense counsel for Donna Adelson, on the basis of Mr. Rashbaum's conflict of interest and the lack of a sufficient "ethical wall." (A-

102).

8. Accordingly, in light of the foregoing, Appellant Adelson intends to file a motion in the trial court raising this conflict claim against Mr. Rashbaum, who represented Appellant Adelson at trial while owing duties to his former client, alleged co-conspirator, and listed witness Donna Adelson – to whom he continued to provide legal advice regarding her own involvement in this case while simultaneously representing Appellant Adelson. Because Mr. Rashbaum's conflict of interest in Donna Adelson's case was just recently considered and ruled upon by the trial court, undersigned counsel submit that it would be in the interest of judicial economy to allow the trial court the opportunity to immediately consider whether the same conflict infected Appellant Adelson's case. The trial court is uniquely situated to decide this issue, having previously presided over Appellant Adelson's trial and now presiding over Donna Adelson's trial – and because the trial court was recently apprised of the conflict issues involved with these lawyers and parties.

9. Appellant Adelson therefore requests the Court to

relinquish jurisdiction to the trial court for a reasonable period of time so that he can file a motion raising this conflict issue. Appellant Adelson respectfully suggests that it would be a more efficient use of judicial resources to address this matter immediately, because if the trial court grants the motion, then the instant appeal will become moot.[5]

10. In *State v. Meneses*, 392 So. 2d 905, 905 (Fla. 1981), the Florida Supreme Court considered the question of "whether the pendency of a petition for writ of certiorari in th[e Florida Supreme] Court, arising from the affirmance on direct appeal of the judgment and sentence, deprives the trial court of jurisdiction to consider a Florida Rule of Criminal Procedure 3.850 motion to vacate filed after the certiorari petition has been filed in th[e Florida Supreme] Court." The Florida Supreme Court held that "the trial court was deprived of jurisdiction to rule on Meneses' motion to vacate while certiorari proceedings were pending" in the Florida Supreme Court. *Id.*

[5] Alternatively, by allowing the trial court to consider this matter, it may allow this conflict issue to be also considered on direct appeal.

However, at the conclusion of the opinion, the Florida Supreme Court stated the following:

> Our holding, however, does not preclude defendant's seeking an order from the appellate court to temporarily relinquish jurisdiction to the trial court for the purpose of filing and being heard on a motion to vacate prior to the appellate court's disposition of the case. This is the practice now utilized in the appellate courts in this state. *See e.g., Jacobs v. State*, 357 So. 2d 169 (Fla. 1978). The filing in the appellate court of a request to relinquish jurisdiction, however, does not require an appellate court to automatically relinquish jurisdiction to the trial court. The proceedings in the appellate court may be nearing conclusion, and therefore the appellate court may not wish to relinquish jurisdiction at the time of the request but it might prefer to proceed with the disposition of the cause. This is within the discretion of the appellate court to decide. Further, the appellate court, before relinquishing jurisdiction, may evaluate the grounds for the motion to vacate to determine whether they are frivolous and may decide not to relinquish on this basis. This denial of the request to relinquish, however, is not a ruling on the merits of the motion to vacate and will not prevent a subsequent filing of a motion to vacate with the trial court at the conclusion of the proceedings in the appellate court.

Id. at 907.

11. The remedy suggested in *Meneses* was followed by this Court in *Jefferson v. State*, 440 So. 2d 20 (Fla. 1st DCA 1983). In *Jefferson*, while the defendant's direct appeal was pending, the Court

"entered an order temporarily relinquishing jurisdiction" so that the defendant could pursue a rule 3.850 motion. *Id.* at 22. The Court stated that the following procedure applies when such relinquishment is granted:

> *Combs v. State*, 403 So. 2d 418 (Fla. 1981), authorizes relinquishment of jurisdiction to the trial court when counsel informs the appellate court of an honest belief that there is an issue as to ineffective assistance of counsel. That opinion, as well as *State v. Meneses*, 392 So. 2d 905 (Fla. 1981), appears to us to contemplate that the proper procedure to follow when such relinquishment is granted is to file a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. If the trial court does not grant the relief, a new notice of appeal may be filed. The original appeal may proceed if there are other issues, and should be dismissed if there are not. As our order in this case stated, jurisdiction was relinquished for collateral proceedings, i.e., for instituting proceedings separate from the trial and pending appeal. However, no such motion was filed. Instead, the trial court and the parties apparently relied on the allegations in appellant's motion to relinquish. While this procedure was not in technical compliance with our order, we entertain the appeal by treating the proceedings below as having been conducted pursuant to remand for hearing upon an application for new trial. *See Antone v. State*, 382 So. 2d 1205 (Fla. 1980), cited in *Combs*, in which the Supreme Court remanded for testimony in the trial court on application for new trial. Under Florida Rule of Criminal Procedure 3.600(b)(8), ineffective assistance of counsel may properly be raised as a ground for new trial. The issue in this case having been thoroughly aired before the trial

> court, it is now sufficiently preserved and presented for our review, and the appeal from the judgment of conviction is carried over for that purpose. *Cf. Wright v. State*, 428 So. 2d 746 (Fla. 1st DCA 1983).

See also Libby v. State, 520 So. 2d 322, 322 (Fla. 2d DCA 1988) ("Accordingly, we affirm the trial court's denial of appellant's rule 3.850 motion without prejudice to appellant (1) filing another such motion after his present appeal has been decided and has become final or (2) as recognized in *Meneses*, *seeking an order from this court to temporarily relinquish jurisdiction to the trial court for the purpose of being heard on his motion*.") (emphasis added); *Wright v. State*, 446 So. 2d 208, 209 n.1 (Fla. 3d DCA 1984) ("The Rule 3.850 proceeding was conducted in the trial court while the plenary appeal was pending here pursuant to our express relinquishment of jurisdiction for that purpose.") (citing *Meneses*).

12. More recently, this Court followed the relinquishment procedure set forth above in *Ferguson v. State*, 1D19-3562 (as demonstrated by the Court's December 30, 2020, order in that case)[6]

[6] Notably, in *Ferguson*, the trial court granted relief after this Court relinquished jurisdiction and therefore the direct appeal in this Court was later voluntarily dismissed.

and *Wall v. State*, 1D15-5881 (as demonstrated by the Court's December 22, 2016, order in that case). *See also Hatton v. State*, case number 2D05-1085 (March 4, 2005, order granting motion to relinquish jurisdiction); *Crain v. State*, case number 2D15-2172 (December 6, 2016, order granting motion to relinquish jurisdiction); *Cugini v. State*, case number 6D23-2869 (August 12, 2024, order granting motion to relinquish jurisdiction).

13. Pursuant to *Meneses*, *Jefferson*, *Ferguson*, and *Libby*, Appellant Adelson requests the Court to temporarily relinquish jurisdiction to the trial court so that he can raise his conflict claim. Consideration of the factors set forth in *Meneses* and *Jefferson* establishes that relinquishment is appropriate in the instant case (i.e., the current direct appeal proceedings are not "nearing conclusion" – as the Initial Brief has not yet been filed; Appellant Adelson's conflict claim is not "frivolous"; and undersigned counsel have an "honest belief" that there is a credible and good faith basis for Appellant Adelson's claim). Moreover, Appellant Adelson submits that it serves both the interests of justice and judicial economy by having the trial

court address Appellant Adelson's claim at this time – since the conflict claim was just considered by the trial court in Donna Adelson's case.[7]

14. *Certificate of Counsel.* Undersigned counsel have contacted opposing counsel (Chief Assistant Attorney General Trisha Meggs Pate), who has indicated that the State needs additional time to consider its position. Undersigned counsel will file a supplement indicating the State's position, or the State will file a response.

WHEREFORE, for the reasons set forth above, Appellant Adelson requests the Court to temporarily relinquish jurisdiction to the trial court so that he can raise his conflict of interest claim.

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[7] Florida Rule of Appellate Procedure 9.600(b) states that "[i]f the jurisdiction of the lower tribunal has been divested by an appeal from a final order, the court by order may permit the lower tribunal to proceed with specifically stated matters during the pendency of the appeal." The rule is "intended to prevent unnecessary delays in the resolution of disputes." Committee Notes, Fla. R. App. P. 9.600(b) (1977).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Assistant Attorney General Trisha Meggs Pate
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by email delivery on October 16, 2024.

Respectfully submitted,

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