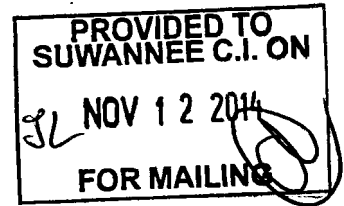


# SUPREME COURT OF FLORIDA

Joe Lee  
Appellant/Petitioner,



v.

CASE NO:  
**SC14-2006**

State of Florida  
Plaintiff/Respondent.

FILED  
JOHN A. THOMAS JR.  
2014 NOV 18 AM 10:36  
CLERK, SUPREME COURT  
BY

## PETITIONER'S JURISDICTIONAL INITIAL BRIEF

*COMES NOW*, the petitioner, Joe Lee and files this instant Jurisdictional Brief in support of the acceptance of jurisdiction by the Florida Supreme Court. The Florida Supreme Court should accept jurisdiction in the instant case based upon the following facts:

1. The petitioner's Notice to Invoke this Court's Jurisdiction presents 2 unique questions of law for this Honorable Court's consideration which further qualify as questions of great public importance, which are:

- [1] "When a District Court issues a written opinion and no action is taken, ie. rehearing, reconsideration, certification, etc. within the 15 days permitted for the filing of such motions, and at the conclusion of the 15 day period, the Clerk fails to issue the Mandate as required by Florida Rule of Appellate Procedure, Rule 9.340 is the opinion of the District Court deemed final and can a District Court later Sua Sponte completely change it's written decision?"

- [2] “May a District Court *materially change* a written opinion issued during one term by issuing a “Clarification” on it’s own motion after the expiration of that term?”

The Florida Supreme Court has the inherent authority, granted by the Florida Constitution and Florida Rule of Appellate Procedure, Rule 9.030 to review :

“Rule 9.030. Jurisdiction of Courts

(a) Jurisdiction of Supreme Court.

(2) Discretionary Jurisdiction. The discretionary jurisdiction of the supreme court may be sought to review

(A) decisions of district courts of appeal that > [FN5]

(i) expressly declare valid a state statute;

(ii) expressly construe a provision of the state or federal constitution;

(iii) expressly affect a class of constitutional or state officers;

(iv) *expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law;*

(v) pass upon a question certified to be of great public importance;

(vi) are certified to be in direct conflict with decisions of other district courts of appeal;

### STATEMENT OF FACTS

In the instant case, the petitioner is a defendant in a criminal case.

The petitioner was convicted by a jury of the offenses of robbery with a firearm and aggravated battery and was sentenced according to the 10-20-Life statute. Petitioner filed a Motion for New Trial which was denied and petitioner appealed. On June 1, 2012 the Fifth District issued a written

opinion which specifically reversed and remanded the petitioner's Judgment and Sentence. See: Lee v. State 89 So.3d 290 (Fla. 5<sup>th</sup> DCA, 2012).

"Accordingly, we reverse the judgment and sentence and remand to the trial court for a new hearing on the motion for new trial."

On or about the 14<sup>th</sup> of July, 2013, the petitioner filed an Emergency Petition for Writ of Habeas Corpus with the 9<sup>th</sup> Judicial Circuit Court in and for Orange County, Florida requesting his immediate release from the Department of Corrections because he was being illegally detained as the Fifth District Court had reversed his judgment and sentence on June 1, 2012 in the above order. On or about August 12, 2013, the petitioner received a response from the ninth Judicial Circuit which included a reference to a clarified opinion which had been issued by the Fifth District Court on July 9, 2013 which purported to be a "Clarified Opinion" but was in fact an opinion which materially changed the original opinion in that the "Clarified Opinion" did *NOT* reverse petitioner's judgment and sentence as did the original opinion.

The decision rendered on July 9, 2013 is a legal nullity for primarily three (3) reasons:

[1] The decision rendered on July 9, 2013 was rendered long after the District Court's original opinion had become final and was no longer subject to change. The original opinion was issued on June 1, 2012 and no request

for rehearing or clarification or certification was filed by any party. Since no motions were filed in reference to the District Court's opinion, then per Florida Rule of Appellate Procedure, Rule 9.340, that decision became final and the Clerk was required to perform the ministerial duty of issuing the Mandate. Since there were no motions filed and the Court did not order the withholding of it's Mandate, it's opinion must be considered to have been final even without the issuing of the Mandate and was not subject to review.

[2] The "Clarified Opinion" issued by the Fifth District on July 9, 2013 is in fact not a "Clarified Opinion" but is in fact a material alteration of the originally pronounced opinion. In it's original opinion issued on June 1, 2012, the Fifth District specifically ordered, "*we reverse the judgment and sentence and remand to the trial court for a new hearing on the motion for new trial.*" The new or "Clarified" opinion completely fails to order that the petitioner's judgment and sentence is reversed. This is a material change and not simply a "Clarification." Clarification is defined as the explaining of something already done or the removal of any ambiguity to enhance the clarity of the decision. Clarification does not and cannot include the wholesale changing of material aspects which were never in question. The Fifth District's original opinion insofar as it ordered; "*Accordingly, we reverse the judgment and sentence and remand to the trial court for a new*

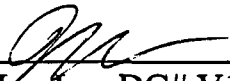
*hearing on the motion for new trial,”* was abundantly clear and without ambiguity. The decision was not subject to multiple interpretations and was in no way confusing or misleading as to its directive. For the Fifth District to issue a completely new order and to mask it in the guise of a clarification was an error which cannot withstand any reasonable judicial scrutiny and must be considered a nullity and the originally published opinion must stand.

[3] The final reason that the Fifth District’s opinion issued July 9, 2013 must be considered a judicial nullity is the simple fact that the “Clarified Opinion” issued July 9, 2013, was not issued during the same term as the originally issued opinion on June 1, 2012. As the Courts of this state have clearly held, *“An appellate court’s power to recall its mandate is **limited to the term during which it was issued, and the limitation is equally applicable to en banc rehearing proceedings.** > West’s F.S.A. R.App.P.Rule 9.340.*

Bruggman<sup>N</sup> v. State 117 So3d 39 37 Fla.L.Weekly D1041 (Fla. 3<sup>rd</sup> DCA, 2012). In lieu of the fact that a District Court is without the power or jurisdiction to recall its Mandate outside of the term in which said Mandate was issued, and in the instant case since there were no other filings in this matter after the issuance of the original opinion within 15 days, there can be no doubt that Mandate either did or definitely should have issued 15 days after the original opinion on June 1, 2012. Thus the Fifth District exceeded its inherent authority in

issuing a new opinion on July 9, 2013, regardless of how said new opinion is titled, which definitely materially changed its original opinion when said new opinion was issued in the term which followed the one in which the original opinion was issued and not in the same term as the original opinion.

**WHEREFORE**, based on the foregoing, this Honorable Court should reverse the July 9, 2013 order to the Fifth District with directions that the opinion issued June 1, 2012 which went unchallenged by any party be considered the final opinion in this mater.

X   
Joe Lee DC# V11647  
Suwannee C.I. Annex  
5964 U.S. Highway 90  
Live Oak, FL 32060

**CERTIFICATE OF SERVICE**


I, Joe Lee, certify that a true and correct copy of the foregoing: Initial Brief on Jurisdiction has been provided to the Office of the Attorney General whose address is: *PL-01 The Capitol* Tallahassee, Florida 32399 via U.S. mail, postage pre-paid on this 12 day of NOVEMBER, 2014.

X   
Joe Lee DC# V11647

**APPENDIX**  
**TO**  
**PETITIONER'S JURISDICTIONAL INITIAL BRIEF**

- I. Copy of Decision of the Florida Fifth District Court of Appeal in case # 5D11-2319 dated June 1, 2012.
- II. Copy of "Clarified Opinion" Decision of the Florida Fifth District Court of Appeal in case # 5D11-2319 dated July 9, 2013.
- III. Copy of Petitioner's Initial Brief on Appeal filed with the Fifth District Court of Appeal on the 26<sup>th</sup> day of December, 2011.
- IV. Copy of Appellee's Answer Brief on Appeal filed with the Fifth District Court of Appeal on the 19<sup>th</sup> day of January, 2012

Respectfully,

/S/   
Joe Lee DC# V11647  
Suwannee C.I. Annex  
5964 U.S. Highway 90  
Live Oak, FL 32060

I



> 89 So.3d 290

District Court of Appeal of Florida,  
Fifth District.

Joe LEE, Appellant, v. STATE of Florida, Appellee.

No. 5D11-2319.

June 1, 2012.

Background: Defendant was convicted in the Circuit Court, St. Johns County, Wendy Berger, J., of robbery with firearm and aggravated battery with firearm, and his motion for new trial was denied. Defendant appealed.

Holding: The District Court of Appeal, Monaco, J., held that, on motion for new trial based on claim that principal testimony was fatally inconsistent, trial court was required to consider whether evidence was technically sufficient to prove charges and whether weight of evidence support guilty verdicts.

Reversed and remanded.

#### West Headnotes

> [1] Criminal Law K> 935(1)

110 ----

110XXI Motions for New Trial

110k935 Verdict Contrary to Evidence

> 110k935(1) Weight and sufficiency of evidence in general.

When ruling on a motion for new trial based on a claim that the verdict is against the weight of the evidence, the trial court is compelled to exercise its discretion to determine whether a greater amount of credible evidence supports one side of an issue or the other. > West's F.S.A. RCrP Rule 3.600(a)(2).

> [2] Criminal Law K> 935(1)

110 ----

110XXI Motions for New Trial

110k935 Verdict Contrary to Evidence

> 110k935(1) Weight and sufficiency of evidence in general.

On defendant's motion for new trial based on claim that principal testimony at trial was fatally inconsistent, trial court was required to consider whether evidence was technically sufficient to prove charges for robbery with firearm and aggravated battery with firearm, and whether weight of evidence support guilty verdicts. > West's F.S.A. RCrP Rule 3.600(a)(2).

> [3] Criminal Law K> 935(1)

110 ----

110XXI Motions for New Trial

110k935 Verdict Contrary to Evidence

> 110k935(1) Weight and sufficiency of evidence in general.

On a motion for new trial based on a claim that the guilty verdict was against the weight of the evidence, the trial court acts as a "safety valve" by considering whether to grant a new trial where the evidence is technically sufficient to prove the criminal charge but the weight of the evidence does not appear to support the jury verdict. > West's F.S.A. RCrP Rule 3.600(a)(2).

Ryan Thomas Truskoski, and Jeffrey Deen, of Office of the Criminal and Civil Regional Counsel, Casselberry, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Robin A. Compton, Assistant Attorney General, Daytona Beach, for Appellee.

MONACO, J.

The appellant, Joe Lee, was convicted of robbery with a firearm and aggravated battery with a firearm, and sentenced on each count in accordance with the 10-20-Life statute. He argues that the trial court used an incorrect standard in ruling on his motion for a new trial founded on his claim that the principal testimony against him at trial was fatally inconsistent. Because there is merit to Mr. Lee's argument, we reverse and remand for a new hearing on his motion for new trial.

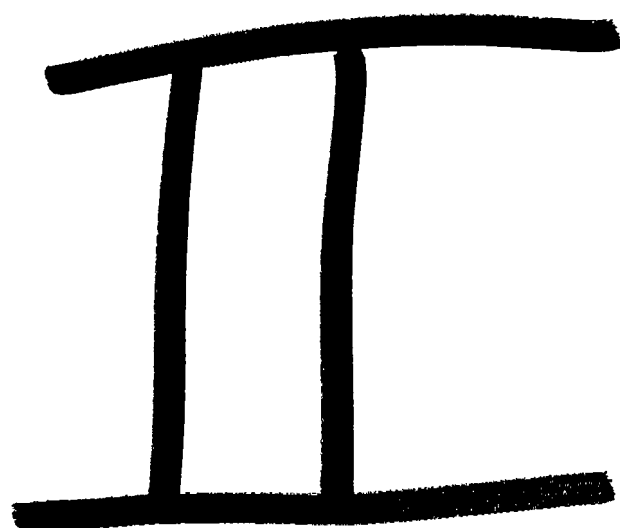
> [1]> [2]> [3] > Rule 3.600(a)(2), Florida Rules of Criminal Procedure, provides that the court shall grant a new trial if, among other reasons, "[t]he verdict is contrary to law or the weight of the evidence." When ruling on a motion for new trial based on a claim that the verdict is against the weight of the evidence, the trial court is compelled to exercise its discretion to determine "whether a greater amount of credible evidence supports one side of an issue or the other." > Fulwood v. State, 29 So.3d 425 (Fla. 5th DCA 2010) (citing > Geibel v. State, 817 So.2d 1042, 1044 (Fla. 2d DCA 2002)). The trial court under these circumstances acts as a "safety valve" by considering whether to grant a new trial where "the evidence is technically sufficient to prove the criminal charge but the weight of the evidence does not appear to support the jury verdict." > Moore v. State, 800 So.2d 747, 749 (Fla. 5th DCA 2001).

In the present case it is unclear whether or not the trial judge applied the correct standard in denying the motion for new trial. Indeed, the State agrees that because the record on the issue is ambiguous, a new hearing on Mr. Lee's motion is appropriate. We agree and commend the State for its candor.

Accordingly, we reverse the judgment and sentence and remand to the trial court for a new hearing on the motion for new trial.

REVERSED and REMANDED with instructions.

PALMER and LAWSON, JJ., concur.



*Anders v. California*, 386 U.S. 738 (1967).

The trial court also revoked Rivera's community control in circuit court case 10-CF-18311; however, the written judgment and sentence in that case comport with the trial court's oral pronouncement. Therefore, no corrections are necessary in that case.

\* \* \*

**criminal law—Sentencing—Correction—Ten-year concurrent sentences imposed pursuant to plea bargain exceeded five-year statutory maximum for third degree felonies—On remand, trial court may restructure sentence by changing concurrent terms to consecutive terms, provided new sentence conforms to plea agreement and is not found to be vindictive**

*NALD GODWIN*, Appellant, v. *STATE OF FLORIDA*, Appellee. 5th District. Case No. 5D13-935. Opinion filed July 12, 2013. 3.800 Appeal from the Circuit Court for Sumter County, William H. Hallman, III, Judge. Counsel: Donald Godwin, Jasper, se. Pamela Jo Bondi, Attorney General, Tallahassee, and Pamela J. Koller and ylee Danielle Tatman, Assistant Attorneys General, Daytona Beach, for Appellee.

*VANDER, J.*) Godwin appeals the denial of his motion to correct legal sentence filed pursuant to rule 3.800(a), Florida Rules of Criminal Procedure. The State properly concedes error.

Godwin was charged with twenty-three counts of possession of child pornography in violation of section 827.071(5), Florida Statutes (2011). A plea agreement was entered into between the State and Godwin, whereby Godwin would plead nolo contendere to Counts 1 through X and be sentenced to ten years imprisonment. In return, the State would nolle prosequi the remaining thirteen counts. The trial court accepted Godwin's plea and sentenced him to ten concurrent sentences of ten years imprisonment on each count.

On appeal, Godwin correctly argues that his sentence is illegal because a violation of section 827.071(5) is a third-degree felony carrying a maximum penalty of five years' imprisonment. Although Godwin is entitled to be relieved of this illegal sentence, the trial court may, on remand, restructure the defendant's sentence by changing concurrent terms to consecutive terms, provided that the new sentence conforms to the plea agreement and is not found to be vindictive. *See Sanders v. State*, 899 So. 2d 1208, 1210-11 (Fla. 5th DCA 2005) (recognizing that illegal sentence "can be restructured in a manner that effectuates the plea agreement") (citation omitted); *Tilley v. State*, 871 So. 2d 294, 295 (Fla. 5th DCA 2004) (remanding for resentencing and noting that defendant "is entitled to the benefit of the plea agreement, but nothing more"); *Buchanan v. State*, 781 So. 2d 449, 450 (Fla. 5th DCA 2001).

REVERSED and REMANDED. (SAWAYA and COHEN, JJ., concur.)

\* \* \*

**Jurisdiction—Service of process—Summonses which did not contain deputy clerk's signature or circuit court's official seal did not strictly comply with rule 1.070(a)—Error to deny motion to quash service of process**

*CHARLES WOIDE AND SUSANNAH WOIDE*, Appellants, v. *FANNIEMAE, ETC.*, Appellee. 5th District. Case No. 5D12-4276. Opinion filed July 12, 2013. Non Final Appeal from the Circuit Court for Volusia County, Robert K. Rouse, Jr., Judge. Counsel: Herbert S. Zischkau III, Deltona, for Appellant. Wm. David Newman, Jr., of Choice Legal Group, P.A., Fort Lauderdale, for Appellee.

(*PER CURIAM*.) Appellants, Charles and Susannah Woide, timely appeal a non-final order denying their motion to quash service of process. They argue the summonses with which they were served were defective because neither contained the deputy clerk's signature or the circuit court's official seal as required by Florida Rule of Civil Procedure 1.070(a). Appellee, Fannie Mae, properly concedes error. *See Fla. R. Civ. P. 1.070(a); § 48.031(1)(a)*, Fla. Stat. (2011); *Ball v. Jones*, 65 So. 2d 3, 4 (Fla. 1953) ("When the Rule mandatorily requires that the summons shall be 'issued by the Clerk', it requires

that the Clerk, or his lawfully authorized deputy, sign such summons as a 'testimonial by which the authenticity of the summons is made to appear.'"); *see also Schofield v. Wells Fargo Bank, N.A.*, 95 So. 3d 1051, 1052 (Fla. 5th DCA 2012) ("Service of process must strictly comply with all relevant statutory provisions."). Accordingly, because the summonses failed to strictly comply with Florida Rule of Civil Procedure 1.070(a), we reverse the order of the trial court.

REVERSED and REMANDED. (LAWSON, BERGER and WALLIS, JJ., concur.)

\* \* \*

**Criminal law—Robbery with firearm—Aggravated battery with firearm—New trial—Verdict against weight of evidence—Defendant entitled to new hearing on motion for new trial founded on claim that principal testimony against defendant at trial was fatally inconsistent where it is unclear whether trial judge applied correct standard in denying the motion**

*JOE LEE*, Appellant, v. *STATE OF FLORIDA*, Appellee. 5th District. Case No. 5D11-2319. Opinion filed July 9, 2013. Appeal from the Circuit Court for St. Johns County, Wendy Berger, Judge. Counsel: ~~Ryan Thomas Truskosky~~ and Jeffrey Deen, of Office of the Criminal and Civil Regional Counsel, Casselberry, for Appellant. Pamela Jo Bondi, Attorney General, Tallahassee, and Robin A. Compton, Assistant Attorney General, Daytona Beach, for Appellee.

**CLARIFIED OPINION**

[Original Opinion at 37 Fla. L. Weekly D1303b]

(*PER CURIAM*) The court, sua sponte, withdraws the opinion previously entered in this matter and substitutes this opinion.

The appellant, Joe Lee, was convicted of robbery with a firearm and aggravated battery with a firearm, and sentenced on each count in accordance with the 10-20-Life statute. He argues that the trial court used an incorrect standard in ruling on his motion for a new trial founded on his claim that the principal testimony against him at trial was fatally inconsistent. Because there is merit to Mr. Lee's argument, we reverse and remand for a new hearing on his motion for new trial.

Rule 3.600(a)(2), Florida Rules of Criminal Procedure, provides that the court shall grant a new trial if, among other reasons, "[t]he verdict is contrary to law or the weight of the evidence." When ruling on a motion for new trial based on a claim that the verdict is against the weight of the evidence, the trial court is compelled to exercise its discretion to determine "whether a greater amount of credible evidence supports one side of an issue or the other." *Fulwood v. State*, 29 So. 3d 425 (Fla. 5th DCA 2010) (citing *Geibel v. State*, 817 So. 2d 1042, 1044 (Fla. 2d DCA 2002)). The trial court under these circumstances acts as a "safety valve" by considering whether to grant a new trial where "the evidence is technically sufficient to prove the criminal charge but the weight of the evidence does not appear to support the jury verdict." *Moore v. State*, 800 So. 2d 747, 749 (Fla. 5th DCA 2001).

In the present case it is unclear whether or not the trial judge applied the correct standard in denying the motion for new trial. Indeed, the State agrees that because the record on the issue is ambiguous, a new hearing on Mr. Lee's motion is appropriate. We agree and commend the State for its candor.

Accordingly, we reverse the order denying the motion for new trial and remand to the trial court for a new hearing on the motion for new trial.

REVERSED and REMANDED with instructions. (SAWAYA, PALMER and LAWSON, JJ., concur.)

\* \* \*

**Dissolution of marriage—Temporary support—Error to fail to award former wife arrearages due from former husband under temporary support order**

*SIMA SASSEEN*, Appellant, v. *BRETT SASSEEN*, Appellee. 5th District. Case No. 5D12-1449. Opinion filed July 12, 2013. Appeal from the Circuit Court for St. Johns