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IN THE SUPREME COURT OF FLORIDA

TERRY JEROME ROCK,

Petitioner,

v. CASE NO. 82,530

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

TERRY JEROME ROCK,

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STATE OF FLORIDA,

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_____:

INITIAL BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

This case is before the court on conflict jurisdiction, pursuant to article V, section 3(b)(3), of the Florida Constitution.

Mr. Rock, the petitioner, was the defendant in the trial court and the appellant in the district court. He will be referred to here as petitioner or by his proper name. Respondent will be referred to as the state. References to the record on appeal appear as (R [page number]), while references to trial transcripts appear as (T [page number]).

STATEMENT OF THE CASE AND FACTS

Mr. Rock was charged by amended information filed December 5, 1991, with burglary of the En Vogue Beauty Salon. (R 13).

On January 27, 1992, a jury was selected to try Mr. Rock's case. The jury was selected through a consolidated jury selection procedure whereby several juries are chosen from one venire. In this procedure, a jury is chosen for one defendant while the other defendants and their counsel watch the entire process. A jury is then selected from the same venire for each of the other defendants.

In the instant case, three juries were selected from the same panel of forty persons. Mr. Rock's counsel represented two of the defendants, Mr. Rock and Mr. Clark. Private counsel represented the other defendant, Mr. Hartley. The Hartley jury was selected first, Mr. Rock's jury second, and the Clark jury last. (T 6-8). The trial court began the process by asking each member of the panel to read aloud their answers to a series of background questions. (R 12-13). The background information included how long each juror had resided in Jacksonville and in what part of town he or she presently lived: place and type of employment; marital status, spouse's employment, number of children, and employment of any grown children; whether the juror was a homeowner; whether the juror had friends or relatives in law enforcement, the State Attorney's Office, or Public Defender's Office: and whether the juror previously had served on a jury, and if so, whether the case was criminal or civil and whether a verdict was reached. (R

13-32). The court then allowed the state and defense to question the individual jurors.

During the consolidated jury selection, jurors struck during the first jury selection were placed back in the jury pool and thus were part of the venire for the second jury selection. Jurors struck during the second jury selection likewise were placed back in the jury pool and became part of the jury panel in the third jury selection.

Prior to jury selection, Mr. Rock's counsel made an oral motion to preclude the simultaneous jury selection on the grounds that it violated her clients' sixth amendment rights. (T 7-8). Counsel stated her written motion would incorporate the rest of her arguments. In the pretrial written motion, counsel asserted, inter alia, that "[t]his attorney will not be able to adequately represent the Defendant since she will have to co-mingle the interest of one Defendant with that of the other Defendant she represents during this simultaneous jury selection process.'' (R 26-27). The written motion also asserted the jury selection procedure violated Mr. Rock's rights to an impartial jury trial, an individual jury trial, and due process. Counsel's motion was denied. (T 8).

Defense counsel filed a pretrial motion in limine to exclude Mr. Rock's prearrest statement that he had never been in the En Vogue Beauty Salon on Gandy Street and the only beauty shop he had been in was a shop on Palmdale Street three years before. (R 23-24). The trial court ruled the statement was admissible if the state could prove it false and permitted

the state to mention the statement during opening statement. (T 142, 152, **198).**

Trial proceeded, and Monica Young testified she was the owner of En Vogue Beauty Salon on Gandy Street in Jacksonville. The shop had **a** reception area to the left of the front entry and four stations along the left wall. The shampoo area was in the back and the dryer chairs along the right wall. (T 156-158). On August **27**, 1991, the shop was locked up around 6 p.m. **The** next morning, the front glass door was broken and a brick had been thrown through the door. A TV and microwave oven were missing. (T 158).

The police dusted a number of objects for fingerprints, including a can that appeared to have been moved during the burglary. The can was on a chair in the back corner of the salon instead of its customary place at **a** work station, and the top was off the can. Young said the can had been in the business since the salon opened the previous February. Customers did not have access it it. (T 158-159).

One of the employees closed the business August 27. Young said she was not present at her salon at all times. (T 160-161). The hair color can was purchased by someone else and Young did not know where **ox** when it was purchased. She did not know every place the can had been since its manufacture. (T 162-163). The person who purchased it had worked at two other salons before she came to En Vogue but had not worked at the salon on Palmdale, which was right around the corner. (T

164-165). Young did not know if that person ever cut friends' hair for free.

Richard Futch, the evidence technician, said objects in the salon had been moved, and cabinets had been opened. (R 170-171). Futch lifted two prints from the hair color can. (R 173). Futch also dusted a plastic card box, a business card, and a candy jar. These items were located near the front counter where the cash register was located. (T 171-172).

Jody Phillips, the fingerprint expert, compared a print from the can with Mr. Rock's prints and concluded the print was made by Mr. Rock's thumb. (T 183).

On cross-examination, Phillips said although four prints were submitted to him, he entered only two of the prints into the AFIS computer. (T 186). Phillips said fingerprints could last many years and moving an object with a print on it would not diminish the print. (T 187).

On redirect, Phillips was asked why the other two prints were not submitted through AFIS and to explain what AFIS was. Phillips said AFIS, an acronym for automatic fingerprint identification system, contained a data base. Over defense objection, the witness was allowed to continue. When Phillips said the data base was made up of inked fingerprint cards submitted "as a result of arrests or applications," defense counsel moved for a mistrial, which was denied. (T 189-191).

The court then heard testimony on proffer from Detective Robinson. During the proffer, defense counsel asked for a ruling on her motion in limine to exclude Mr. Rock's statement

denying he had ever been in the En Vogue Salon. After argument, the trial court denied the motion.

The jury returned, and Robinson said when he asked Mr. Rock if he had been inside the En Vogue Beauty Salon on Gandy Street, Mr. Rock responded he had not but but said he had been in a beauty shop on Palmdale about three years before. (T 202). Robinson said he questioned Mr. Rock at the police station after reading him his constitutional rights. Robinson arrested Mr. Rock after he obtained the statement. (T 204).

Robinson did not take Mr. Rock to the En Vogue to see the building. (T 208). Robinson did not ask Mr. Rock if he had ever touched a hair color can before, ever been inside a beauty supply store before, or ever been involved in the beauty supply business. He did not ask Mr. Rock if he ever loaded a truck with beauty supplies, lived with someone who sold beauty supplies, or visited a cosmetologist who had beauty supplies at home. (T 211-213).

The defense rested without presenting any testimony, and the jury found Mr. Rock guilty as charged. (T 290). The state presented evidenced of two prior felony convictions (T 295), and the trial court sentenced him as a habitual felony offender to ten years in prison. (T 332).

On direct appeal, the First District Court of Appeal affirmed the conviction and sentence. Rock v. State, 622 So. 2d 487 (Fla. 1st DCA 1993).

SUMMARY OF ARGUMENT

ISSUE I

The trial court erred in consolidating Mr. Rock's case with two other defendant's cases for jury selection over defense counsel's objection to representing multiple clients during jury selection. An accused is entitled to conflict-free representation at every critical stage of the prosecution, including jury selection. Because the jury selection procedure required Mr. Rock's counsel to choose juries for two defendants from one venire at one time, counsel was placed in the difficult position of having to consider the effect of her actions in one defendant's jury selection on the other defendant she represented, Foreseeing the potentional for confict, counsel objected to the procedure. Based upon counsel's representations regarding a potential conflict, the trial court should have allowed Mr. Rock's jury selection to proceed separately or conducted further inquiry regarding the asserted conflict. Because reversal is automatic when an objection is made at trial, the district court erred in requiring Mr. Rock to demonstrate actual conflict to obtain reversal on appeal. Mr. Rock therefore is entitled to a new trial.

In addition to burdening defense counsel with a conflict of interest, the simultaneous jury selection method was an improper and unauthorized consolidation of a crucial stage of Mr. Rock's trial. Requiring Mr. Rock to share a venire panel with other defendants, to rely on the questioning of the panel by an attorney other than his own, and to expose his jurors to

the crimes of others infringed his rights to due process and a fair and impartial jury.

ISSUE II

The trial court erred in admitting Mr. Rock's statement that he had never been in the burglarized beauty salon. Exculpatory statements may be admitted only if proven false and therefore rendered inculpatory. Falsity must be proved by evidence independent of the proof of defendant's guilt. Here, the state relied on a fingerprint lifted from a hair color can that had been in the salon to prove the Mr. Rock's statement was false. The fingerprint could prove Mr. Rock's statement false, however, only if the print was made at the time of the burglary. Because the state's proof of falsity was dependent upon proof that Mr. Rock committed the crime, the statement was not admissible as a separate circumstance tending to show guilt. This error requires reversal for a new trial.

ARGUMENT

ISSUE I

MR. ROCK WAS DENIED HIS RIGHT *TO* EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS, AND A FAIR AND IMPARTIAL JURY WHEN THE TRIAL COURT OVERRULED HIS OBJECTION TO CONSOLIDATING JURY SELECTION FOR HIS CASE AND THE CASES OF TWO OTHER DEFENDANTS, ONE OF WHOM WAS REPRESENTED BY MR. ROCK'S COUNSEL.

The trial court employed a multiple jury selection process whereby Mr. Rock's jury and juries for two other defendants were selected from the same venire panel. Mr. Rock's counsel, who represented two of the three defendants, objected to the consolidated jury selection procedure, asserting she could not adequately represent Mr. Rock because she would "have to co-mingle" Mr. Rock's interests with the interests of the other defendant she represented during the consolidated proceeding. (T 6-8, 25-27). Defense counsel also asserted the procedure violated Mr. Rock's constitutional rights to due process and a fair and impartial jury. The trial judge summarily overruled petitioner's objection. (T *8).* The district court approved the trial court's ruling, concluding the record failed to demonstrate an actual conflict of interest. 622 So. 2d at 489.

Both the circuit and district courts' rulings were in error. Once defense counsel advised the trial court she could not effectively represent both her clients' interests during the consolidated proceeding, the trial court should have permitted Mr. Rock's jury selection to proceed separately. Because there was an objection below, Mr. Rock was entitled to

reversal on appeal, and the district court erred in requiring him to show actual conflict or prejudice.

In addition to burdening defense counsel with a conflict of interest, the simultaneous jury selection method was an improper and unauthorized consolidation of a crucial stage of Mr. Rock's trial. Requiring Mr. Rock to share a venire panel with other defendants, to rely on the questioning of the panel by an attorney other than his own, and to expose his jurors to the crimes of others infringed his rights to due process and a fair and impartial jury.

A. THE CONSOLIDATED JURY SELECTION PROCEDURE VIOLATED MR. ROCK'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE STATE AND FEDERAL CONSTITUTIONS.

1. An Accused is Entitled to Conflict-Free Representation at Every Critical Stage of Trial, Including Jury Selection.

An accused is entitled to counsel at every critical stage of a prosecution, Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970); United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), which in every case includes trial, Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), which begins with jury selection. State v. Singletary, 549 So. 2d 996, 998 (Fla. 1989); State v. Melendez, 244 So. 2d 137, 139 (Fla. 1971); Peri v. State, 426 So. 2d 1021, 1024 (Fla. 3d DCA 1983)("it is axiomatic that the selection of a jury in a criminal case is a

critical stage of any trial"), review denied, 436 So. 2d 100 (Fla. 1983).

The Florida courts have long recognized the importance of jury selection in an accused's jury trial. Singletary, 549 So. 2d at 998-99 (jury selection so important judge's presence cannot be waived by anyone); Lavado v. State, 492 So. 2d 1322, 1323-24 (Fla. 1986), adopting dissent in Lavado v. State, 469 So. 2d 917, 919-921 (Fla. 3d DCA 1985)(meaningful voir dire must include questions about jurors' attitudes toward the defense theory); Francis v. State, 413 So. 2d 1175 (Fla. 1982)(reversible error to conduct jury selection in defendant's involuntary absence without waiver); Cross v. State, 89 Fla. 212, 216, 103 So. 636 (Fla. 1925)(wide latitude in questioning permitted); Gosha v. State, 534 So. 2d 912 (Fla. 3d DCA 1988)(reversible error to impose unreasonable time limits on voir dire).

As this Court said in Francis:

> The exercise of peremptory challenges has been held to be essential to the fairness of trial by jury and has been described as one of the most important rights secured to a defendant. Pointer v. United States, 151 U.S. 396, 410, 38 L.Ed. 2d 208 (1894); Lewis v. United States, 146 U.S. 370; 13 S.Ct. 136, 36 L.Ed. 1011 (1892). It is an arbitrary and capricious right which must be exercised freely to accomplish its purpose.

413 So. 2d at 1178-79.

One aspect of the right to counsel guaranteed under our state and federal constitutions is the right to effective counsel, which includes the right to an attorney whose loyalty

is not divided between clients with competing interests. Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); Holloway v. Arkansas, 435 U.S. 475, 480, 98 S.Ct. 1173, 1182, 55 L.Ed.2d 425 (1978); Baker v. State, 202 So. 2d 563, 565 (Fla. 1967). Counsel's allegiance to a client must remain unaffected by competing obligations to other clients. Barclay v. Wainwright, 444 So. 2d 956 (Fla. 1984).

A conflict of interests occurs when one defendant stands to gain significantly by counsel pursuing some strategy that is damaging to the cause of another client whom counsel also represents. See Foxworth v. Wainwright, 516 F.2d 1072, 1076 (5th Cir. 1975). Ordinarily, such conflict arises where a defense attorney represents codefendants during the same proceeding. See Cuyler; Holloway; Baker. Conflict also may arise where a defense attorney represents several persons who are not codefendants but whose interests are nonetheless adverse. See Bellows v. State, 508 So. 2d 1330 (Fla. 2d DCA 1987)(finding confict where public defender represented defendant and state's key witness). The key is not whether the defendants are codefendants but whether defense counsel must serve a "dual and adverse stewardship.'' Id. at 1332.

2. An Accused is Deprived of Effective Assistance of Counsel Whenever a Trial Judge Requires Dual Representation Over Objection Or the Record Shows Actual Conflict.

In Florida, the rules governing challenges to dual representation of conflicting interests were established in a trio of supreme court cases: Baker v. State, 202 So. 2d 563 (Fla.

1967), Belton v. State, 217 So. 2d 97 (Fla. 1968), and **State v.** Youngblood, 217 So. 2d **98, 101 (Fla. 1968).**

In the leading case, Baker, the trial court appointed two members of the bar to jointly represent codefendants in a first-degree murder case. The trial court overruled the attorneys' timely objection to the joint representation, and the defendants went to trial each represented by both attorneys. The court held the joint representation denied the defendants the effective assistance of counsel guaranteed by the federal **and** state constitutions. In so holding, the court relied on Glasser v. United States, 315 U.S. **60,** 62 S.Ct. 457, 86 L.Ed. 680 (1942), in which the Court held

> the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.

Id. at 565 (quoting 315 U.S. at *70).* Observing that other state courts had reached the same conclusion as Glasser, the court said:

> Each of the cited decisions held that an appointment under which one or more attorneys were required to represent jointly two co-defendants denied the defendants effective representation of counsel. The basis for the holdings was that such an appointment denied the individual defendant representation by an attorney who could act for his best interest without regard to the effect of such action on the interest of the co-defendant. The interests and defenses of most co-defendants are conflicting. Evidence,

> strategy and defenses which will benefit one co-defendant usually are detrimental to the other. It is this conflict and inconsistency of position which makes it impossible for the same counsel to effectively represent two or more co-defendants simultaneously.

Id. at **565-66.**

Having concluded the defendants were entitled to separate counsel, the court addressed the state's contention that the error was harmless. Turning again to Glasser, the Court said:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

Id. (quoting Glasser, 315 U.S. at 76). The court thus held it was unnecessary for the defendants to show they were prejudiced by the denial of separate counsel. Id.

In Belton, where, unlike Baker, the defendants did not object to the joint representation, the Court explained and amplified its prior holding:

> [In Baker] [w]e held that it was error to refuse the request for seaarate counsel. . . . Despite the insertion of the obiter regarding the "usual" presence of prejudice or conflict, the Baker judgment really stands for no more than that error was committed when the trial judge refused the request for separate counsel at the beginning of the trial. If a defendant is indigent and such a request is made it should be granted unless it can be demonstrated to the trial judge that no prejudice will result or that no conflict will arise as an incident of the joint representation. Without such a request being made, failure to appoint separate counsel will not be held to constitute error unless it is demonstrated that prejudice results from such failure. Error does not occur because

> of joint counsel in the absence of a request for separate counsel or a showing of prejudice or conflict of interest.

217 So. 2d at 98 (emphasis added). The Court concluded there was no reversible error as "there was neither a request for separate counsel nor a showing of prejudice." Id.

In Youngblood, decided the same day, the Court restated the rule with greater precision:

> (1) When a joint defendant requests separate counsel, his request should be granted unless the state can clearly demonstrate for the record that prejudice will not result from a denial. If request is made and the record shows prejudice from denial or is silent on the subject, such denial will constitute reversible error.
>
> (2) If no request for separate counsel is made and the Court permits trial of joint defendants with single counsel, then reversible error does not occur unless the record reveals that some prejudice results from the failure to appoint separate lawyers for each defendant.

217 So. 2d at 101.

The rules fashioned by the Florida Supreme Court in the Baker line of cases anticipated the United States Supreme Court's decision a decade later in Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). In Holloway, a public defender was appointed to represent three defendants charged with rape and robbery and whose cases were consolidated for trial. Two weeks before trial, defense counsel requested separate counsel for each defendant because "there was a possibility of a conflict of interest in each of their cases." The motion was denied. On the day of trial, defense counsel

renewed the motion "on the grounds that one or two of the defendants may testify and, if they do, then I will not be able to cross-examine them because I have received confidential information from them." The court again denied the motion. 435 U.S. at 477-78. During the trial, each defendant testified, each denying he was in the restaurant the night of the robbery. The jury found all the defendants guilty. Id. at 480-81.

On appeal, the defendants claimed their representation by a single attorney over their objection violated their right to effective assistance of counsel. The Arkansas Supreme Court held the defendants must show actual conflict to obtain reversal. Observing that defense counsel "had failed to outline to the trial court both the nature of the confidential information received from his clients and the manner in which knowledge of that information created conflicting loyalties," and that none of the defendants had incriminated codefendants while testifying, the state court concluded the record demonstrated no "actual conflict of interests or prejudice" to the defendants, and therefore affirmed. Id. at 481.

The United States Supreme Court rejected the "actual conflict or prejudice'' standard applied by the lower appellate court. The Court first pointed out that Glasser had held the right to assistance of counsel means assistance that is unimpaired by a court order requiring one lawyer to simultaneously represent conflicting interests. 435 U.S. at 482. The Court then held:

> Since Glasser was decided, however, the courts have taken divergent approaches to two issues commonly raised in challenges to joint representation where--unlike this case--trial counsel did nothing to advise the trial court of the actuality or possibility of a conflict between his several clients' interests. First, appellate courts have differed an how strong a showing of conflict must be made, or how certain the reviewing court must be that the asserted conflict existed . . . . Second, courts have differed with respect to the scope and nature of the affirmative duty of the trial judge to assure that criminal defendants are not deprived of their right to the effective assistance of counsel by joint representation of conflicting interests.
>
> We need not resolve these two issues in this case, however. Here trial counsel, by the pretrial motions of August 13 and September 4 and by his accompanying representations, made as an officer of the court, focused explicitly on the probable risk of a conflict of interest. The judge then failed either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel. We hold that the failure, in the face of the representations made by counsel . . . deprived petitioners of the guarantee of "assistance of counsel."

Id. at 483-84 (citations omitted)(emphasis added).

In so holding, the Court observed that the trial court has a duty to

> refrain from . . . insisting, or indeed, even suggesting, that counsel undertake to concurrently represent interests which might diverge from those of his first client when the possibility of that divergence is brought home to the court.

Id. at 485 (quoting Glasser, 315 U.S. at 71)(emphasis added). The Court acknowledged that defense counsel perhaps could have

objected more vigorously and presented his claim in more detail, but also recognized counsel "was confronted with a risk of violating, by more disclosure, his duty of confidentiality to his clients." Id. In response to the state's contention that "unscrupulous defense attorneys" might abuse their authority for the purpose of delay, the Court noted its holding did not preclude a trial court from conducting further inquiry regarding an asserted conflict without improperly requiring disclosure of confidential communications. Id. at 487.

The Court also pointed out that most courts had held an attorney's request for appointment of separate counsel based upon a conflict of interest should be granted and found persuasive the rationale of those cases: the trial lawyer is in the best position professionally and ethically to determine when a conflict exists or may develop; defense lawyers are obligated to advise the court of a potential conflict; and lawyers are virtually under oath when they address a judge. Id. at 485-86.

Having concluded a trial court should grant a request for separate counsel based upon the possibility of a conflict of interests, the Court held the failure to grant such request can never be treated as harmless: "[W]henever a trial court improperly requires joint representation over timely objection reversal is automatic." Id. at 488.

The Court explained:

> Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. . . .

> . . . a rule requiring a defendant to show that a conflict of interests--which he and his counsel tried to avoid by timely objections to the joint representation--prejudiced him in some specific fashion would not be susceptible of intelligent, evenhanded application. In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. But in a case of joint representation of conflicting interests the evil--it bears repeating--is in what the advocate finds himself compelled to refrain from doing . . . it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. . . . Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

Id. at 489-91 (citations omitted).

In summary, under both state and federal law, where counsel advises the court there is a possibility of a conflict of interests, the court must either appoint separate counsel or conduct further inquiry. Where the trial court fails to do either of these, reversal is automatic.

The Florida Supreme Court reaffirmed these principles in Foster v. State, 387 So. 2d 344 (Fla. 1980), where Foster's court-appointed attorney also represented a codefendant who testified for the state at Foster's trial. The codefendant's testimony was damaging to Foster, both directly and by damaging his credibility. Although there was no objection to the representation, the court concluded the record demonstrated actual conflict and therefore reversed. The court recognized,

however, that had counsel objected, reversal would have been automatic:

> The state argues that reversal cannot be ordered on this ground since there was no defense objection to representation or motion for separate representation. To deny a motion for separate representation, where a risk of conflicting interests exists, is reversible error. Holloway v. Arkansas, 435 U.S. **475, 98** S.Ct. **1173, 55** L.Ed.2d **426** (1978). Even in the absence of an objection or motion below, however, where actual conflict of interest or prejudice to the appellant is shown, the court's action in making the joint appointment and allowing the joint representation to continue is reversible error. See Belton v. State, **217 So.2d** 97 (Fla.1968).

Id. at **345** (emphasis added).

Consistent with the foregoing principles, the Court subsequently held in Babb v. Edwards, **412** So. **2d 859** (Fla. 1982), that if **a** public defender states to the court that **a** client cannot be represented without conflict, the trial court must appoint other counsel without considering whether the public defender can avoid the conflict.[1]

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[1]The holding in Babb was based solely on the court's interpretation of section 27.53(3), Florida Statutes (Supp. 1980), which provided in pertinent part:

> If at any time during the representation of **two** or more indigents the public defender shall determine that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his staff without conflict of interest, or that none can be counseled by the public defender or his staff because of conflict of interest, it

(Footnote Continued)

3. Mr. Rock was Denied Effective Assistance of Counsel When the Trial Court Required Him to Participate in the Consolidated Jury Selection Procedure After His Attorney Asserted the Procedure Created a Risk of Conflict.

The circuit court's summary dismissal of defense counsel's assertion of conflict violated state and federal law. Under Holloway, Baker, and Babb, the trial court should have permitted Mr. Rock's jury selection to proceed separately or conducted further inquiry to determine whether the possibility of conflict was too remote to require separate voir dire in Mr. Rock's case.

The district court erred in requiring Mr. Rock to show actual conflict or prejudice to obtain reversal on appeal. Under Baker and Holloway, an appellant need not show actual conflict where defense counsel advised the trial court of the possibility of conflict. As the Court said in Holloway, defense counsel "is in the best position professionally and ethically to determine when such a conflict exists or will probably develop." 435 U.S. at 485. Thus, where, as here, there was an objection to the joint representation, the

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(Footnote Continued)
shall be his duty to certify such fact to the court, and the court shall appoint one or more members of The Florida Bar, who are in no way affiliated with the public defender, to represent those accused.

appellate court need look no further than defense counsel's representations regarding a conflict of interest.[2]

The district court's analysis of Johnson v. State, 600 So. 2d 32 (Fla. 3d DCA 1992), also is flawed. In Johnson, the Third District Court held the trial court erred in overruling defense counsel's objection to representing multiple clients during jury selection. The First District concluded Johnson was distinguishable because "the record in that case demonstrated a risk of conflict" and "the record in this case does not demonstrate potential conflict.'' 622 So. 2d at 489. The court then went on to deny Mr. Rock's claim because he failed to demonstrate "actual conflict."

The district court has confused the issue by using the terms "risk of conflict" and "actual conflict'' interchangeably. The distinction is critical. A "risk of conflict" exists whenever one lawyer represents several clients whose interests are adverse or which might diverge. Holloway involved a "risk of conflict.'' See 435 U.S. at 476, 483, 486. An actual conflict, on the other hand, exists when an attorney

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[2]The First District also applied the wrong standard in Main v. State, 557 So. 2d 946 (Fla. 1st DCA 1990), where defense counsel was required over repeated objections to jointly represent two codefendants. In Main, the district court apparently misconstrued Holloway as requiring harmless error analysis even where there is an objection below. The problem is apparent in the quotation from Holloway that appears in the district court's opinion. The quotation omits a critical portion of the original text, thereby wrongly suggesting Holloway sanctioned harmless error analysis in such cases.

representing conflicting interests must choose between alternative courses of action:

> An actual conflict exists if counsel's course of action is affected by conflicting representation, i.e., where there is divided loyalty with the result that a course of action beneficial to one client would be damaging to the interest of another client. An actual conflict thus forces counsel to choose between alternative courses of action. To show actual conflict, one must show that a lawyer not laboring under the claimed conflict could have employed a different strategy and thereby benefited the defense.

McCrae v. State, 510 So. 2d 874, 877 n.1. (Fla. 1987). An actual conflict of interests is ipso facto prejudicial. Washington v. State, 419 So. 2d 1100 (Fla. 3d DCA 1982). That is, a defendant need not show prejudice beyond actual conflict, for example, that the result would have been otherwise. Id.

Both Johnson and the instant case demonstrate a "risk of conflict" because defense counsel in both cases stated to the court there was a possibility of conflict. Furthermore, requiring one lawyer to represent several defendants in a consolidated jury selection procedure creates a risk of conflict for the simple reason that the defendants are competing for the same jurors. Because jurors struck in one case are placed back in the venire pool, defense counsel necessarily must consider the interests of both clients when exercising peremptory challenges. Counsel also must consider the interests of both clients when questioning the jury panel. Asking the venire about matters relevant to one defendant's case might be damaging to another defendant counsel also represents. For

example, defense counsel might be precluded from asking the jurors about their ability to consider fairly the testimony of someone with prior felony convictions for fear other jurors might remember the wrong defendant as having a criminal history. See Moses v. State, 535 So. 2d 350 (Fla. 4th DCA 1988)(meaningful voir dire includes asking about jurors' bias against defendant because he is a convicted felon).

Mr. Rock's counsel thus faced the same ethical dilemma the public defender faced in Johnson. The consolidated jury selection procedure required her "to concurrently represent interests which might diverge from those of [her] first client." See Holloway, 435 U.S. at 485. Foreseeing that she could not act in Mr. Rock's best interests without regard to the effect of her actions on the interests of her other client, defense counsel objected to the procedure. The trial court erred in overruling the objection, and the district court erred in upholding the trial court's ruling. This Court should reverse for a new trial.

B. THE SIMULTANEOUS JURY SELECTION PROCEDURE WAS AN IMPROPER CONSOLIDATION OF A CRUCIAL STAGE OF MR. ROCK'S TRIAL.

The right to an impartial jury is guaranteed by the sixth amendment of the United States Constitution and article I, section 16, of the Florida Constitution. Critical to preserve the right of the accused to an impartial jury is the jury selection process, or voir dire. Lewis v. State, 377 So. 2d 640 (Fla. 1979). Voir dire is governed in Florida by Florida Rule of Criminal Procedure 3.300(b), which provides a defendant with the right to orally examine the prospective jurors.

The Florida courts have long recognized the importance of jury selection and its impact on a defendant's rights to an impartial jury trial and due process. For example, time limits on voir dire are scrutinized, see, e.g., Gosha v. State, 534 So. 2d 912 (Fla. 3d DCA 1988)(reversible error to impose unreasonable time limits on voir dire); wide latitude in questioning is permitted, Cross v. State, 89 Fla. 212, 216, 103 So. 636 (Fla. 1925); and counsel is entitled to question jurors individually, Francis v. State, 579 So. 2d 286 (Fla. 3d DCA 1991). Jury selection is deemed so critical the absence of a judge during it is reversible error. State v. Singletary, 549 So. 2d 996 (Fla. 1989).

A defendant's right to a jury trial is indisputably one of the most basic rights guaranteed by our constitution." Griffith v. State, 561 So. 2d 528 (Fla. 1990). The importance of jury selection likewise is indisputable; it is the cornerstone of a fair trial.

There is no authority for consolidating such a critical part of unrelated trials. Florida Rule of Criminal Procedure 3,151 permits consolidation of jury trials only if the offenses "are triable in the same court and are based on the same act or transaction or on two or more connected acts or transactions." There is no provision in the rules for consolidating just jury selection, or any other segment of trial. The committee note to rule 3.151 states that "The Committee is of the opinion that defendants not connected in the commission of an act and not connected by conspiracy or by common scheme or plan should not, under any circumstances, be joined." Neither the rule nor the committee notes make an exception for jury selection. The trial court improperly required Mr. Rock to share a venire panel with two other defendants, to rely on the questioning of the panel by attorneys other than his own, and to subject and expose his jurors to the crimes of others.

The jury selection process in Mr. Rock's case began with a pool of forty people. (T 4-6). Defendant Hartley selected first. Hartley exercised nine peremptory strikes. The state excused eight members of the panel. Seven jurors were selected to serve in the Hartley case. (T 89-97), The venire panel was left in place, minus those selected to serve but including those excused, and Mr. Rock began his selection process. Mr. Rock struck seven jurors, including one who previously had been struck in the Hartley case. The state exercised three peremptory strikes. (T 122-126). Seven jurors were seated.

Mr. Clark selected last. His jury panel was composed of the twenty-six jurors who had been excused in the first two cases. In Mr. Clark's case, the state excused six jurors, Mr. Clark struck seven jurors, and seven jurors were seated. This process of "reseeding" the jury panel with jurors the state and defense have previously determined to be unacceptable undermines the very integrity of the jury selection process by unfairly diluting the number of peremptory challenges available to defense counsel.

The multiple jury selection method utilized here also violated Mr. Rock's rights to due process and an impartial jury by giving the state an unfair advantage. For example, multiple jury selection allows the state to stack the deck with jurors more favorable to them or disfavorable to defendants who come later in the selection process. By striking jurors themselves, prosecutors can guarantee that a juror who might be more favorable on the third defendant's case will come back if stricken in cases 1 or 2.

Counsel for the defendants in cases 1 and 2 also become tools for the state by striking jurors who were less desirable defense jurors. These jurors return to the panel in subsequent cases. The result for Mr. Rock and other subsequent defendants is a panel composed of "reject" jurors or those more favorable to the state. This process violated Mr. Rock's right to an impartial jury and due process.

This Court in Kritzman v. State, 520 So. 2d 568 (Fla. 1988), addressed the constitutional considerations when the

state has an unfair advantage in the jury selection process. In Kritzman, a codefendant who was to testify in guilt phase participated in jury selection for penalty phase. Citing unfair advantages given the state, the Court said:

> Due process consists of more than the procedural rules we use to safeguard a fair trial. While there may not be a rule which covers this exact situation (probably because it has never arisen before), due process requires that a defendant be given a fair trial in the substantive sense.

Id. at 570. The court reversed, holding the defendant need no show prejudice where substantive due process had been violated to such a degree. The jury selection method employed here was likewise a violation of subtantive due process in that it impermissibly allowed the "stacking" of the venire.

Requiring an attorney to represent several clients simultaneously during a jury selection of unrelated cases also undermines the integrity of the jury trial system. Traditionally, our jury trial system has provided each accused who has no codefendants with a separate jury trial as well as separate counsel. U.S. Const., amend. VI; Art. I, s. 16, Fla. Const. Here, the consolidated procedure of one part of several unrelated trials detracted from the care and importance traditionally given each separate criminal case and jury trial. For example, during voir dire, the trial court constantly interrupted the questioning and urged counsel to move along. (T 41, 43, 56, 83).

The procedure also caused Mr. Rock to select from a venire that had undergone over four hours of questioning with little

time for lunch. Numerous observations were made by the lawyers and the court that the procedure was long and tiring. (T 130-132). At one point, the prosecutor asked the jury, "You're just so tired you want to get it over with? (T 132). The venire was exhausted. One can only assume an exhausted panel has diminished powers of concentration and is in a hurry to get the job done and go home. When this exhaustion results solely from the consolidated jury selection procedure, it unfairly impacts Mr. Rock.

The jury selection process also abrogated Mr. Rock's right under rule 3.300 to an independent examination of the venire. Prior to jury selection in Mr. Rock's case, the court made it clear Mr. Rock would not have the same amount of time that was taken in the first case. (T 100). Mr. Rock was certainly entitled to equal time. He should not have had to rely upon another attorney questioning his panel when that attorney certainly had no interest in selecting the best jury for him. Indeed, Mr. Hartley's attorney's goal was to secure the best attorney for his client. What remained for Mr. Rock and Mr. Clark was of no concern to him.

The benefit of consolidation is judicial economy, a more efficient processing of cases. However, "practicality and efficiency should not outweigh a defendant's right to a fair trial." State v. Vasquez, 419 So.2d 1088, 1091 (Fla. 1982). A defendant is entitled to a trial of his own on the merits of his case. A defendant also is entitled to a trial free from evidence of the crimes of others. See Hirsch v. State, 279 So.

2d 866 (Fla. 1973); Armstrong v. State, 377 So. 2d 205 (Fla. 2d DCA 1979). These rights should extend to all phases of trial, including jury selection.

Constitutional rights have costs, but they are too valuable to compromise. This consolidated jury selection sacrificed Mr. Rock's right to a fair and impartial jury trial for the sake of judicial efficiency. This Court should remedy this error by reversing and granting Mr. Rock a new trial.

ISSUE II

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE MR. ROCK'S STATEMENT THAT HE HAD NEVER BEEN IN THE EN VOGUE BEAUTY SALON.

Petitioner filed a pretrial motion in limine to exclude his statement to Detective Robinson that he had never been in the En Vogue Beauty Salon. The trial court ruled the statemente was admissible as a false exculpatory statement, citing Moore v. State, 530 So. 2d 61 (Fla. 1st DCA 1988), and Walker v. State, 495 So. 2d 1240 (Fla. 5th DCA 1986). (R 29, T 196-198). This ruling was error and entitles petitioner to a new trial.

Exculpatory statements by a non-testifying defendant are inadmissible hearsay not within any exception to the hearsay rule. Moore, 530 So. 2d at 66. When shown to be false, however, exculpatory statements are rendered inculpatory and may be introduced during the state's case-in-chief to show the defendant's consciousness of guilt. Id. at 65-66; Walker, 495 So. 2d at 1241.

The falsity of such statements, however, must be established by evidence independent of proof of the defendant's guilt. Douglas v. State, 89 So. 2d 659 (Fla. 1956). In Douglas, a state's witness testified to a conversation in which the defendant was asked, "What did you do with Jack Johnson?'' and "You killed him, didn't you?," to which the defendant responded, "No, he's around." This Court held the admission of this testimony was reversible error, stating:

> The only way that the falsity of this statement ["he's around"] could be established was by proof of the defendant's guilt of the crime. The body had not been found when the statement was made. The only person who had knowledge of the death of Jack Johnson and who killed him was the person guilty of the crime. Therefore, the only person who knew that Jack Johnson was "around" was the person guilty of the crime. It follows that the only way to prove the falsity of this statement was to prove the defendant guilty of the crime. A circumstance which is dependant upon proof of defendant's guilt for its evidentiary value does not tend to prove guilt.
>
> This is quite different from a case in which one accused of crime might deny guilt and then offer a false alibi, a false denial that he owned a weapon of the type employed in committing the crime or a similar statement that could be disproved independently of the proof of the commission of the crime by the defendant. Under such circumstances evidentiary value could be given proof of the false statement and proof of its falsity as a separate circumstance tending to show defendant's guilt.

Id. at 661.

Here, the state asserted, and the trial court agreed, that the fingerprint on the can found inside the beauty salon proved the falsity of Mr. Rock's statement that he had never been in the beauty salon. The fingerprint proves falsity, however, only if it is assumed he touched the can during the burglary. In other words, the court had to find Mr. Rock guilty of the crime as a predicate to finding the evidence relevant and admissible. This was exactly what the court did:

> I think the State's proven up the case sufficient to establish the guilt of the Defendant inside the store. And your argument that it might have been someone else, he might have done it some other

> time, the can might have on the -- some-
> place else, taken there, that's argument
> you can make to the jury. But that doesn't
> have anything to do with reality or common
> sense or the evidence sufficient to allow
> this statement in, so I deny the motion.
> And I feel as though the State has proven
> the fact.

(T 198).

The evidentiary value of Mr. Rock's statement depended upon proof of his guilt of the crime. Because the state's only proof of the falsity of Mr. Rock's statement was the same proof relied upon to prove his guilt of the crime, the statement was not relevant as a separate circumstance tending to show guilt, and the court should have excluded it.

The admission of the improper evidence was not harmless. The evidence of Mr. Rock's guilt was de minimus: one fingerprint. Absent the statement, the jury may have concluded Mr. Rock touched the can while visiting the salon. Mr. Rock, in fact, may have been mistaken when he said he had not been inside the En Vogue Salon but decided not to testify at trial because of his prior record. There is a reasonable possibility the error affected the jury's verdict, and petitioner is entitled to a new trial on this ground.

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court reverse and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Bradley R. Bischoff, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and **a** copy has been mailed to Petitioner, TERRY JEROME ROCK, #279143, Lawtey Correctional Institution, Post Office Box 229, **Lawtey,** Florida 32058, on this 1st day of March, 1994.

NADA M. CAREY