IN THE SUPREME COURT OF FLORIDA

TERRY JEROME ROCK,

Petitioner,

v.

CASE NO. 82,530
FIRST DCA NO. 92-693

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

NADA M. CAREY
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER
FLA. BAR NO. 0648825

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

TERRY JEROME ROCK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 82,530
FIRST DCA NO. 92-693

PETITIONER'S BRIEF ON **JURISDICTION**

PRELIMINARY STATEMENT

Petitioner, TERRY **JEROME** ROCK, was the defendant and appellant below and will be referred to here as petitioner or by his proper name. Respondent, the State of Florida, was the appellee below and will be referred to here as the state. References to the opinion of the First District Court of Appeal, which is contained in the attached appendix, will be by the symbol "A" followed by the appropriate page number.

STATEMENT OF THE **CASE** AND FACTS

Petitioner seeks review of the decision of the First District in which the court found no reversible error in consolidating unrelated cases for simultaneous jury selection over defense counsel's objection to representing multiple clients in the same proceeding. Rock v. State, 18 Fla. L. Weekly D1583 (Fla. 1st **DCA** July 7, **1993).**

Petitioner's jury **was** selected through a multiple jury selection procedure whereby three juries were selected from the same venire panel. In this procedure, **a** jury is chosen for one

defendant while the other defendants and their counsel watch the entire process. After the first jury is selected, a jury is then selected from the same venire for each of the other defendants. (A 1).

In the instant case, petitioner's counsel represented two of the three defendants. In a pretrial motion, counsel asserted, inter alia, that she could not adequately represent the interests of both defendants during the simultaneous jury selection process. On the day of trial, counsel again objected to the simultaneous jury selection process on all grounds raised in her written motion. (A 1).

The First District recognized that in Johnson v. State, 600 So. 2d 32 (Fla. 3d DCA 1992), the Third District had found reversible error under similar circumstances, i.e., where the trial court had overruled defense counsel's objection to representing multiple clients in a consolidated jury selection process, but distinguished Johnson as follows:

> In Johnson, without explaining the facts giving rise to the conflict of interest, the court stated that because the record in that case demonstrated a risk of conflict, reversal was required. Johnson is distinguishable from the instant case, however, because the record in this case does not demonstrate potential conflict.

(A 1).

Citing Foster, the First District held that in order to obtain reversal, Mr. Rock would have to demonstrate "actual conflict or prejudice." To show actual conflict, said the court, one must show that a lawyer not laboring under the

claimed conflict could have employed a different strategy and thereby benefited the defense. (A 1). The First District concluded the record showed no actual conflict and thus there was no prejudicial denial of the right to counsel. (A 1).

Petitioner timely filed a notice to invoke this Court's jurisdiction.

SUMMARY OF ARGUMENT

The decision below expressly and directly conflicts with Foster v. State, 387 So. 2d 344 (Fla. 1980), Youngblood v. State, 217 So, 2d 98, 101 (Fla. 1968), Belton v. State, 217 So. 2d 97 (Fla. 1968), cert. denied, 395 U.S. 915, 89 S.Ct. 1764, 23 L.Ed.2d 229 (1969), and Johnson v. State, 600 So. 2d 32 (Fla. 3d DCA 1992).

Foster, Youngblood, and Belton plainly hold (1) where, as here, trial counsel has advised the court of the possibility of a conflict of his several clients' interests, the trial court should permit separate representation unless the state can demonstrate prejudice will not result from joint representation; (2) a trial court's denial of separate representation is reversible error if the record shows prejudice or is silent on the subject; and (3) an appellant is required to show actual conflict or prejudice only in the absence of an objection. Applying Foster, the Third District in Johnson held the trial court reversibly erred in overruling defense counsel's objection to representing multiple clients in a consolidated jury selection process.

In the instant case, however, despite the presence of defense counsel's objection to representing multiple clients in the same jury selection proceeding, the First District refused to apply the standard of review announced in Belton and its progeny and rejected petitioner's conflict of interest claim on the ground that petitioner had failed to show actual conflict or prejudice.

ARGUMENT

ISSUE PRESENTED

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY REVIEW AUTHORITY BECAUSE THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

The decision of the First District in the instant case directly and expressly conflicts with decisions from this Court and other district courts of appeal, specifically Foster v. State, 387 So. 2d 344 (Fla. 1980), Youngblood v. State, 217 So. 2d 98, 101 (Fla. 1968), Belton v. State, 217 So. 2d 97 (Fla. 1968), cert. denied, 395 U.S. 915, 89 S.Ct. 1764, 23 L.Ed.2d 229 (1969), and Johnson v. State, 600 So. 2d 32 (Fla. 3d DCA 1992). The conflict arises from the First District's application of the wrong standard in determining whether an asserted conflict of interest claim requires reversal on appeal.

In Foster, this Court held defense counsel's joint representation of Foster and a state witness denied Foster his right to effective assistance of counsel. In reaching this result, the Court applied an "actual conflict or prejudice" standard

because "there was no defense objection to representation or motion for separate representation." See 387 So. 2d at 345. The Court explicitly recognized, however, that had defense counsel objected below, 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. (emphasis added). Foster thus held, in accord with Holloway,[1] that the denial of a motion for separate representation based upon potential conflict is reversible error, whereas if trial counsel has not objected to the multiple representation, an appellant must show "actual conflict or prejudice" to obtain reversal.

This Court's prior cases, upon which Foster relied, stated the rule with greater precision. In Belton, the Court said:

> If a defendant is indigent and such a request [for separate counsel] is made it

---

[1] In Holloway, the Court held that where trial counsel asserts a risk of conflict, the trial court must appoint separate counsel or inquire further to determine whether the conflict is too remote to warrant separate representation. 435 U.S. at 483, 484. Where the trial court fails to do so, reversal is automatic. Id. at 488.

> 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.

217 So. 2d at 98. In Youngblood, decided the same day, the Court explained the Belton rule as follows:

> We have held in Belton v. State, opinion filed December 17, 1968, that:
>
> (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.

Foster, Belton, and Youngblood make plain the standard of review in determining whether a conflict of interest claim predicated on joint representation requires reversal on appeal. Where, as here, trial counsel has advised the court of the possibility of a conflict of his several clients' interests, the trial court should permit separate representation unless the state can demonstrate prejudice will not result from joint representation. If trial counsel's objection is overruled, reversal is required if the record shows prejudice or is silent

on the subject. Only where there is no defense objection is an appellant required to show actual conflict. ~~See also~~ Babb v. Edwards, 412 So. 2d 859 (Fla. 1982)(if public defender states to court client cannot be represented without conflict, court must appoint other counsel without considering whether public defender can avoid the conflict).

The First District plainly applied the wrong standard in the instant case.[2] Despite the presence of defense counsel's

---

[2]The First District similarly 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 co-defendants. In Main, the court quoted Holloway but omitted a critical portion of the original text, thereby suggesting the Court in Holloway had applied a harmless error test. The misleading quote, with omitted portion in ellipses, is as follows:

> Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing . . . . Generally speaking, a conflict may also prevent an attorney from . . . arguing . . . the relative involvment and culpability of his clients in order to minimize the culpability of one by emphasizing that of another.
>
> * * *
>
> [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. .

(Footnote Continued)

objection to the joint representation, the First District held petitioner would have to show actual conflict to obtain reversal. The court concluded petitioner had not met this standard:

> The record fails to demonstrate that appellant's attorney was required to choose between alternate courses of action due to the consolidated jury selection or that a lawyer not laboring under the claimed conflict would have employed a different strategy during jury selection that would have benefited the defense.

(A 1).

In essence, the First District concluded the record was silent on the subject of actual conflict or prejudice. Under Belton, therefore, petitioner was entitled to reversal.

The First District's decision expressly and directly conflicts with Johnson. In Johnson, the Third District reversed under nearly identical circumstances:

> "To deny a motion for separate representation, where a risk of conflicting interests exists, is reversible error." Foster v. State, 387 So. 2d 344, 345 (Fla. 1980). Defendant's counsel stated his objection to representing all three defendants in the consolidated jury selection, asserting that his clients' interests conflicted. The record demonstrates risk of conflict. Thus, we hold that the court erred in overruling the objection.

(Footnote Continued)

> . . Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.]

557 So. 2d at 947-48 (quoting Holloway, 435 U.S. at 489-90).

600 So. 2d at 33.

The First District attempted to distinguish Johnson on the ground that "the record in that case demonstrated a risk of conflict,'' whereas "the record in this case does not demonstrate potential conflict." (A 1). The First District did not peruse the record for potential conflict, however, but far actual conflict. The First District's decision in the instant case thus directly conflicts with Johnson. Furthermore, there is nothing in the Johnson opinion to suggest the potential for conflict in that case arose from anything other than joint representation of multiple defendants whose cases were unrelated in the same voir dire proceeding.

In addition to the direct and express conflict described above, this Court should exercise its discretionary jurisdiction in this case because the legality of simultaneous jury selection has been litigated in a number of circuits in Florida and attacks on the legality of the process no doubt will continue until this Court rules on the matter. Prior to issuing the instant decision, the First District affirmed at least four other cases without opinion where the issue of simultaneous jury selection was raised. (A-2). Since the instant decision was issued, the First District has rejected similar claims in Clark v. State, 18 Fla. L. Weekly D2097 (Fla. 1st DCA Sept. 22, 1993), and Miller v. State, 18 Fla. L. Weekly D2170 (Fla. 1st DCA Sept. 30, 1993).

For these reasons, this Court should exercise its discretionary jurisdiction.

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner respectfully requests this Honorable **Court to** exercise its discretionary jurisdiction in this matter.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

NADA M. CAREY
Fla. Bar No. 0648825
Assistant Public Defender
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Bradley R. Bischoff, Assistant Attorney General, by U.S. Mail and a copy has also been mailed to Petitioner, TERRY JEROME ROCK, #279143, Lawtey Correctional Institution, Post Office Box 229, Lawtey, Florida 32058, on this 24th day of October, 1993.

NADA M. CAREY

IN THE SUPREME COURT OF FLORIDA

TERRY JEROME ROCK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 82,530
FIRST DCA NO. 92-693

APPENDIX

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

NADA M. CAREY
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR RESPONDENT
FLA. BAR NO. 0648825

$688.00 in wage-loss benefits for the weeks of December 10 and 24, 1989.

REVERSED and **REMANDED,** with directions. **(SMITH, KAHN** and WEBSTER, JJ., **CONCUR.)**

* * *

Criminal law—Trial court did not err in conducting simultaneous jury selection for defendant's case and two unrelated cases involving other defendants—Counsel's nonspecific assertion that conflict of interest arose from fact that he represented two of the three defendants not supported by any showing that counsel was required to choose between alternate courses of action due to the consolidated jury selection or that a lawyer not laboring under the claimed conflict would have employed a different strategy during jury selection that would have benefitted the defense

TERRY JEROME **ROCK, Appellant. v. STATE** OF **FLORIDA. Appellee.** 1st District. **Case No. 92-693. Opinion filed July 7, 1993. An appeal** from **the Circuit** Court **for Duval County.** R.Hudson Olliff, Judge. **Nancy A. Daniels, Public Defender; Nada M. Carey, Assistant Public Defender, Tallahassee, for appellant. Robert A. Butterworth, Attorney General; Bradley R. Bischoff, Assistant Attorney General.** Tallahassee, for **appellee.**

(WOLF, J.) Terry Rock, appellant, raises four issues on appeal. We find no reversible error has occurred, but feel that it is necessary to discuss one issue: Whether the trial court erred in conducting simultaneous jury selection for appellant's case and two unrelated cases involving other defendants.

The jury in the instant case was selected through **a** process whereby three juries were selected from the same venire panel.' A jury is chosen for one defendant while the other defendants and their counsel watch the process. After the first jury is selected, **a** jury is then selected for one of the other defendants from the same venire. Prior to jury selection, defense counsel orally objected to the "jury selection process where we have all three defendants in the same **room,"** arguing a violation of the defendant's sixth amendment right. Defense counsel then stated, "My written motion will incorporate the rest of my arguments." A pretrial written motion to preclude "simultaneous multiple jury instructions'' was filed. There were no other objections made during the jury selection process, neither before jury selection began, nor during the selection of appellant's particular jury.

The motion filed by appellant raised the following issues:

> **1.** To force **the** undersigned attorney to participate in simultaneous multiple jury selection for two separate trials, where each Defendant is charged with a difference [sic] crime, under the circumstances would create a very substantial likelihood of jury confusion, in contravention of this Defendant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments **to** the United States [sic] and by Article I, Section 9 of the Florida Constitution.
>
> **2.** Compounding **the** substantial likelihood of jury confusion is that this attorney represents two of **the** three Defendants involved in the Voir Dire Process.
>
> **3.** The knowledge the jury will have that the undersigned attorney represents two Defendants simultaneously will cause a strong likelihood that the jury will not be impartial, in that the presumption of innocence would **be** minimized by the fact that not one but three defendants are all claiming innocence before the jury panel. This is contrary to the defendants' right to an impartial jury trial guaranteed by the Sixth and Fourteen [sic] Amendments to the United States [sic] and by Article I, Section 16 of the Florida Constitution.
>
> **4.** This attorney will not be able to adequately represent the Defendant since he will have to co-mingle the interest of one Defendant with that of the other Defendant she represents during this simultaneous multiple jury selection process.
>
> 5. This process denies the Defendant his right to an individual jury trial because the panel Jury Voir Dire will be exposed to **and** questioned about issues totally irrelevant to this Defendant's case.

No further objections or case specific arguments were made by counsel. Counsel also did not object to the seating of any particular juror.

In *United States* v. *Quesada-Bonilla,* 952 **F.2d 597, 599** (1st Cir. 1991), the court stated, "We are aware of no authority that prohibits **a** court, as a general matter, from empaneling juries for several cases in a single proceeding or using the same jurors in several cases, whether or not the defendants in those separate cases use the same lawyers." ***Accord United States v. Maraj*, 947** F.2d 520, 524 (1st Cir. 1991). In *Maraj*, the court reasoned, "In these days of crowded dockets and severe budgetary constraints, busy trial courts are under considerable pressure to develop more efficient methods of operation. One such method which has gained currency is multiple empanelment.. .. We encourage use of the method when feasible." *Maraj*, ***supra*** at 524.

We fully agree with the rationale utilized in *Quesada-Bonilla* and *Maraj*.[2]

Appellant, however, relies on *Johnson* ***v. Stare, 600*** So. 2d 32 (Fla. 3d **DCA** 1992), to argue that the lower court erred in rejecting the defense counsel's conflict of interest assertion. In ***Johnson,*** the trial court consolidated the defendant's case with the cases of two other defendants, solely for jury selection. There, the same defense counsel represented all three defendants, and counsel objected **on** conflict grounds. The Third District Court of Appeal held that the lower court erred in overruling the objection:

> Assuming, without deciding, that the trial court properly exercised its discretion in consolidating these cases for jury selection, ***see United States v. Quesada-Bonilla,*** 952 F.2d 597, 599 (1st Cir. 1991), and cases cited therein, we find that the trial court erred in overruling defense counsel's objection to representing multiple clients during jury selection. "To deny a motion for separate representation, where a risk of conflicting interests exists, is reversible error." ***Foster*** v. ***State,*** **387 *So.*** 2d **344, 345** (Fla. 1980).

Johnson, ***supra*** at ***33. See also Abraham v. State, 606 So.*** 2d 489 (Fla. 3d DCA 1992), where the state conceded error on **a** similar point.

In *Johnson*, without explaining the facts giving rise to the conflict of interest, the court stated that because the record in that case demonstrated a risk of conflict, reversal was required.[3] *Johnson* is distinguishable from the instant case, however, because the record in this case does not demonstrate potential conflict.

In order to be entitled to **a** reversal, an appellant would have to demonstrate actual conflict or prejudice. ***Foster v. State,*** 387 ***So.*** 2d 344 (Fla. 1980). 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. ***Main v. State, 557*** So. 2d 946, 947 **(Fla.** 1st DCA 1990). To show actual conflict, one must show that a lawyer not laboring under the claimed conflict could have employed a different defense strategy and thereby benefited the defense. *McCrae* ***v. State,*** 510 *So,* 2d 874, 877 **n.** 1 (Fla. 1987). Only when such **an** actual conflict is shown to have affected the defense **is** there prejudicial denial of the right to counsel. ***Id.***

The instant case only raises speculative nonspecific objections concerning conflict. The record fails to demonstrate that appellant's attorney was required to choose between alternate courses of action due to the consolidated jury selection or that a lawyer not laboring under the claimed conflict would have employed a different strategy during jury selection that would have benefited the defense. There is no allegation that the nature **of** the charges against the other defendant was somehow prejudicial to appellant or that any question asked by one of the other attorneys was objectionable. There is no allegation that the method of instructing the jury somehow prejudiced the defense. Absent a demonstration of **a** conflict which is unique to a particular set of cases or particular defendants, we find no problem with the simultaneous jury selection process which was utilized. **(ERVIN,** J., and

CAWTHON, Senior Judge, concur.)

'Simultaneous jury selection is apparently commonly employed in Duval county.

[2]This court has recently affirmed four cases without opinion where the issue of simultaneous jury selection was raised: *Copeland v. State*, No. 91-3753 (Fla. 1st DCA Feb. 20, 1993); *Losco v. State*, No. 92-692 (Fla. 1st DCA March 9, 1993); *Gray v. State*, No. 91-3950 (Fla. 1st DCA March 18, 1993): *Davis v. State*, No. 91-3958 (Fla. 1st DCA March 24. 1993).

'As examples of cases in which the record demonstrated the risk of conflict, the Johnson court cited *Main v. State*, 557 So. 2d 946 (Fla. 1st DCA 1990). a case in which the same attorney was compelled to represent in the same trial two codefendants charged with the sale of marijuana to a minor, and a factual issue existed as to which of the codefendants sold the drugs. The Johnson court also cited *Bellows v. Stare. 508 So.* 2d 1330 (Fla. 2d DCA 1987). where the same attorney was compelled to represent in separate cases two defendants. one of whom was the state's key witness against the other.

* * *

Dissolution of marriage—Abuse of discretion to refuse to temporarily suspend husband's child support obligation where evidence established that he was terminated involuntarily, through no fault of his own, from job he had held for many years, he had been unable to find new employment despite exhaustive search and his assets had been depleted and unemployment benefits had expired—Evidence sufficient to support previous order reducing but not suspending child support obligation

KEITH M. RONAN, Appellant, v. ROBIN LYN RONAN, Appellee. 1st District. Case No. 92-4191. Opinion filed July 7, 1993. An appeal from the Circuit Court for Duval County. A.C. Soud. Judge. Paul M. Glenn of Dale & Bald, P.A.. Jacksonville, for Appellant. C. Fred Moberg, Jacksonville. for Appellee.

(PER CURIAM.) Having carefully reviewed the entire record, we conclude that the trial court abused its discretion when it refused temporarily to suspend appellant's child support obligation. See, *e.g.*, *Manning v. Manning, 600 So.* 2d 1274 (Fla. 1st DCA 1992). The evidence is uncontradicted that appellant was terminated involuntarily, through no fault of his own, from a job which he had held for many years. Despite an exhaustive job search, appellant had been unable to find new employment in more than a year. His assets had been depleted, and his unemployment compensation benefits had expired. It is clear that, despite his best efforts, appellant was simply without funds—on which to live, or with which to pay child support.

We affirm the amended order entered on July 17,1992, which reduced, but did not suspend, appellant's child support obligation, because we conclude that the record contains evidence sufficient to support the trial court's action at the time that order was entered. However, we reverse the order entered on November 5, 1992, which denied appellant's request to suspend his child support obligation until he found-employment, and adjudged appellant to be in contempt of court for nonpayment of child support. We remand with directions that the trial court enter an order suspending appellant's child support obligation effective as of August 10, 1992, and until such time as appellant finds employment or the trial court determines that appellant is no longer making a good-faith effort to do so; and denying appellee's motion for contempt.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED, with directions. (SMITH, KAHN and WEBSTER, JJ., CONCUR.)

* * *

SPECIAL DISABILITY TRUST FUND, DEPARTMENT OF LABOR & EMPLOYMENT SECURITY v. IIELLER BROTHERS PACKING CORPORATION. 1st District. #92-624. July 2, 1993. Appeal from a workers' compensation order. AFFIRMED. *See Florida* Employers *Ins. Serv. Corp. v. Special Disability Trust Fund*, 615 So. 2d 859 (Fla. 1st DCA 1993); *The Breakers Hotel v. Special Disability Trust Fund*, No. 92-820 (Fla. 1st DCA. July 2, 1993)[18 Fla. L. Weekly D1537].

* * *

Criminal law—Sentencing—Where defendant was initially placed on five years probation, trial court erred when it again placed defendant on five years probation upon violation of probation

EDWARD PAUL RAULERSON, et al.. Appellants, v. STATE OF FLORIDA, Appellee. 5th District. Case Nos. 92-2457 & 92-2720. Opinion filed July 2, 1993. Appeal from the Circuit Court for St. Johns County, Richard G. Weinberg. Judge. James B. Gibson. Public Defender. and Kenneth Witts, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Belle B. Turner, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) In this case Raulerson was placed on five years probation in August, 1989, upon conviction for a vehicular homicide. In 1992, he violated that probation and again was placed on five years probation, contrary to *Kolovrat v. Slate,* 574 So. 2d 294 (Fla. 5th DCA 1991). We reverse the sentence and remand for resentencing.

REVERSED AND REMANDED, (DAUKSCH, COBB and THOMPSON, JJ., concur.)

* * *

Criminal law—Probation—Condition regarding award of state attorney's fee stricken

JAMES WILLIAMS, Appellant, v. STATE OF FLORIDA. Appellee. 5th District. Case No. 92-2364. Opinion filed July 2. 1993. Appeal from the Circuit Court for Volusía County, John W. Watson, III, Judge. James B. Gibson, Public Defender, and M. A. Lucas, Assistant Public Defender, Daytona Beach, for Appellant. No Appearance for Appellee.

(PER CURIAM.) The special condition regarding the award of a state attorney's fee in the amount of $250.00, contained in the order of probation in Case Number 92-31346 is hereby stricken. *Badie v. State,* 18 Fla. L. Weekly D1188 (Fla. 5th DCA May 7, 1993). The judgment and sentence is otherwise affirmed. (COBB, SHARP, W. and GRIFFIN, JJ., concur.)

* * *

Criminal law—Sentencing—Habitual offender—Improper reliance on out-of-state convictions—Failure to raise issue in motion to correct sentence

ARTHUR RAYMOND PENROD, Appellant, v. STATE OF FLORIDA. Appellee. 5th District. Case No. 93-683. Opinion filed July 2, 1993. 3.800 Appeal from the Circuit Court for Brevard County, John Dean Moxley, Jr., Judge. Arthur Raymond Penrod, Bonifay, pro se. No Appearance for Appellee.

ON MOTION FOR REHEARING

(DAUKSCH, J.) Appellant has sought a rehearing because the trial court improperly relied on out-of-state convictions to habitualize him under section 775.084, Florida Statutes (Supp. 1988). Because appellant failed to raise this argument before the trial court in his Florida Rule of Criminal Procedure 3.800(a) motion to correct sentence, his motion for rehearing is denied without prejudice to his raising this ground for relief in another 3.800(a) motion below. See *Johnson v. State*, 616 So. 2d 1 (Fla.), *revised,* 18 Fla. L. Weekly S234 (Fla. April 8, 1993).

DENIED. (HARRIS and PETERSON, JJ., concur.)

* * *

Criminal law—Question certified whether statute prohibiting sexual activity with minors under age sixteen violates constitutional right to privacy

THEODORE B. COOK, Appellant. v. STATE OF FLORIDA, Appellee. 5th District. Case No. 92-2823. Opinion filed July 9, 1993. Appeal from the Circuit Court for Marion County, Thomas D. Sawaya. Judge. Scott Martin Roth, Ocala, for Appellant. Robert A. Butterworth, Attorney General. Tallahassee, and Nancy Ryan, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) We affirm on the authority of *Jones v. State,* 18 Fla. L. Weekly D1375 (Fla. 5th DCA June 4, 1993). We also certify to the Florida Supreme Court as a question of great public importance the issue certified in *Jones*. (GRIFFIN and THOMPSON, JJ., and RAINWATER, T.B., Associate Judge, concur.)

* * *

former section 627.736(3)(b), providing for equitable distribution of personal injury protection benefits, attorney's fees must be awarded when statutory prerequisites are met regardless of whether or not the insurance company has acted in bad faith. Rather, I agree with the view announced by the District Court of Appeal, First District, in *Catches v. Government Employees Insurance Co.*, 318 So.2d 552 (Fla. 1st DCA 1974), *cert. denied*, 333 So.2d 41 (Fla.1976), and the District Court of Appeal, Fourth District, in *Reliance Insurance Co. v. Kilby*, 336 So.2d 629 (Fla. 4th DCA 1976), that in an equitable distribution situation pursuant to former section 627.736(3)(b), an insured is entitled to an award of attorney's fees when the insurer refuses or fails to negotiate in good faith.

I concur in result, however, with the quashal of the district court's remand for further proceedings fixing attorney's fees in *Lindsay v. Travelers Indemnity Co.*

Clyde FOSTER, Appellant,

v.

STATE of Florida, Appellee,

No. 50393.

Supreme Court of Florida.

June 19, 1980.

Rehearing Denied Sept. 26, 1980.

Defendant appealed from a judgment of the Circuit Court, Columbia County, Samuel S. Smith, J., in which a sentence of death was imposed for his conviction of murder. The Supreme Court held that defendant was denied his right to the effective assistance of counsel by court-appointed attorney's joint representation of defendant and a state witness, who testified against him.

Judgment and sentence vacated and case remanded.

Adkins, J., dissented and filed opinion.

1. Criminal Law ⇐641.5

Sixth Amendment right to assistance of counsel contemplates legal representstion that is effective and unimpaired by the existence of conflicting interests being represented by a single attorney. U.S.C.A. Const. Amend. 6.

2. Criminal Law —1166.11

To deny a motion for separate representation, where a risk of conflicting interests exists, is reversible error.

3. Criminal Law ⇐641.5, 1166.11

Even in the absence of an objection or motion for separate representation, where actual conflict of interest or prejudice to defendant is shown, court's action in making joint appointment and allowing joint representation to continue is reversible error.

4. Criminal Law ⇐641.5

Defendant was denied his right to the effective assistance of counsel by court-appointed attorney's joint representation of defendant and a state witness, who testified against him. U.S.C.A.Const. Amend. 6.

Carl S. McGinnes, Asst. Public Defender, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and A. S. Johnston, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

This cause is before the Court on appeal from a judgment of the Circuit Court of the Third Judicial Circuit, in and for Columbia County, in which that court imposed a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla.Const.

The appellant and Betty Jean Strouder were both indicted for the felony-murder and premeditated murder of two persons.

Attorney Thomas K. McKee, Jr., was appointed by the court to represent both defendants.

The trial court imposed the sentence of death on the appellant on December 13, 1974. The notice of appeal was not filed with this Court until October 11, 1976. The delay by trial counsel in effecting the appeal was apparently due to a fee dispute. On August 11, 1978, we granted appellant's counsel leave to withdraw and appointed the Public Defender of the Second Judicial Circuit as counsel for the appellant. On February 13, 1979, the public defender filed a brief on appellant's behalf, and oral argument was heard on September 14, 1979.

The appellant has presented several points for our review. We conclude that a new trial is required and will discuss only the dispositive issue.

In response to the appellant's demand for discovery, the state provided a witness list showing Betty Jean Strouder as one of its intended witnesses at trial. At trial, the state called Betty Jean Strouder as a witness. Her testimony was damaging to the appellant, both directly and by darnaging his credibility. It was contradictory to his testimony.

In cross-examining Betty Jean Strouder, attorney McKee brought out that she had been charged with the crimes in question, that the charges against her were still pending, and that he was her lawyer. At the end of cross-examination, the following exchange was had among the court, prosecutor and defense counsel:

By the Court: You may stand down.

By Mr. Willis: This witness, your Honor, this witness is charged with the offense of murder in the first degree, and at this time the State would nolle prosequi any and all cases that arc pending against this defendant. She is free to go.

By the Court: Very well.

By Mr. McKee: Is she granted immunity as far as any other charges?

By Mr. Willis: I helieve that's statutory.

By the Court: In other words, you are dismissing the case against this defendant, arising out of this incident?

By Mr. Willis: Yes, your Honor.

By the Court: Very well. You are free to go.

[1] The sixth amendment right to the assistance of counsel contemplates legal representation that is effective and unimpaired by the existence of conflicting interests being represented by a single attorney. *Glasser* v. *United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Baker* v. State, 202 So.2d 563 (Fla.1967). Since Betty Jean Strouder and the appellant were both charged with these crimes, there was a strong probability of a conflict between their interests at the time the court appointed McKee to represent them. This conflict became more substantial and apparent to McKee at the time he learned that the state might use Strouder's testimony. The conflict was again revealed to the court when Strouder gave her damaging testimony and stated on cross-examination that McKee was her attorney.

[2–4] 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 reversihle error. See *Belton* v. *State*, 217 So.2d 97 (Fla.1968). As the United States Supreme Court said in *Glasser*, "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . The trial court should protect the right of an accused to have the assistance of counsel." 315 U.S. at 71, 62 S.Ct. at 465.

We hold that the appellant was denied his right to the effective assistance of counsel by the joint representation of the appellant and a state witness by the same court-ap-

pointed attorney. The judgment and sentences are vacated and the case is remanded for a new trial.

It is so ordered.

ENGLAND, C. J., and BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., concur.

ADKINS, J., dissents with an opinion.

ADKINS, Justice, dissenting.

The question of whether joint representation of appellant and Strouder by trial counsel in any **way** prevented effective assistance of counsel to the appellant was not ruled upon by the trial court. In the past, we have held that the issue of adequacy of representation by counsel cannot be properly raised for the first time on a direct appeal. *State v. Barber*, **301** So.2d 7 (Fla. **1974).**

I would relinquish jurisdiction for the purpose of allowing the trial judge to conduct post-conviction proceedings and allow the state and appellant to present facts upon which the trial court could make an adequate determination of whether a conflict of interest between appellant and Strouder existed which would preclude effective representation of appellant.

KEY NUMBER SYSTEM

THE FLORIDA BAR, Petitioner,

v.

Robert A. ZINZELL, Respondent.

No. 57885.

Supreme Court of Florida.

July **3,** 1980.

Rehearing Denied Sept. 17, 1980.

Disciplinary proceeding came before the Supreme Court on complaint of the State Bar and report of the referee. The Supreme Court held that preparing document for client allowing her to believe it is will, but in fact is trust agreement conveying her property, using trust power, without client's knowledge or consent, to convert and convey certain of her property to own use and purposes, and mortgaging such property, paid for by client and her family without restitution or explanation, and failing to appear in person or by representation before grievance committee or referee warrants disbarment.

Disbarment ordered.

Attorney and Client ⇐58

Preparing document for client allowing her to believe it is will, but in fact is trust agreement conveying her property, using trust power, without client's knowledge or consent, to convert and convey certain of her property to own use and purposes,'and mortgaging such property, paid for by client and her family without restitution or explanation, and failing to appear in person or by representation before grievance committee or referee warrants disbarment. **32** West's F.S.A. Code of Professional Responsibility, DR1–102(A)(4, 6), DR7–101(A)(3).

R. Stuart Huff, Bar Counsel, and Paul **A.** Gross, Branch Staff Counsel, Miami, and Anita F. Dahlquist, Asst. Staff Counsel, Tallahassee, for complainant.

Robert **A.** Zinzell, in pro. per.

PER CURIAM.

This disciplinary proceeding by The Florida Bar against Robert **A.** Zinzell, a member of The Florida Bar, is before us on complaint of The Florida Bar and report of the referee. An appeal earlier filed in this cause was dismissed. We have received respondent's "motion to dismiss referee's report" but note that it was untimely **filed.** Other papers filed subsequently by **Mr.** Zinzell in this Court are also untimely and without merit. ***See*** FLorida Bar Integration Rule, article XI, Rule 11.09(3)(a). Jur-

Samuel R. BELTON, Petitloner,

v.

The STATE of Florida, Respondent.

No. 37662.

Supreme Court of Florida.

Dec. 17, 1968.

Defendant appealed from a judgment of conviction and sentence entered by the Criminal Court of Record for Dade County, Paul Baker, J. The District Court of Appeal, 211 So.2d 238, affirmed. On certiorari, the Supreme Court, Thornal, J., held that failure to appoint separate counsel for jointly tried indigent codefendants did not constitute rrror in absence of a demand therefor and without a showing of prejudice or conflict of interests.

Writ discharged.

Criminal Law ⇐641.5

Failure to appoint separate counsel for jointly tried indigent codefendants did not constitute error in absence of a demand therefor and without a showing of prejudice or conflict of interests.

Robert L. Koeppel, Public Defender and Herbert M. Klein, Asst. Public Defender, for petitioner.

Earl Faircloth, Atty. Gen., and Jesse J. McCrary, Jr., Asst. Atty. Gen., for respondent.

THORNAL, Justice.

We have for review a decision of a district court of appeal which passed upon a question certified to be of great public interest. Fla.Const. art. V, § 4, F.S.A.; Belton v. State, 211 So.2d 238, 239 (3d Dist.Ct.App.Fla.1968).

We must decide whether error occurs when a trial judge fails to appoint separate counsel for jointly tried indigent co-defendants in the absence of a demand therefor and without a showing of prejudice or conflict of interests.

Petitioner Belton and two co-defendants were jointly tried and convicted or. a charge of robbery. Pctitioncr and one of the others were adjudged insolvent. All three were represented by the same public defender. There was no demand for separate counsel and no objection to joint representation at the trial. There was no showing of a conflict of interest among the tlcfendants and no actual prejudice has been made to appear. On appeal to the District Court of Appeal, Third District, Belton urged for the first time that a fundamental crror occurred when he arid a co-defendant were not provided separate counsel at the trial. The District Court did not agree. The conviction was affirmed. This certiorari proceeding followed. Our jurisdiction stems from the ccrtiiicnte of great public intcrcst.

As in the District Court, Belton claims here that the problem must be resolved in his favor on the authority of Baker v. State, 202 So.2d 563 (Fla.1967). As did the District Court, we find the two cases to be clearly distinguishable. *Baker* did not involve the necessity of searching out a so-called fundamental error. There it demand for independent counsel was made at the trial. it was refused by the trial judge. The alleged error was preserved and advanced on appeal. We held that it was crror *to refuse the request* for separate counsel. *Baker* relied on a number of out-of-state cases which stand for the rule that co-defendants have the right to separate, independent counsel when (1), there is an objection or request made during the trial; (2), there is a conflict of interests between the co-defendants; or (3), the record reveals that some prejudice results frotn service by joint counsel. We commented that the "interests and defenses of *most* co-defendants are conflicting" and "*usually*" the strategy that will benefit one will renct *to* the detriment of the other.

We then stated that "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." Despite the insertion of the obiter regarding the "usual" prcscnce of prejudice or conflict, the *Baker* judgmcnt 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 demonstrnted 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 prejurlicc results from such failure. Error does riot occur because of joint counsel in the absence of a request for scparatc counscl or a showing of prejudice or conflict of interest.

Tn the instant case there was neither a request for separate counsel nor a showing of prejudice. Consequently, reversible error is not revealed by the record. This in cffcct was the rule of Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), which is generally accepted as the leading case on the subject. There one attorney was assigned to represent two defendants, Glasser and Kretskc. Glasser objected. In reversing his conviction **thc** United States Supreme Court determined: (1) a conflict of interest which adversely affected Glasser's defense and (2), Glasser's demand for separate counsel should have been respected. On the other hand Kretske's conviction was affirmed. He made no objection to joint counsel nor did the record reveal iiny harm to him. It appears from this authoritative decision that the mere existence of two defendants with one attorney does not necessarily equal the denial of the cffcctivc assistance **of** counsel as a matter of law.

In addition to the decision under review, the same application was accorded to *Raker* and *Glasser* in Rogers **v.** State, 212 So.2d 367 (1st Dist.Ct.App.Fla.1968); and Dunbar v. State, 214 So.2d 52 (2d Dist.Ct. App.Fla.1968), where the Second District Court of Appeal modified its earlier view as stated in Williams **v.** State, 214 So.2d 29 (2d Dist.Ct.App.Fla.1968). **A** different view has been taken in Youngblood v. State, 206 So.2d 665 (4th Dist.Ct.App.Fla.1968).

We find that the District Court correctly disposed of the matter. Its decision is approved and the writ is discharged.

It is so ordered.

CALDWELL, C. J., arid DREW, ERVIN and HOPPING, JJ., concur.

STATE of Florida, Potltioner,

v.

James Otis YOUNGBLOOD and Willie Frank Campbell, Respondents.

No. 37281.

Supreme Court of Florida.

Dec. 17, 1968.

Rehearing Denied Jan. 6, 1969.

Defendants were convicted in the Court of Record, Broward County, John G. Ferris, J., of robbery, and they appealed. The District Court of Appeal, 206 So.2d 665, reversed judgments and remanded cause for new trial. On certiorari, the Supreme Court, Thornal, J., held that failure to appoint separate counsel for indigent codefendants did not constitute fundamental error absent showing of prejudice.

Decision of District Court of Appeal quashed and cause remanded to that Court for further proceedings.

We then stated that "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." 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 lie 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 demonstrnted 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 ititcrcst.

In the instant case there was neither a request for separate counsel nor a showing of prejudice. Consequently, reversible error is not revealed by the record. This in cffcct was the rule of Glasser v. United States, 315 U.S. 60, 62 S.Ct. ,137, 86 L.Ed. 680 (1942), which is generally accepted as the leading case on the subject. There one attorney was assigned to represent **two** defendants, Glasser and Kretske. Glasser objected. In reversing his conviction the United States Supreme Court determined: (1) a conflict of interest **which** adversely affected Glasser's defense and (2), Glasser's demand for separate counsel should have been respected. On the other hand Kretske's conviction was affirmed. He made no objection to joint counsel nor did the record reveal any harm to him. It appears from this authoritative decision that the mere existence of two defendants with one attorney does not necessarily equal tlic denial of the effective assistance of counsel as a matter of law.

In addition to the decision under review, the same application was accorded to *Raker* and *Glasser* in Rogers v. State, 212 So.2d *367* (1st Dist.Ct.App.Fla.1968) ; and Dunbar v. Statc, 214 So.2d *52* (2d Dist.Ct. App.Fla.1968), where the Second District Court of Appeal rnodificd its earlier view as stated in Williams **v.** State, 214 So.2d 29 (2d Dist.Ct.App.Fla.1968). **A** different view has been taken in Youngblood v. State, **206** So.2d 665 (4th Dist.Ct.App.Fla.1968).

We find that the District Court correctly disposed of the matter. Its decision is approved and the writ is discharged.

It is so ordered.

CALDWELL, C. J., and DREW, ERVIN and HOPPING, JJ., concur.

STATE *of* Florida, Petitioner,

v.

James Otis YOUNGBLOOD and Willie Frank Campbell, Respondents.

No. 37281.

Supreme Court **of** Florida.

Dec. 17, 1968.

Rehearing Denied Jan. 6, 1969.

Defendants were convicted in the Court of Record, Broward County, John G. Ferris, J., of robbery, and they appealed. The District Court of Appeal, 206 So.2d 665, reversed judgments and remanded cause for new trial. On certiorari, the Supreme Court, Thornal, J., held that failure to appoint separate counsel for indigent codefendants did not constitute fundamental error absent showing of prejudice.

Decision of District Court of Appeal quashed and cause remanded to that Court for further proceedings.

I. Courts ⇐216

jurisdiction for certiorari was laid with claim that decision of a district court of appeal conflicted with decision of the Supreme Court.

2. Criminal Law ⇐641.1

Mere fact of total deprivation of counsel is presumptively prejudicial.

3. Criminal Law ⇐641.5

Prejudice does not presumptively follow joint representation.

4. Criminal Law ⇐641.5

Failure to appoint separate counsel for indigent codefendants did not constitute error absent showing of prejudice.

Earl Faircloth, Atty. Gen., and James T. Carlisle, Vero Beach, for petitioner.

Leonard L. Stafford, Asst. Pub. Defender, Broward County, Fort Lauderdale, for Willie Frank Campbell.

Leroy H. Moe, Hollywood, Fla., for James Otis Youngblood.

THORNAL, Justice.

By petition for certiorari we have for review a decision of a district court of appeal which allegedly conflicts with a decision of this Court on the same point of law. Fla.Const. art. V, § 4, F.S.A.; Youngblood v. State, 206 So.2d 665 (4th Dist.Ct. App.Fla.1968).

We are confronted by a claim of alleged fundamental error because of failure to appoint separate counsel for indigent codefendants.

Respondents Youngblood and Campbell were charged with robbery. They were represented jointly at the trial by a single court-appointed lawyer. Following conviction they appealed to the District Court of Appeal, Fourth District. That Court sua sponte raiscd the question of the propriety of representation of the two defendants by a single attorney although error had not been assigned on that point. However, the District Court regarded the failure as a fundamental error that would support reversal even though the point had not been made at trial nor raised on appeal.

[1] Jurisdiction for certiorari is laid here with the claim that the decision under review conflicts with the decision of this Court in Raker v. State, 202 So.2d 563 (Fla. 1967).

Although the District Court relied on Baker v. State, supra, that case and this are distinguishable. *Baker* did not involve the fundamental error problem. There, objection to joint counsel was raiscd at the trial **and** expressly saved for appellate review. Here, it was not. However, subsequent to the decision in the instant case the Court of Appeal, Third District, decided Belton v. State, 211 So.2d 238, **239** (3d Dist.Ct.App.Fla.1968), and the Court of Appeal, First District, decided Rogers v. State, 212 So.2d 367 (1st Dist.Ct.App. Fla.1968). In the instant case, the Fourth District decided that the alleged error was fundamental, that is that reversal could be based upon it even though the point was not made at trial. In the cases mentioned for conflict the First and Third Districts held otherwise. The Court of Appeal, Second District, in Dunbar v. State, 214 So.2d 52 (2d Dist.Ct.App.Fla.1968), has joined *Belton* and ***Rogers.*** The decision under review is, therefore, in jurisdictional conflict with the decisions of the other three districts.

We have approved the decision of the District Court in Belton v. State, supra, by our opinion dated December 17, 1968, 217 So.2d 97. We there held that failure to appoint separate counsel for co-defendants is not error in the absence of a request therefor or a showing of prejudice. Dunbar v. State, supra, is currently pending here on a ccrtiiicntc of public importance raising the problem of whether Baker v.

State, should be accorded retroactive application.

We, therefore, find jurisdictional conflict between the Fourth District in *Youngblood* and thr First, Second and Third Districts in *Rogers*, *Dunbar* and *Belton* respectively.

[2,3] It is important to place tlir problem at hand in proper focus. We do not here deal with the total deprivation of counsel. The mere fact of total deprivation of counsel is presumptively prejudicial. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and on remand Gideon v. Wainwright, 153 So.2d 299 (Fla.1963). See also, Harris v. Stntc, 162 So.2d 262 (Fla.1964), where we discussed the deprivation of counsel impact reflcctcd by Hamilton v. Alabama, 368 U. S. 51, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961), and White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (196.3). The matter of joint or separate counsel for jointly tried co-defendants is an aspect of the broader problem involving the *effective assistance of counsel*. Baker v. State, supra, 202 So.2d at 565. In Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), two co-dcfcndants wcrc jointly representctl by the same lawyer. Glasser objected and pointed to potential conflicts and prejudices. His co-defendant, Kretske, filed no objection and made no showing of prejudice. The United States Supreme Court reversed as to Glasser, but affirmed as to Krctske. Obviously, if joint rcpresentatiori of co-defendants by the same lawyer *necessarily* results in prejudice, the court could not have reached different results for Glasser and Kretske. The decision in *Glasser* is literally saturated with the need to show some prejudice following from the joint representation. The Court will not weigh or evaluate the quantum of prejudice if harm to an accused is demonstrated. The fact remains that every joint representation of co-defendants by the same lawyer does not, standing alone, automatically require a reversal. Prejudice does not presumptively follow joint representation as it docs total deprivation of all representation by counsel.

The District Court here held that failure to object to joint representation did not constitute a waiver of the right to effective assistance of counsel. That Court went further. It held that a conviction is fundamentally defective and subject to reversal on tlir joint representation ground even though there is no request for separate counsel arid, further, even though no prejudice results from such joint representation.

We have held that a so-called fundamental error which will justify a reversal absent an objection at trial must be one which reaches down into the vitals of the trial itself, and must be such as to produce the guilty verdict which otherwise could not have resulted without the assistance of the crror. Hamilton v. Stntc, 88 So.2d 606, 607 (Fla.1956). When subjected to this test, the error relied on for reversal by tlic District Court could not have constituted a fundamental crror because it *hit.;* tint been demonstrated, nor has it even been claimed, that any prejudice at all resulted. In the absence of a showing of prejudice it could hardly he correctly concluded that the alleged error was a critical element in producing the conviction.

Our own research has led us to no decision which holds for reversal of a conviction on the subject ground where there was no objection at trial *and* no showing of prejudice as a result of the error. Conversely, the cases which reverse convictions where there was no objection to joint counsel at trial consistently find present the element of prejudice flowing from the joint representation. Illustrative is State v. Tapia, 75 N.M. 757, 411 P.2d 234 (1966), quoted for support in the opinion under review. It is true that in *Tapia* the convicted defendant did not make a trial ohjrction. However, the New Mexico Court dwelt at considerable length on the serious prejudice that resulted against the convicted Tapia and in favor of his co-defendant who was acquitted. No such situation is presented by the case at bar.

We have held in Belton v. State, opinion filed December 17, 1968, that:

(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 arid 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.

[4] On the authority of our opinion in Belton v. State, supra, the decision under review is quashed and the cause remanded to that Court for further proceedings cow sistcnt herewith.

It is so ordered.

CALDWELL, C. J., and DREW, ERVIN and HOPPING, JJ., concur.

FLORID SANITARIUM & HOSPITAL and Safeco Llfeco General Insurance, Petitioners,

v.

Dorothy M. HANNA (Watson) and the Florida Industrial Commission, Respondents.

No. 37896.

Supreme Court *of* Florida.

Dec. 3, 1968.

Rehearing Denied Jan. 21, 1969.

Writ of Certiorari to the Florida Industrial Commission.

Joe B. Weeks of Gurney, Gurney & Handley, Orlando, for petitioners.

Dan G. Wheeler, Jr., of Wheeler & Evans, Miami, Patrick H. Mears and J. Franklin Garner, Tallahassee, for respondents.

PER CURIAM.

By petition for a writ of certiorari we have for review an order of the Florida Industrial Commission bearing date August 13, 1968.

We find that oral argument would serve no useful purpose and it is therefore dispensed with pursuant to Florida Appellate Rule 3.10, subd. e, 32 F.S.A.

Our consideration of the petition, tlic record and briefs leads us to conclude that there has been no deviation from the essential requirements of law.

The petition is therefore denied.

It is so ordered.

CALDWELL, C. J., and ROBERTS, DREW, ERVIN and HOPPING, JJ., concur.

INTERNATIONAL BUILDERS *OF* FLORIDA, INC., a Virginia corporation, Petitioner,

v.

William G. STEVENS, Respondent.

No. 37325.

Supreme Court of Florida.

Dec. 12, 1968.

Writ of Certiorari to the District Court of **Appeal,** Third District.

Leo M. Alpert, Miami, for petitioner.

Edward L. Magill, of Stephens, Demos, Magill & Thornton, Miami, for rcspondcnt.

sion of more than **20** grams of marijuana exceeded statutory maximum sentence that could be imposed and mandatory minimum three-year sentence, which was not authorized for the offense, would be deleted. West's F.S.A. §§ 775.082(3)(d), 893.13(1)(f).

Nancy **A.** Daniels, Public Defender, and Glen P. Gifford, Asst. Public Defender, Tallahassee, for appellant.

Robert **A.** Butterworth, Atty. Gen., and Amelia L. Beisner, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

Appellant **seeks** review of his conviction and sentences on the offenses of possession of cocaine and marijuana and sale of cocaine. He raises five issues, only one of which merits discussion. The trial court sentenced appellant to five years' imprisonment, with a three year mandatory minimum Sentence, followed by ten years' probation for possession of more than 20 grams of marijuana in violation of section 893.13(1)(f), Florida Statutes (Supp.1990). Tho state concedes that this sentence exceeds the statutory maxitnum sentence that may be imposed and that the mandatory minimum three year sentence is not authorized for this offense. Section 775.-082(3)(d), Florida Statutes (1989).

On remand, the trial court shall correct the sentence for possession of marijuana by deleting the three year mandatory minimum sentence and the probationary period. In all other respects, the judgment and sentences are affirmed.

AFFIRMED in part, REVERSED in part and REMANDED.

BOOTH, BARFIELD and ALLEN, JJ., concur.

Kenneth JOHNSON, Appellant,

v.

The STATE of Florida, Appellee.

No. 91-2578.

District Court of Appeal of Florida, Third District.

June 9, 1992.

Defendant was convicted in the Circuit Court, Dade County, Philip Knight, J., of grand theft. Defendant appealed. The District Court of Appeal, Baskin, J., held that prosecutor's reasons for striking black prospective juror were invalid.

Reversed and remanded for new trial.

1. Criminal Law ⇐641.5

Assuming that trial court properly exercised its discretion in consolidating three criminal cases for jury selection, trial court erred in overruling defense counsel's objection to representing multiple clients during jury selection since record demonstrated **a risk** of conflict.

2. Jury ⇐33(5.1)

Timely objection and demonstration that individuals challenged are members of distinct racial group establish predicate for trial court to determine whether there is substantial likelihood that peremptory challenges have been exercised in racially discriminatory manner.

3. Jury ⇐33(5.1)

If trial court decides that discriminatory exercise by the prosecutor of peremptory challenges is likely, state must then provide clear and reasonably specific racially neutral explanation of legitimate reasons for peremptory challenges.

4. Jury ⇐33(5.1)

Black prospective juror's occupation was not valid reason for state's peremptory challenge in the absence of connection between occupation and facts of grand theft case.

Jury ⇐33(5.1)

Prosecutor's reason for peremptory challenge of black prospective juror that juror resided in high crime area was invalid reason in the absence of connection between prospective juror's residing in high crime area and facts of grand theft case.

Jury ⇐33(5.1)

Presence of other black jurors on panel was an invalid reason for state's excluding black juror.

Bennett H. Brummer, Public Defender, and Carol J.Y. Wilson, Asst. Public Defender, for appellant.

Robert A. Butterworth, Atty. Gen., and Charles M. Fahlbusch, Asst. Atty. Gen., for appellee.

Before HUBERRT, BASKIN and COPE, JJ.

BASKIN, Judge.

Kenneth Johnson appeals his conviction and sentence for grand theft. We reverse.

Defendant Johnson was charged by information with burglary and grand theft. To expedite jury selection, the trial court consolidated defendant's case with the cases of two other defendants, solely for jury selection. The assistant public defender, who represented all three defendants, objected to having to represent all three clients in the consolidated jury selection process. The trial court overruled the objection and proceeded with the simultaneous selection of three separate juries.

During the selection of defendant Johnson's jury, the state exercised peremptory challenges striking two of the three black venire members. When defendant objected to the challenge of Franklin James, the first black venire member, the state responded that its strike was based on his unclear responses to questions. The trial court disallowed the strike and seated James. The state used another peremptory challenge to strike the second black prospective juror, George Ellis. Upon defendant's objection, the state explained that it challenged Ellis because he lived in a high crime area, because he had worked with people who had problems, and because there were other black jurors on the panel. The state did not ask Ellis any questions. The trial court allowed the strike.

At the conclusion of the trial, the jury found defendant Johnson guilty of grand theft. The trial court sentenced him as an habitual felony offender to ten years imprisonment, with five years mandatory minimum. After considering defendant's appeal, we reverse the conviction and sentence.

[1] Defendant Johnson argues that the trial court committed reversible error in consolidating three cases for simultaneous jury selection. Assuming, without deciding, that the trial court properly exercised its discretion in consolidating these cases for jury selection, *see United States v. Quesada-Bonilla*, 952 F.2d 597, 599 (1st Cir.1991), and cases cited therein, we find that the trial court erred in overruling defense counsel's objection to representing multiple clients during jury selection. "To deny a motion for separate representation, where a risk of conflicting interests exists, is reversible error." *Foster v. State*, 387 So.2d 344, 345 (Fla.1980); *Belton v. State*, 217 So.2d 97 (Fla.1968); *Baker v. State*, 202 So.2d 563 (Fla.1967); *Bellows v. State*, 508 So.2d 1330 (Fla. 2d DCA 1987); *Washington v. State*, 419 So.2d 1100, 1100 n. 2 (Fla. 3d DCR 1982); *see Main v. State*, 557 So.2d 946 (Fla. 1st DCA 1990). Defendant's counsel stated his objection to representing all three defendants in the consolidated jury selection, asserting that his clients' interests conflicted. The record demonstrates a risk of conflict. *Foster; Main; Bellows.* Thus, we hold that the court erred in overruling the objection.

[2, 3] Defendant Johnson cites as error the trial court's grant of the state's peremptory challenge of juror Ellis over defense objection. *State v. Neil*, 457 So.2d 481 (Fla.1984), *clarified, Slate v. Castillo*, 486 So.2d 565 (Fla.1986), *and clarified, State v. Slappy*, 522 So.2d 18, 22 (Fla.), *cert. denied*, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988), sets forth the test

trial courts must apply to determine whether a peremptory challenge has been used in a discriminatory manner. A timely objection and demonstration that the individuals challenged are members of a distinct racial group establish the predicate for the trial court to determine whether there is a substantial likelihood that the peremptory challenges have been exercised in a racially discriminatory manner. *Neil,* **457** So.2d at 486.' If the trial court decides that discriminatory exercise is likely, the state must then provide " 'clear and reasonably specific' racially neutral explanation of 'legitimate reasons' " for the peremptory challenge. *State v. Slappy,* **522** So.2d 18, 22 (Fla.), *cert. denied,* 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988).

[4,5] The state's reasons for its peremptory challenge of juror Ellis were insufficient. A prospective juror's occupation is not a valid reason for challenge unless there is some connection between the occupation and the facts of the case. *Slappy; Mayes v. State,* **550** So.2d 496 (Fla. 4th DCA 1989). A review of the record reveals no such connection. Furthermore, the record discloses no connection between the juror's residing in a high crime area and the facts of the case before us. Accordingly, we conclude the reason was pretertual. *Slappy,* 522 So.2d at **22;** *see Albury v. State,* **541** So.2d 1262 (Fla. 3d DCA 1989) (strike against juror from low socioeconomic background pretextual). Our conclusion gains support from the state's failure to question prospective juror Ellis on either of the stated grounds. *Slappy; Hicks v. State,* 591 So.2d 662 (Fla. 4th DCA 1991); *Gadson v. State,* 561 So.2d 1316 (Fla. 4th DCA 1990).

[6] The state's final reason for striking prospective juror Ellis, the presence of other black jurors on the panel, has repeatedly been ruled an invalid reason for excluding a black juror. *Bryant v. Slate,* 565 So.2d 1298 (F'Ia.1990); *Slappy,* **522** So.2d at 21; ***see*** *Norwood v. State,* **559** So.2d 1255 (Fla. 3d DCA 1990); *Smellie v.* ***Torres,*** **570** So.2d **314** (Fla. 3d DCA 1990). Under these circumstances, reversal is mandated.'

Reversed and remanded for new trial.

1. We note that in *Alen v. State,* **596 So.2d 1083.** 1085 (Fla. **3d DCA** 1992). this court held that "Hispanic jurors may **not** be peremptorily challenged solely on the basis of their ethnicity."

2. The state correctly conccdcs that the trial court erred in sentencing defendant to serve ten years in prison, **with** five years minimum mandatory, as an habitual felony offender. § 775.084(4)(a)3, **Fla. Stat.** (1989) (habitual felony offender, upon conviction for third degree felony, **may** be sentenced "for a term of years **not** exceeding ten."); *compare* § 775.084(4)(b)3, Fla. Stat. **(1989)** (habitual *violent* felony offender, upon conviction for third degree felony, may be sentenced to **a** maximum term of ten ycars, and "such offender shall not he eligible for release for 5 years.")

WEST AMERICAN INSURANCE COMPANY, Appellant,

v.

Carolyn LOWRIE. Appellee.

Nu. 91-2975.

District Court of Appeal of Florida, Third District.

June 9, 1992

Insured whose waterbed **broke** while being filled brought suit under homeowner's policy for water damage. The Circuit Court,, Dade County, Edward S. Klein, J., granted partial summary judgment on liability in favor of insured. Insurer appealed. The District Court of Appeal, Cope, J., held that: (1) waterbed was not "household appliance" under coverage provision of policy, and **(2)** leak from waterbed did not stem from plumbing system.

Reversed and remanded with directions.