IN THE SUPREME COURT OF FLORIDA

TERRY JEROME ROCK,

Petitioner,

v. CASE NO.: 82,530

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

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_____/

PRELIMINARY STATEMENT

Petitioner, Terry Jerome Rock, defendant/Appellant below, will be referred to herein as "Petitioner", Respondent, the State of Florida, will be referred to herein as either "respondent" or "the State".

STATEMENT OF THE CASE AND FACTS

Respondent is in agreement with Petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

Petitioner has failed to demonstrate that there is any conflict whatsoever between the court of appeal's opinion below dealing with multiple representation during jury selection and the cited cases which deal with multiple representation at trial. This Court should therefore decline to accept discretionary jurisdiction in this case.

ARGUMENT

ISSUE

THIS COURT SHOULD DECLINE TO ACCEPT DISCRETIONARY REVIEW OF THE INSTANT CASE AS THE OPINION IN THIS CASE IS NOT IN CONFLICT WITH THE CASES CITED BY THE PETITIONER

In the District Court of Appeal, First District of Florida's opinion in this case, the court held that based on the record in this case no potential conflict of interest was present when simultaneous jury selection was conducted.

The lower court opinion in this case is reported as Rock v. State, 18 Fla. L. **Weekly** D1583 (Fla. 1st DCA July 7, 1993 (attached hereto)). Simultaneous jury selection was conducted in Petitioner's case and those of two other unrelated defendants. Petitioner's attorney also represented one of the other unrelated defendants. These cases were only "consolidated" for purposes of jury selection. The trial court denied Petitioner's motion to preclude Simultaneous multiple jury selection. Petitioner did not object to the seating of any particular juror. Id.

In its opinion in this case, the First District held that

> 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,* 520 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 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.

Id.

Petitioner first contends that the opinion below is in conflict with Foster v. State, 387 So. 2d 344 (Fla. 1980). In Foster, this Court held that Foster was denied his right to effective assistance of counsel at trial by counsel's joint representation of Foster and a State witness where the witness had been indicted for the same murders as Foster and the witness' testimony was damaging to Foster and his credibility

and contradicted his testimony. In the instant case, however, counsel represented two unrelated defendants jointly solely for jury selection, and no actual conflict existed, unlike in Foster. The cases are thus completely distinguishable.

Petitioner next argues that the opinion below is in conflict with State v. Youngblood, 217 So. 2d 98 (Fla. 1968). In Youngblood, this Court held that even when codefendants are tried jointly, prejudice does not presumptively follow joint representation, and that the failure to appoint separate counsel for indigent codefendants did not constitute error absent a showing of prejudice. Not only is Youngblood factually distinguishable, but its holding offers Petitioner no solace or support.

Petitioner next alleges conflict with Belton v. State, 217 So. 2d 97 (Fla. 1968), cert. den. 395 US 915 (1969). In Belton, three codefendants were jointly tried and convicted for robbery. This Court noted that "(t)here was no showing of a conflict of interest among the defendants and no actual prejudice has been made to appear." Id, Again, Belton involved trial on the merits and conviction, whereas the instant case only involves jury selection. Again, too, the Petitioner's case was unrelated to the other cases for which juries were being selected, unlike in Belton. Petitioner is comparing apples and oranges.

Finally, Petitioner argues that the instant case is in conflict with Johnson v. State, 600 So. 2d 32 (Fla. 3d DCA 1992). In Johnson, defense counsel represented all three defendants, whose cases had been consolidated solely for jury selection. The opinion does not reflect whether or not the cases were related. Regarding multiple jury selection, the court stated only that

> 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 interest exists, is reversible error." *Foster v. State,* 387 So. 2d **344, 345** (Fla. **1980); *Belton v. State,* 217 *So.* 2d *97* (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 **DCA** 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, assertion 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.

600 So. 2d at **33** (emphasis supplied). The court was silent as to what appeared in the record to demonstrate a risk of conflict.

Recognizing the obvious, the court below stated in the instant case that

> 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.

The corresponding footnote states:

> As example 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. State*, 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.

18 Fla. L. Weekly at D1583.

Clearly, there is a substantial difference between representing multiple defendants during the guilt phase of trial, where one may testify to the other's detriment, and representing multiple defendants during jury selection. No conflict or prejudice has been made to appear in the instant **case**, particularly where the Petitioner was satisfied with the jury that was chosen in his case.

Petitioner is seeking to create a per se rule of reversal in every case where it is alleged that there might be the possibility of a conflict at jury selection. Petitioner relies on language from multiple representation at trial cases, particularly Foster, supra, which cites Holloway v. Arkansas, 435 US 475 (1978), for the proposition that "(t)o deny a motion for separate representation, where a risk of conflicting interests exists, is reversibly error." Foster, supra at 345.

Again, Holloway involved representation of robbery codefendants at trial, which is a situation where, admittedly, there exists a possible risk of conflicting representation. No such risk exists at jury selection and Petitioner's proposed per se rule simply makes no Sense in that context. Unlike the court in Johnson, supra, an examination of the record in the instant case convinced the court below that no risk of conflict existed.

As Petitioner has failed to demonstrate that there is any conflict whatsoever between the opinion below in this case and the cited cases, this Court must decline to accept discretionary jurisdiction in this matter.

CONCLUSION

Based on the above arguments and citations of legal authorities, Respondent respectfully urges this Honorable Court to decline accepting jurisdiction in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail *to* Nada M. Carey, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 2nd day of November, 1993.

BRADLEY R. BISCHOFF
Assistant Attorney General

$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.[1] 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. State*, 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

AWTHON, Senior Judge, concur.)

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

²This court has recently affirmed four cases without opinion where the issue of simultaneous jury selection was raised: *Copeland* v. *Bare*, No. 91-3753 (Fla. 1st DCA Feb. 20, 1993); *Losco v. State*, Nd. 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. State*, 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—Evidencc 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. 924191. 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. HELLER 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. State*, 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 Coun for Volusia 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.

(PERCURIAM.) 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 sentencc

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.)

* * *