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IN THE SUPREME COURT OF FLORIDA

MALCOLM BERNARD WILLIAMS,

Petitioner,

v. CASE NO. 82,811

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

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INITIAL BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

This is an appeal from the decision of the First District Court of Appeal below, Williams v. State, 627 So.2d 524 (Fla. 1st DCA 1993) (opinion on motion for rehearing or clarification). The district court affirmed Williams' conviction on the basis of its previous decision in Rock v. State, 622 So.2d 487 (Fla. 1st DCA 1993). Rock is currently pending in this court, no. 82,530.

All proceedings in the trial court were before Duval County Circuit Judge Hudson Olliff. The record on appeal will be referred to as "R," Volumes II through VII of the transcript will be referred to as "T," and Volumes I through IV of the supplemental record will be referred to as "S."

II STATEMENT OF THE CASE AND FACTS

Petitioner, Malcolm Williams, was charged with and convicted of burglary of a structure. The facts of the alleged burglary are that he took a used clothes dryer, worth $5, from an outdoor fenced area at Michelle's Stuff and Such, a second-hand furniture and appliance store in Jacksonville (T-195,225-26).

On March 16, 1992,[1] in a multiple jury selection procedure, separate juries were chosen for codefendants Irron Bronner and Kareem Johnson and petitioner Williams. Bronner and Johnson were to be tried at the same time for multiple robberies, but each had a separate jury (T-52 et seq.). Williams' charges were completely unrelated to those against Bronner and Johnson. Assistant Public Defender Stephanie Owens represented both Johnson and petitioner Williams. Bronner and Johnson's juries were selected first. Williams' jury was selected third.

Counsel objected to the serial voir dire, on the grounds raised in her written motion and argued apparently in previous trials, but without new argument. The trial judge summarily denied the motion (T-58-59).

The jury selection process began with a single pool of prospective jurors. Forty prospective jurors were initially questioned (T-94-97). Three petit juries were selected from this group of 40; Williams' jury was selected last. Irron

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[1]The transcript cover page erroneously says March 6; a new cover page with the correct date was submitted.

Bronner and Kareem Johnson were charged together with multiple counts of robbery. Bronner was represented by Refik Eler; Johnson by Stephanie Owens, who was also petitioner Williams' attorney. Bronner's jury was chosen first by Mr. Eler (T-154). Then Owens selected a jury for Kareem Johnson (T-158).

As the selection of Bronner's jury began, five jurors were excused for cause, four more or less by stipulation (some due to scheduling problems, some based on an inability to be fair) and one at the state's request (T-141-53). These jurors were never returned to the pool.

Bronner exercised nine peremptory strikes. The state excused one member of the panel. Seven jurors were selected to serve on Bronner's jury (T 151-55). The prospective jurors who had been peremptorily challenged were then returned to the jury box (T-155). Immediately after Bronner's jury was selected, without further questioning, Ms. Owens selected Johnson's jury from a different group of the venire. On Johnson's behalf, four prospective jurors and one alternate were peremptorily struck. The state excused one juror. Seven jurors were selected (T-155-58).

After further questioning by a different prosecutor than in the Bronner-Johnson trial and by Ms. Owens, a jury was selected for Williams' trial. The defense peremptorily struck six prospective jurors and one alternate. The state excused two jurors. After exhausting peremptories, the defense sought to excuse for cause Mrs. Yankowicz, who said she had seven times been the victim of purse-snatching. The challenge was

denied, and Mrs. Yankowicz served on the jury which heard Williams' trial. Of the seven prospective jurors peremptorily challenged by the defense, five (Egyed, Sudbury, Sandberg, Adams and Lux) had been previously challenged in the earlier jury selection (T-169-73).

While it took around 3-1/2 hours and 100 record pages to select the first two juries (T-59-159), it took only a half-hour and 10 pages to select Williams' (T-164-73).

Trial. At trial, Jacksonville Police Officer Thomas Racer testified he was on patrol when he saw petitioner, Malcolm Williams, two feet from the fence at the rear of Michelle's Stuff & Such, a second-hand furniture and appliance store. Williams was about to pick up the handles of a wheelbarrow, which held a clothes dryer (T-195-96). Racer made a U-turn and stopped Williams (T-197). Williams did not have any identification. Racer put him in the patrol car and read him his Miranda rights. Racer returned to the fenced area behind Michelle's. He found the chain still wrapped around the gate, but the lock was missing (T-198).

Racer followed the wheelbarrow track back inside the fenced area. It led to a spot where there were washers and dryers stored in a line. There was a disturbed area in the dirt; there appeared to have been a washer and dryer there (T-199). An objection to the last answer was sustained. There were footprints near the disturbed area. The dirt in the area was damp, because it had rained a few nights before; the dirt in the disturbed area was drier, as if something had been

sitting over it (T-200). Racer compared Williams' soles to the shoeprints and concluded that the shoes he was wearing had the same type of tread as the prints. An objection to this testimony was overruled. At that point, Racer arrested Williams (T-201-02).

On cross, Racer said he did not compare the size of the shoeprints with Williams' shoes (T-211). Racer did not find a broken lock, although he looked for one, and he did not find any type of burglary tool on Williams or in the area (T-214-15).

Michelle Doughtery, the store owner, testified she closed the business that day between 5 and 6:00 p.m. The gate to the fenced area was closed, with a chain wrapped around it and the biggest Masterlock available on the chain. At the time, she had three Kenmore dryers and two Maytag washing machines in the fenced area. She had bought them all at the same time, intending to resell them (T-221-22).

An officer came the next day and told her about the burglary. One dryer was missing, the one recovered was on its side, and the lock to the gate was gone (T-222). They are required by law to keep records of the serial numbers of the machines they have, but she did not know the serial number of this dryer. Nevertheless, she identified the dryer as one of hers, which she has since sold (T-223,225). On cross, Doughtery said she purchased the dryer for $5. She did not check the serial number (T-225-26).

After Doughtery was excused, the state recalled her to ask if she had given Williams permission to enter the business; she said no. Defense counsel asked if the lock had been missing for a long time and whether the gate were open to the public. The state's objections to both questions were sustained (T-233-34).

There were no witnesses for the defense.

April 16, Williams was sentenced to 9 years in prison as an habitual felony offender, with credit for 137 days time served (R-97-100). His recommended guidelines range was 2-1/2 to 3-1/2 years, the permitted range, 1 - 4-1/2 years (R-107).

Notice of appeal was timely, the district court affirmed, and this appeal follows.

III SUMMARY OF ARGUMENT

The trial court erred in consolidating petitioner Williams' case with two other defendants' cases for jury selection over defense counsel's objection to representing multiple clients during jury selection. An accused is entitled to conflict-free representation at every critical stage of the prosecution, including jury selection.

Because the jury selection procedure required petitioner's counsel to choose juries for two defendants from one venire at one time, counsel was placed in the difficult position of having to consider the effect of her actions in one defendant's jury selection on the other defendant she represented. Foreseeing the potential for conflict, counsel objected to the procedure. Based upon counsel's representations regarding a potential conflict, the trial court should have allowed Williams' jury selection to proceed separately or conducted further inquiry regarding the asserted conflict. Because reversal is automatic when an objection is made at trial, the district court erred in requiring a defendant to demonstrate actual conflict to obtain reversal on appeal. See Rock, infra. Williams therefor is entitled to a new trial.

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

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

IV ARGUMENT

ISSUE PRESENTED

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

The trial court employed a serial jury selection process whereby petitioner Williams' jury and juries for two other defendants were selected from the same venire panel. Williams' counsel, who represented two of the three defendants, objected to the consolidated jury selection procedure, asserting she could not adequately represent Williams because she would have a conflict of interests, due to "conflicting defenses and issues" (R-67). Defense counsel also asserted the procedure violated Williams' constitutional rights to due process and a fair and impartial jury. The trial judge summarily denied the motion (T-59). In Rock, the district court approved a similar ruling by the trial court, concluding the record failed to demonstrate an actual conflict of interest. 622 So. 2d at 489. The court followed Rock in its decision here.

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

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

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

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

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

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

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

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

As this Court said in Francis:

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

413 So.2d at 1178-79.

One aspect of the right to counsel guaranteed under our state and federal constitutions is the right to effective counsel, which includes the right to an attorney whose loyalty is not divided between clients with competing interests.

Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); Holloway v. Arkansas, 435 U.S. 475, 480, 98 S.Ct. 1173, 1182, 55 L.Ed.2d 425 (1978); Baker v. State, 202 So.2d 563, 565 (Fla. 1967). Counsel's allegiance to a client must remain unaffected by competing obligations to other clients. Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984).

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

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

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

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

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

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

Baker, 202 So.2d at 565 (quoting 315 U.S. at 70). Observing that other state courts had reached the same conclusion as Glasser, the court said:

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

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

Id. at 565-66.

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

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

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

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

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

> request for separate counsel or a showing of prejudice or conflict of interest.

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

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

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

217 So.2d at 101.

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

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

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

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

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

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

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

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

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

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

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

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

The court explained:

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

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

Id. at 489-91 (citations omitted).

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

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

therefore reversed. The court recognized, however, that had counsel objected, reversal would have been automatic:

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

Id. at 345 (emphasis added).

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

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

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

(Footnote Continued)

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

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

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

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(Footnote Continued)
court shall appoint one or more members of the Florida Bar, who are in no way affiliated with the public defender, to represent those accused.

look no further than defense counsel's representations regarding a conflict of interest.[3]

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

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

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

conflicting interests must choose between alternative courses of action:

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

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

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

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

Most importantly, however, is Holloway's holding that "actual conflict" is the standard of review for conflict as fundamental error, that is, only when the defendant does not object to joint representation. When the defendant does object, then only risk of conflict is necessary, and as risk of conflict is typical in cases of joint representation, the trial court must either appoint separate counsel or take steps to ascertain that the risk of conflict was too remote to require separate counsel. Holloway, 435 U.S. at 483-84. The trial court here did neither.

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

district court erred in upholding the trial court's ruling. This court should reverse for a new trial.

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

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

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

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

of jury selection likewise is indisputable; it is the cornerstone of a fair trial.

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

The jury selection process in petitioner's case began with a pool of forty people. As the selection of Bronner's jury began, five jurors were excused for cause, four more or less by stipulation (some due to scheduling problems, some based on an inability to be fair) and one at the state's request (T-14153). These jurors were never returned to the pool.

Defendant Bronner selected his jury first. Bronner exercised nine peremptory strikes. The state excused one member of the panel. Seven jurors were selected to serve on Bronner's

jury (T 151-55). The prospective jurors who had been peremptorily challenged were then returned to the jury box (T-155). Immediately after Bronner's jury was selected, without further questioning, Ms. Owens selected defendant Johnson's jury. On Johnson's behalf, four prospective jurors and one alternate were peremptorily struck. The state excused one juror. Seven jurors were selected (T-155-58).

Only then, after further questioning by a different prosecutor than that in the Bronner-Johnson trial and by Ms. Owens, was a jury selected for Williams' trial. The defense peremptorily struck six prospective jurors and one alternate. The state excused two jurors. After exhausting peremptories, the defense sought to excuse for cause Mrs. Yankowicz, who said she had seven times been the victim of purse-snatching. The challenge was denied, and Mrs. Yankowicz served on the jury which heard Williams' trial. Of the seven prospective jurors peremptorily challenged by the defense, five (Egyed, Sudbury, Sandberg, Adams and Lux) had been previously challenged in the earlier jury selection (T-169-73).

This process of reseating jurors the state and defense have previously determined to be unacceptable undermines the integrity of the jury selection process by unfairly diluting the number of peremptory challenges available to defense counsel.

The multiple jury selection method utilized here also violated petitioner's rights to due process and an impartial jury by giving the state an unfair advantage. For example,

multiple jury selection allows the state to stack the deck with jurors more favorable to them or unfavorable to defendants who come later in the selection process. By striking jurors themselves, prosecutors can guarantee that a juror who might be more favorable for the state on the third defendant's case will come back if stricken in cases 1 or 2.

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

In Kritzman v. State, 520 So.2d 568 (Fla. 1988), this court addressed the constitutional considerations when the state has an unfair advantage in the jury selection process. In Kritzman, a codefendant who was to testify in guilt phase participated in jury selection for penalty phase. Citing unfair advantages given the state, the court said:

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

Id. at 570. The court reversed, holding the defendant need no show prejudice where substantive due process had been violated to such a degree. The jury selection method employed here was

likewise a violation of substantive due process in that it impermissibly allowed the "stacking" of the venire.

Requiring an attorney to represent several clients simultaneously during a jury selection of unrelated cases also undermines the integrity of the jury trial system. Traditionally, our jury trial system has provided each accused who has no codefendants with a separate jury trial as well as separate counsel. U.S. Const., am. VI; Fla. Const., art. I, § 16. Here, the consolidated procedure of one part of several unrelated trials detracted from the care and importance traditionally given each separate criminal case and jury trial.

The procedure also caused petitioner to select from a venire that had undergone 3-1/2 hours of questioning without a significant break. The record does not reveal the time at which the jurors arrived at the courthouse, but that time is almost universally 9:00 a.m. This serial voir dire commenced at 10:00 a.m. (T-54). After the second jury was selected, the judge noted it was 1:30 p.m. and asked the venire if they would prefer to have a 5-minute break or a half-hour lunch break before selecting the third jury (T-163). The judge also announced that the trial for which the last jury was selected would begin that same afternoon. The venire chose the 5-minute break, then the jury was selected. The judge excused them for a half-hour lunch break, they were ordered to return by 2:35 p.m,, and the trial commenced at 3:00 that afternoon (T-176-78).

The trial judge made at least one comment on the length of voir dire, which amounted to an apology for its length (T-141). It is likely that the venire was fatigued, if not exhausted. The jury chosen to hear Williams' case had probably been at the courthouse since 9:00 a.m. and had no significant break until 2:00 in the afternoon. One can only assume an exhausted panel has diminished powers of concentration and is in a hurry to get the job done and go home. When this exhaustion results solely from the consolidated jury selection procedure, it unfairly impacts the defendant. The record does not reveal the length of the jury's deliberations, nor what time the trial ended, but the trial, begun at 3:00 p.m., concluded the same day.

The jury selection process also abrogated petitioner's right under rule 3.300 to an independent examination of the venire. It took 3-1/2 hours to select the first two juries, but only a half-hour to select Williams' jury. Petitioner was certainly entitled to equal time in voir dire. He should not have had to rely upon another attorney questioning his panel when that attorney certainly had no interest in selecting the best jury for him. Indeed, the goal of Bronner's attorney was to secure the best jury for his client. What remained for Johnson and Williams was of no concern to him.

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

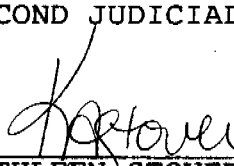
merits of his case. A defendant also is entitled to a trial free from evidence of the crimes of others. See Hirsch v. State, 279 So.2d 866 (Fla. 1973); Armstrong v. State, 377 So.2d 205 (Fla. 2d DCA 1979). These rights should extend to all phases of trial, including jury selection.

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

V CONCLUSION

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

Respectfully submitted,
NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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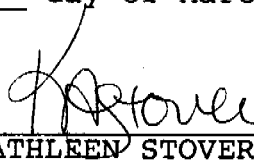
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Bradley R. Bischoff, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Malcolm B. Williams, inmate no. 071154, Lawtey Correctional Institution, P.O. Box 229, Lawtey, Florida, 32058, this 29 day of March, 1994.



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