IN THE SUPREME COURT OF FLORIDA

MALCOLM BERNARD WILLIAMS,

Petitioner,

v. CASE NO. 82,811

STATE OF FLORIDA,

Respondent.

JURISDICTIONAL BRIEF OF PETITIONER

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SECOND JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

MALCOLM BERNARD WILLIAMS,	:	
Petitioner,	:	
vs.	:	CASE NO.
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

JURISDICTIONAL BRIEF OF PETITIONER

I PRELIMINARY STATEMENT

This is an appeal from the decision of the First District Court of Appeal below, Williams v. State, ____ So.2d ____, 18 Fla.L.Weekly D2449 (Fla. 1st DCA Nov. 19, 1993) (opinion on motion for rehearing or clarification).

Petitioner, appellant in the district court and defendant in the circuit court, will be referred to by name or as petitioner. Respondent, appellee in the district court and prosecutor in the circuit court, will be referred to as the state.

II STATEMENT OF THE CASE AND FACTS

The district court opinion here is little more than a "PCA cite" to its prior decision in Rock v. State, 622 So.2d 487 (Fla. 1st DCA 1993), decision on jurisdiction pending, no. 82,530 (Fla. 1993).

III SUMMARY OF ARGUMENT

The decision below expressly and directly conflicts with Foster, Youngblood, Belton, and Johnson, infra. 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 Court 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, as in Rock, despite 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.

IV ARGUMENT

ISSUE PRESENTED

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY REVIEW AUTHORITY BECAUSE THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN ROCK, INFRA, IS IN DIRECT AND EXPRESS CONFLICT WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

The decision of the First District Court in Rock v. State, 622 So.2d 487 (Fla. 1st DCA 1993), decision on jurisdiction pending, no. 82,530 (Fla. 1993), 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." 387 So.2d at 345. The court explicitly recognized, however, that had defense 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, [infra]. 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, [infra]. (emphasis added)

Id.

Foster thus held, in accordance with Holloway, that the denial of a motion for separate representation based upon potential conflict is reversible error, whereas had trial counsel not objected to the multiple representation, an appellant must show "actual conflict or prejudice" to obtain reversal. Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). In Holloway, the U.S. Supreme 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.

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 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, [supra], 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 her 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 that client cannot be represented without conflict, court must appoint other counsel without considering whether public defender can avoid the conflict).

The First District Court plainly applied the wrong in Rock.[1] Despite the presence of defense counsel's objection to

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[1]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 codefendants. In Main, the district court quoted Holloway, but omitted a critical portion of the original text, thereby suggesting the court had applied a harmless error test in Holloway. The misleading quote, with the 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 involvement 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 -- its bears repeating -- is in what the advocate finds himself compelled to refrain from doing. . . Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.]

(Footnote Continued)

the joint representation, the First District held Rock would have to show actual conflict to obtain reversal. The court concluded Rock 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.

Rock, 622 So.2d at 489.

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

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, [supra]. 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.

600 So.2d at 33.

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

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." Rock, 622 So.2d at 489. The First District did not peruse the Rock record for potential conflict, however, but for 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 Rock, the First District affirmed without opinion at least four other cases in which the issue of simultaneous jury selection was raised. 622 So.2d at 488, n.2. Since Rock was issued, the First District has rejected similar claims in Clark v. State, ____ So.2d ____, 18 Fla.L.Weekly D2097 (Fla. 1st DCA Sept. 22, 1993) and Miller v. State, 624 So.2d 829 (18 Fla.L.Weekly D2170) Fla. 1st DCA 1993), and this case.

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

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this court exercise its discretionary jurisdiction and accept review of this case.

Respectfully submitted,
NANCY A. DANIELS
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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 30 day of November, 1993.

KATHLEEN STOVER

IN THE SUPREME COURT OF FLORIDA

MALCOLM BERNARD WILLIAMS,

Petitioner,

v. CASE NO.

STATE OF FLORIDA,

Respondent.

APPENDIX

NANCY A. DANIELS
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conduit that was shown on the relocation schedule. This nondisclosure involves a material fact, in that Misener's project engineer, Timothy Swanson, testified that the unknown fiber optic cable caused delay in the pile-driving activities. Because a genuine issue of material fact exists whether the nature of the fiber optic cable within the conduit created a relocation problem that delayed the contractor during the first phase of construction, as discussed in Part 1 of this opinion, factual questions exist as well in regard to whether the undisclosed fiber optic cable involves a material misrepresentation. Summary judgment was, therefore, inappropriate.

REVERSED and REMANDED. (JOANOS and WOLF, JJ., CONCUR.)

[1]A copy of the relocation schedule between DOT and Bell was furnished to Misener as part of the bid package.

[2]Because the theory for breach of the duty to defend under Count I and the cause relating to DOT's claim for contractual indemnity alleged in Count III overlap, the disposition of the claim for failure to defend is discussed under Part 3, *infra*.

[3]See contract provision quoted in Part 1 of this opinion.

* * *

Criminal law—Simultaneous selection of juries

MALCOLM BERNARD WILLIAMS, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 92-1373. Opinion filed November 19, 1993. An Appeal from the Circuit Court for Duval County. R. Hudson Olliff, Judge. Nancy A. Daniels, Public Defender; Kathleen Stover, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General; Bradley R. Bischoff, Assistant Attorney General, Tallahassee, for Appellee.

OPINION ON MOTION FOR REHEARING OR CLARIFICATION

(PER CURIAM.) Appellant's motion for rehearing is denied. However, we grant the motion for clarification as to the basis for our "Per Curiam, affirmed" decision issued on October 11, 1993, by stating that we affirmed the issue regarding simultaneous selection of juries on authority of this court's decision in *Rock v. State*, __ So. 2d __, 18 Fla. Law Weekly D1583 (Fla. 1st DCA July 7, 1993), *decision on jurisdiction pending*, no. 82,530, Florida Supreme Court. (BOOTH, SMITH AND WEBSTER, JJ., CONCUR.)

* * *

Torts—Real property—Limitation of actions—Action against excavator for negligent removal of lateral support to land after defendant removed soil from property adjacent to that of plaintiffs, and soil on plaintiffs' lot shifted and their house fell and was destroyed—Statute of limitations did not begin running at time prior to fall of house when plaintiffs' builder wrote to plaintiffs that removal of soil from adjacent property was causing soil to shift from under and around plaintiffs' property—Limitation period starts to run only when plaintiffs' land is actually harmed

DONALD E. STOKES and GRACE P. STOKES, Appellants, v. HUGGINS CONSTRUCTION COMPANY, INC., and RICHARD GENE FLORENCE, and BUCK SCONIERS, d/b/a SCONIERS SEPTIC TANK AND FILL DIRT SERVICE, Appellees. 1st District. Case No. 92-3826. Opinion filed November 17, 1993. An Appeal from the Circuit Court for Walton County. Laura Melvin, Judge. E. Allan Ramey of Ramey & Davis, DeFuniak Springs, for Appellants. Bart O. Moore of Moore, Kessler & Moore, Niceville, for Appellee Richard Gene Florence. Ernest L. Cotton of Cotton, Poché & Gates, Shalimar, for Appellee Buck Sconiers, d/b/a Sconiers Septic Tank and Fill Dirt Service.

(SMITH, J.) The Stokes appeal two final summary judgments determining that their cause of action for negligent removal of lateral support, filed against defendants Richard Gene Florence and Buck Sconiers, d/b/a Sconiers Septic Tank and Fill Dirt Service, was barred by the four-year statute of limitations set forth in section 95.11(3)(a), Florida Statutes (1989). We reverse.

In 1985, Huggins Construction Company built a beach house for the Stokes on Grayton Beach. Sometime before July 24, 1987, the adjoining property owner, Richard Gene Florence, hired Sconiers, an excavator, to remove between six and seven feet of soil from a portion of his property which was adjacent to the east side of the Stokes' lot. According to the allegations of the second amended complaint, following the excavation, sand and soil from the Stokes' lot shifted and slid into the excavation.

In the meantime, the Stokes were embroiled in a controversy with the builder, Huggins Construction Company. Mr. Stokes allegedly accused Huggins of using inferior pilings which were not properly installed. On June 3, 1986, Jackie Huggins, president of Huggins Construction Company, wrote a letter to Stokes which provides in pertinent part:

> However, you know as well as I do what the problem is. You are once again attempting to shift your responsibilities to someone else. You know that your neighbor on the East side has removed the top 6-7 feet of soil next to your house and the sand continues to shift in that direction. I told you and your attorney in my office what would be necessary to stop this problem and that it was needed now and not to wait. You did not respond to that. I am now telling you once again that this needs to be taken care of immediately before major problems occur. You have now been warned twice. Until this problem is corrected, I am withdrawing my contractor's Warranty and will not accept any further responsibility until this problem is solved.

On July 24, 1987, after a summer storm, the Stokes' house fell and was destroyed.

In May 1990, the Stokes sued Huggins and their insurer, Florida Windstorm Underwriting Association,[1] for damages which resulted when the beach house fell. On July 15, 1991, the Stokes amended their complaint to include Florence and Sconiers as additional defendants.

After filing responsive pleadings, Florence and Sconiers filed identical motions for summary judgment contending that the Stokes' action against them was time-barred. They contended that the Stokes knew or should have known of their alleged negligent acts on or before June 3, 1986, when Huggins advised Stokes by letter that excavation on the Florence property was causing sand to shift from under and around the Stokes' house.

Thereafter, the trial court entered orders granting the motions for summary judgment, essentially agreeing with appellees that as of June 3, 1986, the Stokes were on notice that the removal of lateral support on the east side of their property, by Florence, had caused sand to shift from under and around their house. The court found that as of this date, the Stokes were damaged by the removal of the lateral support and by Huggins withdrawal of his warranty until the problem was solved. The court noted that for purposes of the statute of limitations, a cause of action accrues when the last element constituting the cause of action occurs. § 95.031(1), Fla. Stat. (1989). Thus, the court ruled, even assuming appellees owed a duty to the Stokes and assuming that the negligent removal of lateral support was a breach of that duty, the letter of Huggins dated June 3, 1986, supplied the last element constituting a cause of action—damage. Because the Stokes' suit was filed in excess of five years after this letter, the court found, their suit was time-barred.

The parties do not dispute the general rule, set forth in 1 Am. Jur. 2d Adjoining Landowners, §69 (1962), that the statute of limitations begins to run against an action for damages based on impairment of lateral support to land not from the time of excavation but from the actual occurrence of mischief, which is the subsidence or sliding of the earth, and that a new and separate cause of action arises with each new subsidence. The Stokes urge application of the majority rule, while appellees contend that the rule is not applicable because as of June 3, 1986, the date of Huggins' letter to Stokes, the Stokes were on notice of an invasion of their legal rights resulting in permanent injury. *Johnson v. Mullee*, 385 So. 2d 1038 (Fla. 1st DCA 1980), *rev. denied*, 392 So. 2d 1377 (Fla. 1981); and *Smith v. Continental Insurance Co.*, 326 So. 2d 189 (Fla. 2d DCA 1976).

Although the Stokes have cited no Florida appellate decision directly on point, they rely upon two cases which they contend