IN THE SUPREME COURT OF FLORIDA

MALCOLM BERNARD WILLIAMS,

Petitioner,

vs. Case No. 82,811

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, MALCOLM BERNARD WILLIAMS, 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." References to the record on appeal will be by the symbol "R" followed by the appropriate page number(s). References to the transcripts of proceedings will be by the symbol "T" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

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

Respondent would note here that the outcome of the instant case is to be determined by the outcome in Rock v. State, Fla. Case No. 82,811, oral argument set for May 3, 1994. The appellate decision in this case is based on Rock, supra.

SUMMARY OF THE ARGUMENT

ISSUE:

The District Court of Appeal properly affirmed the trial judge's denial of Petitioner's motion to preclude multiple jury selection in his and two other cases where Petitioner failed to demonstrate any actual attorney conflict or even the risk of a conflict. The multiple jury selection procedure is a valid exercise of a trial court's discretion in promoting jury management efficiency.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DETERMINED THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONDUCTING MULTIPLE JURY SELECTION.

Prior to Petitioner's trial for burglary, Petitioner filed a "Motion to Preclude Simultaneous Multiple Jury Selection." The motion averred that defense counsel must select two juries and another defense counsel must select a third jury, and that each of the defendants is charged with a different and distinct crime. Defense counsel argued in her motion that the multiple jury selection process would (1) create a substantial likelihood of jury confusion, (2) cause a strong likelihood that the jury will not be impartial, (3) deny the defendant his right to an individual jury trial, and (4) cause potential prejudices which would outweigh any advantage of judicial economy. (R 65-67). The motion was summarily denied (T 59).

At the outset of defense counsel's questioning of the venire in Petitioner's case, counsel stated:

> Ladies and Gentlemen, you saw me here in the previous jury selection process. Let me make clear that those facts in that case and that Defendant is entirely separate from Mr. Williams. Does everyone understand that?
>
> THE VENIRE: Yes.
>
> MS. OWENS: Totally different cases?
>
> THE VENIRE: Yes.

(T 167, 168).

Counsel made no case-specific arguments and did not object to the seating of any particular juror (T 175).

On appeal, the District Court of Appeal, First District of Florida, issued a per curiam affirmance. On Motion for Clarification, the district court cited to Rock v. State, 622 So. 2d 32 (Fla. 1st DCA 1993), attached hereto as Appendix "A." In Rock, the court concluded that

> 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 benefitted 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. at 489.

A. MULTIPLE JURY SELECTION

In February of 1992, the Office of the State Courts Administrator issued a document entitled Towards an Efficient Jury Management System, A Report of the Jury Management Project

for November 1990 - June 1991 (attached hereto as Appendix "B").[1] One of the key juror management strategies which had been introduced was "multiple voir dire," which the Office of the State Courts Administrator described as ". . . a technique whereby one judge selects multiple juries on one day for two or more jury trials scheduled during the week or term." Report of the Jury Management Project, p. 5.

This technique is apparently commonly employed in Duval County; Rock v. State, 622 So. 2d 487 (Fla. 1st DCA 1993), and in Dade County; Johnson v. State, 600 So. 2d 32 (Fla. 3d DCA 1992). The multiple jury selection process itself is a valid exercise of a trial court's wide discretion in the conduct of jury selection in the interest of the orderliness and dispatch of trials. See, e.g., Barker v. Randolph, 239 So. 2d 110 (Fla. 1st DCA 1970). Trial courts have very broad discretion in the procedural conduct of trials. Feenen v. State, 359 So. 2d 569 (Fla. 1st DCA 1978).

In United States v. Maraj, 947 F.2d 520 (1st Cir. 1991), the court stated:

> While we have been unable to find any cases squarely on point, we think that, in the absence of some founded claim of prejudice on the part of a specific juror or jurors, the mere fact that defense counsel appears before the venire and chooses juries back to back while representing defendants in two different cases will not support a claim of generalized unfairness. *See United States v. Graham*, 739

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[1] A request for judicial notice and motion to supplement the record with this document has been filed in this Court in the Rock case, case no. 82,811. Oral argument is set in Rock for May 3, 1994.

F.2d 351, 352 (8th Cir. 1984)("In the absence of some showing of actual prejudice . . . we have repeatedly rejected the argument that a juror's service in prior cases involving the same attorneys or witnesses supports a per se theory of implied bias.")(citing other Eighth Circuit cases); *United States v. Riebschlaeger*, 528 F.2d 1031, 1032-33 (5th Cir.)(per curiam)(the fact that many of the jurors served in other criminal cases which defense counsel had unsuccessfully defended did not taint venire), *cert. denied*, 429 U.S. 288, 97 S. Ct. 86, 50 L. Ed. 2d 91 (1976); *United States v. Lena*, 497 F.Supp. 1352, 1363 (W.D. Pa. 1980)(similar; same prosecuting attorney involved in both cases), *aff'd*, 649 F.2d 861 (3d Cir. 1981); *see also United States v. Carranza*, 583 F.2d 25, 28 (1st Cir. 1978)(absent a specific showing of bias or prejudice, "the fact that a juror sat in a prior case involving the same government witnesses and the same type of crime will not be grounds for disqualification *per se* unless the defendant is charged with an offense arising from the same transaction"); *Johnson v. State*, 484 F.2d 309, 310 (8th Cir.)(per curiam)(similar), *cert. denied*, 414 U.S. 1039, 94 S. Ct. 539, 38 L. Ed. 2d 329 (1973). Jurors, after all, do not expect that a lawyer will represent only one client in his or her lifetime.

> 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. Instead of selecting juries only on the eve of actual trial, federal district judges often select four or five juries at a crack, calling the jurors to serve as the cases are reached. Properly handled, the adverse effects of back-to-back empanelment are negligible. By the same token, the economies of the practice are significant. We encourage use of the method when feasible, much as we applaud other efforts at judicial economy so long as they can be implemented without diluting the parties' rights to a fair trial.

Id. at 524, 525. In the same vein, the First Circuit Court of Appeals stated in United States v. Quesada-Bonilla, 952 F.2d 597, 599 (1st Cir. 1991), that:

> 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. Such practices are fairly common in several judicial districts. *See, e.g., United States v. Franklin*, 700 F.2d 1241, 1242 (10th Cir. 1983); see also *United States v. Maraj*, 947 F.2d 520, 523-35 (1st Cir. 1991). And, we see no reason to challenge, or to depart from that circuit authority. See also *United States v. Graham*, 739 F.2d 351, 352 (8th Cir. 1984)(absent showing of "actual prejudice on the part of the challenged jurors, we have repeatedly rejected the argument that a juror's service in prior cases involving the same attorneys or witnesses supports a per se theory of implied bias"); *United States v. Riebschlaeger*, 528 F.2d 1031, 1032-33 (5th Cir.)(per curiam), *cert. denied*, 429 U.S. 828, 92 S. Ct. 86, 50 L. Ed. 2d 91 (1976)(jurors' service in other cases with same defense counsel and same prosecutor and resulting in convictions did not require the court to "quash" entire jury panel; "concept of implied bias" rejected).

B. THE JURY SELECTION PROCEDURE IN THIS CASE IN NO WAY IMPAIRED PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner first argues that the multiple jury selection process deprived him of effective assistance of counsel because defense counsel represented him and one other unrelated defendant at jury selection. Specifically, Petitioner argues that ". . . 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." (Petitioner's brief, p. 19).

As a preliminary matter, Respondent would note that Petitioner's boilerplate citations regarding critical stages of proceedings, the right to conflict-free counsel, etc. fail to show the presence of any conflict or denial of counsel whatsoever in this or any other multiple jury selection case. There has

been no showing in this case that there was any actual or potential conflict of interest whereby counsel's divided loyalty damaged the interests of one defendant while benefitting the other. Petitioner has failed to demonstrate that he was prejudiced whatsoever by this procedure.

Petitioner argued on appeal that although generally claims of ineffective assistance of counsel are not appropriate for direct appeal, the error in this case was plain from the record, citing, inter alia, cites Sobel v. State, 437 So. 2d 144 (Fla. 1983). (initial brief of Appellant, p. 20). The State countered that the issue could not be raised for the first time on direct appeal as the exceptions to the general rule did not apply. The district court apparently agreed with the State as the appellate opinion does not address ineffective assistance of counsel. As ineffective assistance was not addressed or ruled on below, this Court should likewise refuse to address it.

Petitioner cites a host of cases involving one attorney representing two codefendants during the guilt and penalty phases of trial for the novel proposition that when one attorney represents two unrelated defendants during jury selection only, per se reversible error occurs. These cases do not support Petitioner's position as it relates to jury selection.

Petitioner also cites Baker v. State, 202 So. 2d 563 (Fla. 1967)(joint representation of codefendants at trial); Belton v. State, 217 So. 2d 97 (Fla. 1968)(joint representation of codefendants at trial); and State v. Youngblood, 217 So. 2d 98

(Fla. 1968)(joint representation of codefendants at trial). This Court held in Belton and Youngblood that a failure to appoint separate counsel was not error absent a showing of prejudice or conflict of interests and that prejudice does not presumptively follow joint representation.

The other cases cited by Petitioner in this regard are also distinguishable: Holloway v. Arkansas, 435 U.S. 475 (1978)(joint representation of codefendants at trial); Foster v. State, 387 So. 2d 344 (Fla. 1980)(counsel also represented codefendant who testified for the State against Foster); Babb v. Edwards, 412 So. 2d 859 (Fla. 1982)(representation of adverse codefendants by same public defender office).[2] None of these cases are relevant to the issue before this Court.

Petitioner argues that the District Court erred in requiring him to show actual conflict or prejudice to obtain a reversal on appeal. The district court stated:

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[2] In fact, the holding in Babb was based solely on this Court's interpretation of §27.53(3), F.S. (Supp. 1980). The statute has been changed, and now states that

> If at any time during the representation of two or more indigents the public defender shall determine that the interests of the accused are so adverse or hostile that they cannot 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 move the court to appoint other counsel. The court may appoint one or more members of the Florida Bar, who are in no way affiliated with the public defender, in his capacity as such, or in his private practice, to represent those accused. (emphasis supplied).

> 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 another client. *Main v. State*, 557 So. 2d 946, 937 (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.*

Rock, supra at 489.

In the present case, Petitioner has failed to demonstrate even a scintilla of conflict or prejudice or that there was ever a risk of such. The District Court below correctly held that "[i]n order to be entitled to a reversal, an appellant would have to demonstrate actual conflict or prejudice" (Rock, supra at 489), citing Foster v. State, supra.

In Johnson v. State, 600 So. 2d 32, 33 (Fla. 3d DCA 1992), the Third District stated:

> Defendant Johnson argues that the trial court committed reversible error in consolidating three cases for simultaneous jury selection. Assuming, without deciding that the trial court properly exercised its discretion in consolidating these cases for jury selection, *see United States v. Quesada-Bonilla*, 952 F.2d 597, 599 (1st Cir. 1991), and cases cited therein, we find that the trial court erred in overruling defense counsel's objection to representing multiple clients during jury selection. "To deny a motion for separate representation, where a risk of conflicting interests exists, is reversible error." *Foster v. State*, 387 So. 2d 344, 345 (Fla. 1980); *Belton v. State*, 217 So. 2d 97 (Fla. 1968); *Baker*

> *v. State*, 202 So. 2d 563 (Fla. 1967); *Bellows v. State*, 508 So. 2d 1330 (Fla. 2d DCA 1987); *Washington v. State*, 419 So. 2d 1100, 1100 n. 2 (Fla. 3d 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, asserting that his clients' interests conflicted. The record demonstrates a risk of conflict. *Foster; Main; Bellows.* Thus, we hold that the court erred in overruling the objection. (emphasis supplied).

In contrast, the record in this case demonstrates no risk of conflict as each defendant was charged with a separate and distinct crime. There is nothing to show that any of the defendants were disadvantaged or that any of the defendants failed to receive a fair trial before an impartial jury.

The District Court in Rock noted in footnote 3 of the opinion:

> 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 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 1130 (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.

Rock, supra at 489.

Petitioner's jury selection never presented a risk of conflict. Petitioner asserts that "[b]oth Johnson and the instant case demonstrate a 'risk of conflict' because defense counsel in both cases stated to the court that there was a

possibility of conflict." (Petitioner's brief, p. 23). The mere saying of a thing does not make it so. Petitioner's perception that a risk of conflict existed is nothing more than sheer speculation and conjecture. This Court has held that reversible error cannot be predicated on conjecture. Sullivan v. State, 303 So. 2d 632 (Fla. 1974), cert. denied, 428 U.S. 911 (1976); Ford v. Wainwright, 451 So. 2d 471 (Fla. 1984).

In sum, Petitioner has failed to demonstrate that the District Court used the wrong standard in reviewing his claim of attorney conflict or that a risk of such conflict even existed in this case.

C. THE JURY SELECTION PROCESS IN THIS CASE WAS NOT AN IMPROPER CONSOLIDATION OF A CRUCIAL STAGE OF PETITIONER'S TRIAL.

Petitioner contends that the multiple jury selection procedure constitutes an improper "consolidation", however, the procedure is not prohibited by statute or by the Rules of Criminal Procedure. Serial voir dire is no more prejudicial or unconstitutional than serial arraignment. The prosecutions below were not consolidated for trial.

As the trial court noted below, there is no practical difference between the multiple jury selection process and the single jury selection process. Regardless of whether juries are picked through a multiple or sequential process, the prospective jurors all come from the same jury pool and more prospective jurors are brought in if needed. Each defendant retains the same number of peremptory challenges in both systems.

Petitioner first complains that when a jury is picked for a subsequent case, the jury pool consists of some prospective jurors who were excused in previous cases. Petitioner argues that this result "undermines the integrity of the jury selection process by unfairly diluting the number of peremptory challenges available to defense counsel." (Petitioner's brief, p. 27). The State disagrees. Normally, an excused prospective juror is sent back to the jury pool to participate in a subsequent voir dire. Here, the excused prospective juror merely remains in the courtroom instead of going back to the venire room. The number of peremptory challenges is in no way "diluted", as each defendant has his full number of challenges. A juror who was struck once may be struck again. Being struck or challenged does not render a prospective juror ineligible for service. If anything, the multiple selection system benefits subsequent counsel as counsel has the benefit of already having observed voir dire of a good portion of the venire, who may be voir dired further by subsequent counsel. Counsel is aware that a prospective juror has previously been struck, as opposed to the sequential system where counsel is unaware whether or not a prospective juror from the jury pool may have been struck in a prior case.

Petitioner further contends that multiple voir dire violated his rights to due process and an impartial jury by giving the State an unfair advantage. Petitioner argues that "[b]y striking jurors themselves, prosecutors can guarantee that a juror who might be more favorable on the third defendant's case will come

back if stricken in cases 1 or 2." (Petitioner's brief, p. 28). This scenario is purely speculative and Petitioner does not even allege that this happened in his case. In any event, Petitioner ignores the fact that such a "strategy" would work both ways, and defense counsel could attempt such a "strategy" just as well as prosecutors could.

Next, Petitioner contends that "[c]ounsel for the defendants in cases 1 and 2 also become tools for the State by striking jurors who were less desirable defense jurors." (Petitioner's brief, p. 28). Petitioner reasons that because these jurors return to the panel in subsequent cases, subsequent defendants get panels composed of "reject jurors."

In the normal jury selection process the same thing occurs, but counsel is unaware of it. If anything, subsequent defendants here are at a greater advantage than normal due to this knowledge. Again, Petitioner's argument is speculative and ignores the clear observation that such a result would work both ways, i.e., would impact prosecution and defense equally. The State has no unfair advantage.

Petitioner fails to identify any aspect of the multiple jury selection process which violated his right to due process and an impartial jury. In fact, Petitioner affirmatively accepted his jury as constituted without reservation (T 175). He does not allege that any objectionable juror sat on his jury.

Petitioner also complains that the jury selection process was long and tiring. These complaints were not raised as error below and are not preserved for review. Tillman v. State, 471 So. 2d 32 (Fla. 1985). Even if true, jury trials are normally long and tiring.

Finally, Petitioner contends that the multiple jury selection process abrogated his right to an independent examination of the venire. The contrary is true. Not only did defense counsel have ample opportunity to question the venire, but she also had the benefit of hearing voir dire in the preceding cases. No further time was requested nor was such apparently necessary. The trial judge did not limit counsel's time.

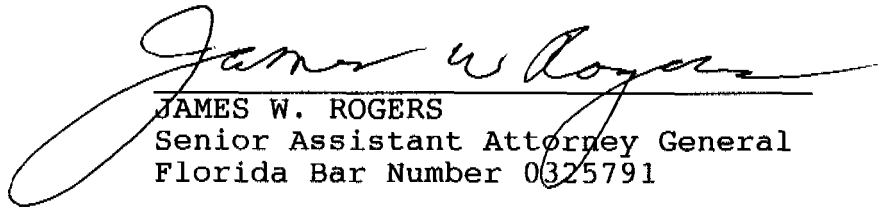
In sum, Petitioner has failed to show that the trial court abused its discretion in conducting multiple jury selection or that he suffered any prejudice whatsoever by this procedure. The District Court's decision must consequently be affirmed.

CONCLUSION

Based on the above arguments and citations of legal authorities, Respondent respectfully urges this Honorable Court to approve the decision of the District Court in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF ON THE MERITS has been furnished by U.S. Mail to **MS. KATHLEEN STOVER**, Assistant Public Defender, Office of the Public Defender, Second Judicial Circuit of Florida, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 13th day of April, 1994.

BRADLEY R. BISCHOFF