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IN THE SUPREME COURT OF FLORIDA

CHARLIE BROWN, JR.,

Petitioner,

v.

CASE NO. 83,511
1DCA CASE NO. 92-1476

STATET OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON JURISDICTION

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PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

CHARLIE BROWN, JR.,	:	
Petitioner,	:	
vs.	:	CASE NO. 1DCA CASE NO. 92-1476
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

BRIEF OF PETITIONER ON JURISDICTION

I PRELIMINARY STATEMENT

This is on review from the decision of the First District Court of Appeal below, Brown v. State, 19 Fla. L. Weekly D___ (Fla. 1st DCA April 7, 1994) (opinion on motion for clarification), which is attached hereto as an appendix.

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 a "PCA cite" to its prior decision in Rock v. State, 622 So. 2d 487 (Fla. 1st DCA 1993), review pending, no. 82,530, oral argument set for May 3, 1994.

Timely notice of discretionary review was filed on April 8, 1994.

III SUMMARY OF ARGUMENT

This Court has jurisdiction to grant review under Jollie v. State, infra. Jollie held that review may be granted over a citation PCA when the cited case is pending review in this Court. Here, the cited case, Rock, is currently pending review and this Court has scheduled oral argument for May 3, 1994. Thus, this Court has jurisdiction to accept review over the instant case and decide it along with Rock.

The decision below also 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.

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 IS CURRENTLY PENDING IN THIS COURT, AND IT IS IN DIRECT AND EXPRESS CONFLICT WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

This Court has jurisdiction to grant review under Jollie v. State, 405 So. 2d 418 (Fla. 1981), Art. V, §3(b)(3), Fla. Const., and Rule 9.030(a)(2)(A)(i), Fla. R. App. P. Jollie held that review may be granted over a citation PCA when the cited case is pending review in this Court. Here, the cited case, Rock, is currently pending review and this Court has scheduled oral argument for May 3, 1994. Thus, this Court has jurisdiction to accept review over the instant case and decide it along with Rock.

The decision of the First District Court in Rock v. State, supra, also 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, infra, 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 standard in Rock.[1] Despite the presence of defense counsel's

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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

(Footnote Continued)

objection to 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 here.

(Footnote Continued)

> 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.]

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

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.

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 Miller v. State, 624 So. 2d 829 (Fla. 1st DCA 1993); Clark v. State, 625 So. 2d 68 (Fla. 1st DCA 1993); Williams v. State, 626 So. 2d 1100 (Fla. 1st DCA 1993), review pending, no. 82,914; Williams v. State, 627 So. 2d 524 (Fla. 1st DCA 1993), review pending, no. 82,811; 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 along with Rock.

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 petitioner, this 12th day of April, 1994.

P. DOUGLAS BRINKMEYER

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

CHARLIE BROWN, JR.

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO.: 92-1476

Opinion filed April 7, 1994.

An appeal from the circuit court for Duval County. John Southwood, Judge.

Nancy A. Daniels, Public Defender; Josephine L. Holland, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Bradley R. Bischoff, Assistant Attorney General, Tallahassee, for Appellee.

OPINION ON MOTION FOR CLARIFICATION

PER CURIAM.

The judgment of conviction appealed is affirmed on the authority of Rock v. State, 622 So. 2d 487 (Fla. 1st DCA 1993), review pending before the Supreme Court of Florida, Case No. 82,530.

SMITH, ALLEN AND DAVIS, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

CHARLIE BROWN, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO.: 92-1476

83511

Opinion filed March 3, 1994.

An appeal from the Circuit Court for Duval County.
John Southwood, Judge.

Nancy A. Daniels, Public Defender; Josephine L. Holland, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Bradley R. Bischoff, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM

AFFIRMED.

SMITH, ALLEN AND DAVIS, JJ., CONCUR.