

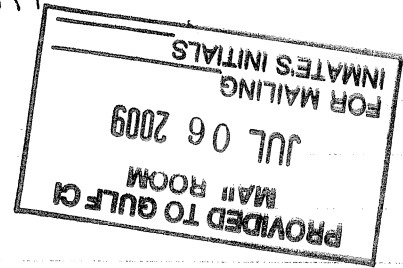
SC09-1150

IN THE SUPREME COURT  
STATE OF FLORIDA

EDMOND DAVID BELCHER  
Appellant / Petitioner

v.  
STATE OF FLORIDA  
Appellee / Respondant

DCA Case No.  
1D06-2049



JURISDICTIONAL BRIEF  
FOR APPELLANT

APPEAL TO INVOKE DISCRETIONARY  
REVIEW OF FIRST DISTRICT COURT  
OF APPEAL'S DECISION IN  
BELCHER V. STATE

FILED  
THOMAS D. HALL  
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## PRELIMINARY STATEMENT

Petitioner will self refer as petitioner, Belcher, or E.B. where economically necessary to avoid confusion. Belcher will refer to the record as Indexed on appeal T-Transcript, R-Record, S-Sentencing. Belcher is a Pro-se litigant, with no legal training, and asks for the most liberal consideration this Court is authorized to apply to this brief.

## SUMMARY OF ARGUMENTS

I. First District's decision is based on an unpreserved and waived procedural/technical claim that the record does not reflect good cause to grant a tardy motion for juror interview. This decision is based on a non-reviewable action of the trial court and in conflict with *United Telephone Co. of Fla. v. Mayo*, 345 So2d 648 (FLA 1977); *Philon v. Reid*, 602 So2d 648 (FLA 2d DCA 1992) as trial court acted well within its discretion to accept the amended motion.

II First District's decision expresses both prongs of ineffective assistance of counsel yet fails to grant review or relief which conflicts with the decisions and reasoning of *Sims v. States*, 33 FLA L. Weekly S 698 (FLA 2008); *Rios v. State*, 730 So2d 831 (FLA 3d DCA 1999) et al in that the error is clear and apparent on the face of the record, is the finding of the court, and would be a waste of judicial resources to send it back to the trial court.

## STATEMENT OF CASE

Petitioner's May 26, 2004 arrest culminated in a July 6, 2004 single count indictment for first Degree Pre-Meditated murder and/or felony murder with a firearm. Petitioner's jury trial in the First Judicial Circuit in and for Escambia County, Honorable Nickolas Geeker presiding was January 30-31, 2006. Jury returned a guilty verdict for Second Degree Murder with a firearm, a lesser included offense. Trial counsel moved for Directed Verdict of Acquittal and Judgement of Acquittal on grounds state's case reached by evidence, Manslaughter, at best. Motions denied. Petitioner filed motion for new trial February 8, 2006. Said motion denied without hearing February 13, 2006. Petitioner's March 30, 2006 Sentencing included an ORE TENUS motion for new trial and/or juror interview. Said motion was accepted and denied without prejudice same day. Written amended motion for juror interview filed April 11th, 2006, written denial of said motion filed April 18, 2006. Notice of Appeal filed April , 2006. First DCA accepted jurisdiction and First DCA remanded jurisdiction to First Judicial Circuit for trial court hearing on motion to allow juror interview on or about January 2007 (Not in record). Trial court hearing of January 11, 2007, resulted in a denial to allow juror interviews based on failure to meet the requirements of Sconyers v. State 513 So2d 1113 (Fla App 2 Dist 1987). First District Court of Appeals Affirmed with opinion Petitioner's convictions on April 3, 2009. Mandate issued June 16, 2009. Notice to invoke Discretionary review filed (by prison mail system) June 24, 2009.

## STATEMENT OF FACTS

During opening arguments

State would present a case of First Degree Murder,

Second Degree Murder, or at a minimum Manslaughter (T-1-108, 110). Belcher would present an affirmative defense of justifiable homicide / Self defense (T-I- 115-116). State's witnesses testified Belcher argued with Mother May 26, 2004 and was angry (T-I-144). At Belcher's residence (The crime scene) Dustin Norton (Witness) and Brayden Smith (Victim) were told, once again, not to be at the residence by Sheri Belcher, (Petitioner's Mother) (T-1-156, 174, 176, 177), and petitioner (T-1-182, 183, 184). Norton and Smith were verbally and physically combative. Norton and Smith entered and exited Belcher property 2 times after being told to leave and not be there. Smith re-entered property a third time after going to his vehicle while threatening petitioner and Sheri Belcher (T-1-187, T-4-501). Sheri Belcher and petitioner testified Smith forcibly entered the house (T-3-421, 422, T-4-498). They testified Smith battered Sheri Belcher. Sheri Belcher testified she was afraid Smith would kill her (T-3-428, 431). Norton did not see Smith's actions. Petitioner used non-deadly force to cause Norton and Smith to leave the residence (T-1-158, 159). Smith returned (third time) AFTER being informed petitioner retrieved firearm and took a position on driveway (T-1-161). Smith verbally assaulted petitioner and yelled "What ya gonna do, Shoot me dog?" (T-1-161). Petitioner dropped the .22 caliber cartridge, picked it up, loaded the single shot squirrel rifle, and fired into Smith's Chest (T-1-163, 165). Petitioner was video and audiotaped in police cruiser and tape was played for jury. Escambia County Sheriff's Department placed petitioner in "interview" room where petitioner asked for attorney. Deputy Amerson entered and convinced petitioner to talk to investigator's (T-2-373). Petitioner signed Miranda waiver. Videotape was made of interview and played for jury. Defense moved for directed verdict and judgement of acquittal prior to charging conference based on Thompson v. State 552 So2d 264 (FLA App 2 Dist 1989) (T-1-542).

Motions denied (T-3-555). At charging conference, petitioner requested forcible felony definitions pertinent to victims actions, Aggravated Stalking denied - Tampering with a witness denied. Burglary - Attempted burglary, aggravated assault and false imprisonment granted (T-3-566). Petitioner requested removal of aggressor instruction (T-3-578) denied. Requested removal of "Duty to retreat instruction" (Petitioner was on his own premises). Denied (T-3-580). Requested special instructions on motive denied (T-3-582, 585). Requested Castle Doctrine denied (T-3-586). Requested Castle Doctrine use of force - denied (T-3-587). Requested Castle Doctrine No Duty to retreat - denied (T-3-589). In total, Petitioner was denied all requested instructions. Jury returned a verdict of guilty of Second Degree Murder with a firearm (T-4-963-964) on a defective verdict form. Petitioner filed a motion for New trial on February 8, 2006. Denied February 13, 2006 with no hearing. Petitioner moved at sentencing "ORE TENUS" to interview jurors based on alleged misconduct of false answering voir dire questions concerning prior arrests and prosecutions. Court accepted evidence and denied amended motion without prejudice (S-15). Written motion filed April 11, 2006, written order finding "There having been good cause shown" ordered the motion denied without prejudice.

On Appeal, April 18, 2006, The First District remanded jurisdiction to trial court to hear a new motion to interview jurors. Trial court heard argument and denied based on failure to meet the criteria of Sconyers v. State 513 So.2d 1113 (FLA App 2 Dist 1987). Petitioner appealed THIS denial in initial brief.<sup>FN</sup>

FN - First District's opinion and decision appear to ignore this January 11, 2007 litigation. Belcher understands the correctness of the First District's decision is not at issue in the Jurisdictional brief, and includes those facts to establish the record.

# I

First District's decision expressly and directly conflicts with United Telephone Co. of Fla. v. Mayo 345 So2d 648 (FLA 1977). This court cited the United States Supreme Court's rule "... it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party" id at 653 (citing NLRB v. Monsanto Chemical Co. 205 F.2d 763, 764) (quoting American Farm Lines v. Balch Ball Freight 397 U.S. 532, 539 (U.S. 1970)). Direct conflict is apparent as "good cause for bringing a motion for juror interview after the deadline imposed by rule", is a matter of trial court discretion. Appellate court cited FLA. R. Crim. P. 3.575 which in fact grants the trial court authority to accept a tardy motion for juror interview upon showing of good cause. Trial court accepted the amended motion (S.T. pg 15 paginated 159) and denied motion without prejudice. According to Mayo (supra) this exercise of discretion is not reviewable. Belcher presented evidence jurors provided false information on the voir dire questionnaire concerning prior prosecutions which the court accepted (paginated 172-183). The issue is of direct constitutional magnitude, and the ends of justice (a fair and impartial jury) allow the trial court to decide whether to hear the motion according to Mayo (supra).

Furthermore, the decision in Belcher is in conflict with a plethora of this court's decisions. As State never presented a legal argument to establish "lack of good cause" as a preserved issue.



"For an issue to be preserved for appeal, it must be presented to the lower court, and the specific legal argument or ground to be argued on appeal must be part of that presentation" Doorbal v. State 983 So2d 464 (FLA 2008) (citing Perez v. State 919 So2d 347, 359 (FLA 2005)) see also Murray v. State 34 FLA L. Weekly 5171 (FLA 2009)

"While no magic words are needed to make a proper objection. The articulated concern must be 'sufficiently specific to inform the court of the perceived error'" (quoting State v. Stephenson 973 So2d 1259, 1262 (FLA App 5 Dist 2008)). Without proper specific objection, Belcher was not informed of, nor could he argue the timeliness issue decided on appeal.

Belcher points to Philon v. Reid 602 So2d 648 (FLA App 2 Dist 1992) "... District court of appeal was prohibited from independent examination of record to determine if there was record support for unspecific conclusions of trial judge granting new trial..." id at 651, jurisdiction accepted 614 So2d 503, cause dismissed 620 So2d 762. First District's decision rests on the Appellate court's review of the record, and their opinion that good cause did not exist for the trial court to hear the motion and thus, the motion was time barred. This directly conflicts with the rule of law prohibiting such review once the trial court has exercised its broad discretion as pointed out in Mayo (supra) and Philon (supra).

In Crossley v. State, this court concluded "That because the court below 'reached the opposite result on controlling facts which, if not virtually identical, more strongly dictated' the result reached by the alleged conflict case, a conflict of decision existed that warranted accepting jurisdiction." Crossley v. State 596 So2d 447, 449 (FLA 1992) (as cited in Arenas v. Miami-Dade County 928 So2d 1163, 1166, 1167 (FLA 2006)).

Belcher argues the controlling facts are the trial court's exercise of discretion and the Appellate Court's lack of authority to review. Because Fla. R. Crim. P. 3.575 is relatively new, this court has not heard the specific issue of a time barred motion for juror interview on direct appeal from jury trial, but the decision in Belcher clearly expresses a point or rule of law that has great propensity to be repeated, but not reviewed due to the lack of prior litigation.

Furthermore, the decision in Belcher creates a hypothetical conflict between decisions on Fla. R. Crim. P. 3.050 enlargement of time after the period ends "based on excusable neglect" and Fla. R. Crim. P. 3.575 "upon showing of good cause". Belcher's decision could be read to indicate rule 3.050 would not apply to motions for juror interview, and it could be read to establish motion for juror interviews MUST BE AMENDED before the 10-day new trial motion period ends.

Either conclusion would cause conflict over which test, i.e. Good cause or excusable neglect should control in tardy motion for juror interview cases. The Appellate decision denies Belcher basic Due Process and is contrary to firmly established decisional law as cited above. Thus, this court has jurisdiction to review Belcher v. State (supra).

## II

First District's decision expressly and directly conflicts with this court's decision in Sims v. State 33 Fla L. Weekly S698 (Fla 2008) (and all cases cited in sections [7] [8] of decision) see also Bios v. State 730 So2d 831 (Fla App 3 Dist 1999)

"... ineffective assistance may be considered during direct appellate proceedings if the ineffectiveness is apparent on the face of the record and it would be a waste of judicial resources to require the trial court to address the issue" id at

The Belcher decision states "... The record reflects that defense counsel knew of possible juror misconduct by mid-February at the latest but did not raise the issue until March 30, 2006. The motion for jury interview was therefore time barred. Fla. R. Crim. P. 3.575" (see attached opinion). The decision outlines defense counsel's performance failure. The obvious prejudice of being denied a jury interview meets Strickland's "but for counsel's errors, it is reasonably probable the outcome of the proceedings would have been different". Strickland v. Washington, 446 U.S. 668, 104 S.Ct 2052 (1984).

Further prejudice is evident as Belcher must spend years attempting to litigate this issue post-conviction when the "record" reflects Appellate Counsel presented the issue <sup>FN1</sup> on direct appeal. First District's decision blames counsel for the failure.

When faced with Prima facie evidence of juror misconduct this court has remanded jurisdiction to the trial court for limited juror interviews. Marshall v. State 854 So2d 1235 (Fla 2003) First District viewed record evidence (paginated ) which establishes a prima facie case of juror misconduct. Where voir dire questionnaire reflects negative response to prior arrest or prosecution question, and public records, Court records, etc. reflect prior arrest or prosecutions. <sup>FN2</sup>

FN1 - Issue one - Three jurors failed to reveal post criminal prosecutions and/or to answer questions honestly in voir dire, and the court erred in failing to permit post-trial interviews to determine the reason for their misconduct. (8)

In Roberts v. Tejada 814 So2d 334, 336, 337 (FLA 2002) This court noted a motion to interview jurors was granted based on jury pool, public record, driver's license and birthdate evidence. The Fourth District cited this in Sterling v Feldbaum 980 So2d 596 (FLA App 4 Dist 2008) before stating "...where the information submitted by the appellant was sufficient to show reasonable grounds that the jurors identified in the motion concealed material information during voir dire, the trial court should have granted appellants request to interview them. Then, depending upon the outcome of the juror interviews and appellants ability to establish that a jurors non-disclosure ... is relevant and material to jury service in this case, and not attributable to appellants lack of diligence, the court could determine whether appellant is entitled to a new trial." (see De la Rosa v. Zeguer 659 So2d 239, 241 (FLA 1995))  
id at 599

Belcher presented ample evidence to establish grounds to grant a motion to interview jurors. To deny a review of the issue based on a procedural rule that clearly falls within the trial court's broad discretion, flies in the face of prior decisions which have granted the interview up to years after the trial and direct appeal.

FN2 - Belcher's trial was prior to this Court's 2008 amendment which included a standardized voir dire questionnaire

## CONCLUSION

Belcher would ask this court to exercise discretionary review of the preserved errors in his trial, including but not limited to:

Defense motion in limine paragraph 3; Introduction of videotape from squad car to establish state of mind after the fact; All jury instruction denials, especially aggressor instruction, forcible felony instruction (as Belcher was not charged with any independent felony); and Castle Doctrine instructions; Sufficiency of evidence to bring a First or Second Degree Murder Case to deliberation; Denial of judgement of acquittal and directed verdict; Trial courts instruction to defense counsel to inform jury of the law during closing argument (see charging conference).

Belcher prays this Court would accept jurisdiction and allow a brief on petitioner's behalf be filed to correct the violations of Due Process and Equal Protection which culminated in an erroneous conviction for murder when Belcher was justified by law in his actions.

dissented from the majority opinion upholding the trial court's failure to grant a continuance. *See Brown v. State*, 942 So. 2d 12 (Fla. 1st DCA 2006) (Browning, J., dissenting). We are now faced with the consequences of such result and must affirm, because Appellant cannot show ineffective assistance of counsel with prejudice. Unfortunately, Appellant's alleged errors were not caused by his counsel, but, in my view, by the trial court's failure to follow existing case law and this court's failure to correct it. A far, far better result would have been achieved had the trial court granted one of Appellant's four motions for a continuance, or this court corrected the trial court's abuse of discretion on direct appeal. I must affirm here, but believe now, as I believed at the time of my dissent, that I was correct. Accordingly, I unenthusiastically concur with the majority opinion.

\* \* \*

**Criminal law—Second degree murder—Juror interview—Motion for jury interview, alleging three jurors misrepresented whether they or their immediate family had been prosecuted, was time-barred where motion was not filed within ten days after rendition of verdict and record does not reflect good cause for bringing motion after deadline imposed by rule**

EDMOND DAVID BELCHER, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 1D06-2049. Opinion filed April 3, 2009. An appeal from the Circuit Court for Escambia County. Hon. Nickolas P. Geeker, Judge. Counsel: Michael R. Rollo, Pensacola, for Appellant. Bill McCollum, Attorney General; and Giselle Lysten Rivera, Assistant Attorney General, Tallahassee, for Appellee.

(BROWNING, J.) Edmond Belcher appeals his second-degree murder conviction on three grounds, only one of which bears comment. Belcher argues that the trial court erred in denying his motion for a juror interview. Belcher claims three jurors misrepresented whether they or their immediate family had been prosecuted. We affirm because the record does not reflect good cause for bringing a motion for juror interview after the deadline imposed by rule.

Florida Rule of Criminal Procedure 3.575 governs motions for permission to interview a juror or jurors. By rule, such motions must be filed within ten days after rendition of the verdict, unless good cause is shown for delay. Such motions must state the names of the juror(s) to be interviewed and must give the reasons the moving party believes that the verdict may be subject to challenge.

The jury rendered its verdict on February 1, 2006, and Belcher brought a motion for new trial on February 8, 2006. The motion for new trial focused on the jury instructions and the sufficiency of the evidence. The motion was denied without a hearing on February 12, 2006, but defense counsel brought it up during the sentencing hearing on March 30, 2006. Defense counsel claimed that the motion reserved the right to claim juror misconduct at hearing.\*

Defense counsel then made an oral motion for a jury interview, claiming three jurors had misrepresented whether they or their family had been prosecuted. Defense counsel acknowledged the 10-day time limit under Rule 3.575. The state objected to the motion as untimely, but the trial court allowed testimony from Belcher's mother to establish when she first learned of the prosecutions.

Ms. Belcher testified that she hired a private investigator on the day after her son's conviction. She testified that the investigator obtained copies of the juror questionnaires within the ten-day window. She testified that she notified defense counsel right after she "found out on the computer about all these things so it was with just in a few days."

Defense counsel stated that, at the time he filed the motion for new trial on February 8, Ms. Belcher had not told him what she learned. The trial judge found that defense counsel had not filed an amended motion for new trial or otherwise raised allegations of juror misconduct within the time established by rule.

We agree. The record reflects that defense counsel knew of possible juror misconduct by mid-February at the latest but did not

raise the issue until March 30, 2006. The motion for jury interview was therefore time-barred. Fla. R. Crim. P. 3.575.

AFFIRMED. (KAHN and BENTON, JJ., CONCUR.)

\*The motion for new trial concluded with this cryptic sentence: "If, upon hearing of this Motion, there arrives any indication of a denial of the Defendant's rights to a fair trial, and in particular with regard to conduct by the State, the Court, Defense Counsel, a juror, or any Court personnel, the Defendant submits such was without fault by him, and thus alleges that such comprises a basis for a new trial." It is not obvious what this means, but whatever it means, it does not satisfy Rule 3.575.

\* \* \*

**Criminal law—Sentencing—Resentencing—Where appellate court reversed defendant's original downward departure sentence for failure to provide written reasons, trial court on resentencing was required to sentence defendant within guidelines**

STATE OF FLORIDA, Appellant, v. KELVIN L. DUNN, Appellee. 1st District. Case No. 1D08-840. Opinion filed April 3, 2009. An appeal from the Circuit Court for Leon County. Richard L. Hood, Judge. Counsel: Bill McCollum, Attorney General, and Thomas D. Winokur, Assistant Attorney General, Tallahassee, for Appellant. Nancy A. Daniels, Public Defender, and Kathleen Stover, Assistant Public Defender, Tallahassee, for Appellee.

(PER CURIAM.) The State appeals the trial court's resentencing of Kelvin L. Dunn to a downward departure sentence following this court's reversal and remand of his original downward departure sentence in *State v. Dunn*, 970 So. 2d 922 (Fla. 1st DCA 2007). The State contends that on remand, the trial court was required to sentence Dunn within the guidelines. We agree.

In *Pope v. State*, the supreme court held, "[W]hen an appellate court reverses a departure sentence because there were no written reasons, the court must remand for resentencing with no possibility of departure from the guidelines." 561 So. 2d 554, 556 (Fla. 1990); *see also Henderson v. State*, 622 So. 2d 172, 173 (Fla. 1st DCA 1993) (reversing the defendant's departure sentence due to the trial court's failure to provide reasons for departure and remanding "for resentencing within the guidelines, with no possibility of departure therefrom"); *State v. Tiedge*, 670 So. 2d 191, 192 (Fla. 3d DCA 1996) (instructing the trial court to sentence the defendant to a sentence within the guidelines on remand when the trial court had failed to give reasons for the downward departure); *Pressley v. State*, 921 So. 2d 736, 736 (Fla. 1st DCA 2006) (reversing the defendant's upward departure sentence where the trial court failed to state its reasons for the upward departure and directing the trial court to impose a guidelines sentence on remand). Accordingly, we reverse Dunn's sentence and remand with directions that the trial court sentence him within the guidelines.

REVERSED and REMANDED with directions. (BARFIELD, ALLEN, and LEWIS, JJ., CONCUR.)

\* \* \*

TIMOTHY BROWN, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 1D08-0930. Opinion filed April 3, 2009. An appeal from the Circuit Court for Gadsden County. Thomas H. Bateman, III, Judge. Counsel: Nancy A. Daniels, Public Defender, and Joel Arnold, Assistant Public Defender, Tallahassee; Timothy Brown, pro se, for Appellant. Bill McCollum, Attorney General, and Christine A. Guard, Assistant Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) Appellant appeals his conviction under section 800.04(5), Florida Statutes, on several points, only one of which bears comment. This case is REMANDED for the limited purpose of correcting the scrivener's error in the conviction order to reflect that Appellant was convicted by jury verdict. Appellant does not need to be present for this correction of sentence. *See Williams v. State*, 997 So. 2d 486 (Fla. 2d DCA 2008). As to all other issues,

AFFIRMED. (WOLF, BENTON and BROWNING, JJ., CONCUR.)

\* \* \*

DECLARATION

UNDER PENALTIES OF PERJURY I declare that I have read the foregoing Jurisdictional Brief and that the facts stated in it are true.

Accord: Florida Statutes, §92.525 (2002);  
State v. Shearer, 628 So.2d 1102 (Fla. 1994).

Executed on this 2<sup>nd</sup> day of July, 2009, by  
the undersigned.

Edmond D. Belcher  
EDMOND DAVID BELCHER, pro se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished to the following: Office of The Attorney General, Criminal Appeals Division, PL-01, The Capitol, Tallahassee, Florida, 32399-1050, by placing in the hands of prison officials for delivery to the above listed

via United States Postal Service on this 6 day of July,  
2009.

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