IN THE SUPREME COURT OF FLORIDA



CRUZ MARTA-RODRIGUEZ,

Appellant,

vs.

Case No. 85,326

STATE OF FLORIDA,

Appellee.

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APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

# REPLY BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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### ISSUE I

APPELLANT MUST BE GRANTED A NEW TRIAL, AS THE RECORD DOES NOT REFLECT THAT HE WAS PRESENT WHEN JUROR CHALLENGES WERE EXERCISED, OR KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS PRESENCE, OR RATIFIED THE STRIKES.

Appellee asserts that Coney v. State, 653 So. 2d 1009 (Fla. 1995) should not be applied to Appellant's cause because, although Coney was decided before Appellant's trial, it did not become final until after Appellant's trial. (Brief of Appellee, pp. 6-7) Even though this Court stated in Coney that the rule therein was to apply prospectively only, this Court should nevertheless apply Coney to this cause, because that decision did not announce a new rule of criminal procedure, but merely synthesized and reaffirmed prior precedent, and, even if Coney did establish a new rule, constitutional norms of adjudication require that such a rule be applied to all cases pending at trial or on direct appeal when the rule is announced. It should also be noted that this Court's application of its rule in Conev to the appellant, Jimmie Lee Coney, himself, belies the Court's statement that the rule would have only prospective application.

"The decisional law in effect at the time an appeal is decided governs the issues raised on appeal, even where there has been a change of law since the time of trial." Wheeler v. State, 344 So. 2d 244, 245 (Fla. 1977). In Griffith v. Kentucky, 479 U.S. 314,

328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), the Supreme Court wrote:

> that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past.

This Court adopted the Griffith rule for applying this Court's decisions in criminal cases to all other cases which were not yet final at the time of decision in Smith v. State, 598 So. 2d 1063 (Fla. 1992).

Both Griffith and Smith are grounded upon the basic constitutional principles of due process and equal protection of the law. Amend. XIV, U.S. Const.; Art. I, §§ 2 and 9, Fla. Const. In Griffith, 479 U.S. at 322-23, the Supreme Court explained that "after we have decided a new rule in the case selected [for review], the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review." Also, "selective application of new rules violates the principle of treating similarly situated defendants the same." Id. In Smith, 598 So. 2d at 1066, this Court explained,

> We are persuaded that the principles of fairness and equal treatment underlying Griffith, which are embodied in the due process and equal protection provisions of article I, sections 9 and 16 [sic] of the Florida Constitution, compel us to adopt a similar evenhanded approach to the retro-spective application of the decisions of this Court with respect to all nonfinal cases. Any rule of law that substantially affects the life, liberty, or property of criminal defendants must be applied in a fair and even-handed manner. [Footnote omitted.]

Both Griffith and Smith were intended to resolve past inconsistencies in the application, or refusal to apply, new rules for criminal cases to cases pending on direct appellate review at the time the case announcing the new rule was decided. Unfortunately, this Court has reverted to the same inconsistency which was supposed to have ended with Smith. In Wuornos v. State, 644 So. 2d 1000, 1007-08 n. 4 (Fla. 1994), the Court explained that Wuornos was not entitled to the benefit of another case decided by this Court while her appeal was pending:

> We recognize that this holding may seem contrary to a portion of Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992), which can be read to mean that any new rule of law announced by this Court always must be given retrospective application. However, such a reading would be inconsistent with a number of intervening cases. [Citations omitted.] We read Smith to mean that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise. [Emphasis added.]

The Wuornos explanation of the Smith rule strips Smith of its original meaning and purpose. If due process and equal protection under the Florida Constitution require the application of a new rule to all cases not yet final when the rule is announced, then any decision of this Court which announces that a new rule will be given only prospective effect violates the Constitution. The Griffith and Smith rules are necessary because inconsistent and inequitable application of the law calls into question the fundamental integrity of our system of justice. Griffith, 479 U.S.

at 322-23; Smith, 598 So. 2d at 1066. Coney is applicable to Appellant's cause.[1]

Appellee also argues that the record does not necessarily show that Appellant was not present at the bench when challenges to prospective jurors were exercised. (Brief of Appellee, pp. 7-9) What the record **does** show, however, is the following (T 202):

> (Volume II continues with jury selection at the bench.)
>
> THE COURT: Counsel, your client may come up.

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[1] The First, Third, and Fourth District Courts of Appeal have indicated that, because of the language this Court used in Coney making the decision prospective only, the rule in Coney would not be applied to cases which were tried before Coney became final. Lett v. State, 668 So. 2d 1094 (Fla. 1st DCA 1996); Branch v. State, 671 So. 2d 224 (Fla. 1st DCA 1996); Bell v. State, 671 So. 2d 226 (Fla. 1st DCA 1996); Ogden v. State, 658 So. 2d 621 (Fla. 3d DCA 1995); Henderson v. State, 21 Fla. L. Weekly D 1710 (Fla. 3d DCA July 31, 1996); Garcia v. State, 21 Fla. L. Weekly D 1726 (Fla. 3d DCA July 31, 1996); Quince v. State, 660 So. 2d 370 (Fla. 4th DCA 1995). However, the courts have noted uncertainty as to the correctness of this position. In Mejia v. State, 21 Fla. L. Weekly D 1355, 1356 (Fla. 1st DCA June 13, 1996), the court wrote that this Court's "failure to elucidate as to its intent when it pronounced that the holding in Coney was to be 'prospective only' (653 So. 2d at 1013) has engendered considerable confusion, in both trial and appellate courts, regarding the applicability of the holding to 'pipeline,' and other, cases. [Citation omitted.]" And the First and Third District have certified the following question to this Court:

> DOES THE DECISION IN CONEY APPLY TO "PIPELINE CASES," THAT IS, THOSE OF SIMILARLY SITUATED DEFENDANTS WHOSE CASES WERE PENDING ON DIRECT REVIEW OR NOT YET FINAL DURING THE TIME CONEY WAS UNDER CONSIDERATION BUT PRIOR TO THE ISSUANCE OF THE OPINION?

Lett, 668 So. 2d at 1094-1095; Branch, 671 So. 2d at 224; Bell, 671 So. 2d at 226-227; Garcia, 21 Fla. L. Weekly at D 1726.

(Court and counsel conferred at the bench, as follows:)

If Appellant was present at the bench, surely the court reporter would have noted this, just as he or she noted that counsel was present at the bench to confer with the court. Furthermore, to satisfy Coney, it must affirmatively appear from the record that the defendant either was present when strikes were exercised, or knowingly, intelligently, and voluntarily waived his presence, OF ratified his attorney's strikes; the record reflects none of these scenarios.

Appellee further contends that Appellant's issue is foreclosed because he did not object in the trial court to his absence when jury challenges were exercised. (Brief of Appellee, pp. 9-11) In support of its argument, Appellee notes that this Court's original opinion in Coney containedthe following language which was deleted from the final revised opinion when rehearing was denied: "Obviously, no contemporaneous objection by the defendant is required to preserve this issue for review, since the defendant cannot be imputed with a lawyer's knowledge of the rules of criminal procedure." From this deletion, Appellee concludes that "an objection is required to preserve this issue for review." (Brief of Appellee, p. 10) In Mejia v. State, 21 Fla. L. Weekly D 1355 (Fla. 1st DCA June 13, 1996), the court recently rejected this very argument. The court was "unwilling to read so much into such a revision," and concluded that a violation of Coney "constitutes fundamental error, which may be raised for the first time on

appeal, notwithstanding the lack of a contemporaneous objection." 21 Fla. L. Weekly at D 1356.[2]

Finally, Appellee concludes, with no supporting analysis whatsoever, that "if Appellant was not present during the strikes, the court's failure to get Appellant's waiver for his presence or for his acceptance of the strikes made is harmless beyond a reasonable doubt under Coney." (Brief of Appellee, p. 11) As discussed in Appellant's initial brief at pages 41-42, in Coney this Court found the error in Coney's absence from the bench during juror challenges to be harmless only because no peremptory challenges were exercised. Coney, 653 So. 2d at 1013. In the instant case, both challenges for cause and peremptory challenges were exercised. (T 202-210) Conev provides no support for Appellee's contention that the error here was harmless.

## ISSUE II

THE EVIDENCE FAILED TO SUPPORT THE TRIAL COURT'S FINDINGS IN AGGRAVATION THAT THE HOMICIDE OF ALFREDO GARCIA WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST AND THAT THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

It is important to note that all the cases cited by the State in support of its argument that the two aggravators apply in this case were cases in which completed crimes preceded the homicides.

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[2] With regard to the question of Coney's retroactivity, the Mejia court assumed that Coney applied, for purposes of its opinion; Mejia's trial began four days before Coney became final. 21 Fla. L. Weekly at D 1356

None involved the failed-robbery scenario that exists in the instant case. Nor did any of the cited cases involve the additional element of the Appellant's outraged and angry reaction to Alice Knestaut's inflammatory statement that one of the victims had touched her in private areas of her body and therefore "deserved to die." These factors provide alternative motives for the killings apart from the elimination of witnesses, as well as taking them out of the category of pre-planned and cold homicides that would qualify as CCP.

At page 14 of its brief, Appellee says that Appellant "quickly got a loaded gun," after the victims were hooded and taped. Although Luis Pecina and Chris Nicholson testified that Appellant had a gun when the victims were in Knestaut's trailer, neither witness said the gun was loaded. (T 509, 517-519, 550, 918-919, 929) Appellee's statement is without evidentiary support in the record.

Also without record support is Appellee's statement on page 15 of its brief that the victims made "pleas to live" at the bridge where they were shot. Chris Nicholson, the only State witness who was supposedly present at the scene at the time of the homicides, initially testified that he "imagine[d] the two men were begging for their lives[,]" (T 924), but this was mere speculation; Nicholson then admitted that he did not know what the men were saying [because they were speaking Spanish]. (T 924)

## ISSUE III

THE TRIAL COURT ERRED IN SENTENCING CRUZ MARTA-RODRIGUEZ TO DEATH OVER THE JURY'S RECOMMENDATIONS OF LIFE IMPRISONMENT, BECAUSE THE FACTS SUGGESTING DEATH AS THE APPROPRIATE PENALTY WERE NOT SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER.

Appellee cites Williams v. State, 622 So. 2d 456 (Fla. 1993) in support of its argument that the life overrides in the instant case were proper (Brief of Appellee, page 19), but there are substantial differences between this case and Williams. For example, Williams involved the murder of four people, and the attempted murder of another. The mitigating evidence in Williams was much weaker than that presented at Appellant's trial, consisting essentially of some "warm and fuzzy" testimony that Williams was a good person. There was no evidence such as that presented in Appellant's case as to his state of intoxication at the time of the offenses and his violent upbringing. And in Williams this Court noted that the life recommendation could have resulted from an improper, emotional argument to the jury by defense counsel, a factor not present in the case now before the Court.

With regard to the trial court's outright rejection of Appellant's ineligibility for parole for 50 years as a mitigating circumstance, Appellee seems to concede error in stating, "Clearly, this type of evidence is an appropriate consideration in the determination of mitigating evidence. [Citation omitted.]" (Brief of Appellee, p. 22) But Appellee takes the position that an error in the trial court's failure to consider this factor is harmless

because, standing alone, it would not provide a reasonable basis for a jury to recommend life. (Brief of Appellee, pp. **22-25)** Of course, this circumstance does not stand alone; it must be considered in conjunction with all the other mitigating circumstances which the court found and should have found. To give it no weight at all, no consideration whatsoever in the sentencing process, as the court below did, skewed the sentencing process against Appellant in an unconstitutional way. The court's complete rejection of this factor becomes even more egregious when one considers the record evidence that it was particularly important to Appellant's jury in returning their life recommendations.

Appellee quotes extensively from the trial court's sentencing order at pages **26-27** of the State's brief. In discounting Appellant's mitigation, the trial court played fast and loose with the facts, hinting darkly that Appellant "was engaging in major drug deals for which he was never arrested," and referring to Appellant's supposed "record of criminal arrests, convictions, and criminal activity including drug dealing and firearms offenses." Where is the evidence for these damaging allegations? This Court has a copy of Appellant's presentence investigation report, which shows but two prior felony convictions, only one of them for a violent offense, the aggravated assault about which State witness Glenn Holmes testified at penalty phase. There is scant support for the court's charges of past criminal conduct by Appellant, certainly insufficient record support to justify rejecting the mitigating circumstances propounded by the defense. There is not

the "substantial competent evidence" that must be present before the trial court is justified in rejecting mitigating circumstances that have been reasonably established. Nibert **v.** State, **574** So. 2d **1059, 1062** (Fla. **1990).**

Washinston v. State, 653 So. 2d 362 (Fla. 1994), cited by Appellee at pages **28-29** of its brief, is inapposite. There the only "mitigating circumstances were the defendant's close family ties and maternal support[,]" which this court characterized as "inconsequential." Washinston, 653 So. 2d at 366. Appellant's case in mitigation, while it includes his close family ties and maternal support, includes many other elements as well, and is much more substantial.

At pages 29-30 of its brief, Appellee cites Taylor **v.** State, 638 So. 2d **30** (Fla. **1994)** in support **of** its argument that the trial judge properly considered the testimony of Chris Nicholson, which the jury had no opportunity to consider. The testimony at issue in Taylor, unlike that in the instant case, concerned an incident that occurred after the jury was discharged. Obviously, it would have been impossible to have presented this testimony to Taylor's jury. Also, the testimony in Taylor was presented for the specific purpose of rebuttingthe defense argument in mitigation that Taylor had behaved well in custody. Nicholson's testimony here served a more general purpose: persuading the trial court to override the jury's life recommendations.

Appellee asserts that the trial court did not discount the jury's recommendations on the basis of Nicholson's testimony, but

overrode the recommendations because no mitigating circumstances were established. (Brief of Appellee, p. 30) However, the court used Nicholson's testimony not only to support her findings in aggravation, but also to support her rejection of mitigating factors. (R **490-497)** A fair reading of the sentencing order and the transcript of the hearing at which Chris Nicholson testified shows that Nicholson's testimony was very important to the court in her decision to sentence Appellant to death despite his jury's recommendations that his life be spared.

Appellee states that Appellant "could not possibly have been prejudiced by the fact that the jury did not hear prejudicial information specifically identifying him as the shooter." (Brief of Appellee, p. 30) Of course, Appellee really misses the point, which is that the entire capital sentencing process becomes distorted when the trial court uses evidence that could have been presented to the jury to justify a life override; the prejudice was manifested not at the point of the penalty phase before the jury, but when the evidence was later used to discount the life recommendations and support sentencing Appellant to die despite the life verdicts.[3]

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[3] If it was proper for the trial court to consider Nicholson's testimony, she should also have considered it as it related to Luis Pecina's role in the events in question. Nicholson testified that Pecina took a much more active role than Pecina's own testimony indicated. According to Nicholson, Pecina tied the victims **up,** "and he went and got the pillowcases and drove their car from the front of the house to the back of the trailer. He beat them up at one point, and he carried the bodies to the car." (T 919) This was relevant to impeach Pecina, to partially corroborate what Appellant told the police regarding Pecina's actions on the night/morning in question, and went to the disparate treatment accorded the

In addition to the cases cited in Appellant's initial brief as to the override question, please see Cooper v. State, 581 So. 2d 49 (Fla. 1991), which involved a tie vote of the jury for life. This Court noted in Cooper that conflicting evidence on the identity of the actual killer, that is, the triggerman, can form the basis for a life recommendation.

## ISSUE IV

THE COURT BELOW ERRED IN SENTENCING APPELLANT TO CONSECUTIVE MANDATORY MINIMUM TERMS FOR USING A FIREARM IN THE COMMISSION OF THE NONCAPITAL FELONIES OF WHICH HE WAS CONVICTED, WHERE ALL OFFENSES STEMMED FROM A SINGLE EPISODE.

In Murray v. State, 491 So. 2d 1120 (Fla. 1986) this Court held that minimum mandatory sentences may be consecutive where the crimes were sufficiently separate in nature, time, and place. In the instant case, however, the crimes all occurred at the same place (Alice Knestaut's trailer) and at the same time. Appellee's statement that "the victims were robbed separately" (Brief of Appellee, page 32) is erroneous in two regards. There were no robberies, but rather only attempts, And the attempts occurred simultaneously as to both victims; they were not "robbed separately." The kidnappings bath began at Knestaut's residence at the same time. Both men were bound at the same time, and Luis Pecina's testimony seems to show that they were both carried to the car at the same time (T522-523), as does Chris Nicholson's testimony. (T

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participants. Yet, the trial judge considered the testimony only as it cut against Appellant, and did not address the matters discussed above.

918-919) Under these circumstances, there was no justification for the court to impose consecutive minimum mandatories for the noncapital offenses; they should all run concurrently.

If this Court should ascertain that the attempted robberies constituted a sufficiently linked set of crimes so that the minimum mandatories could only be concurrent, but that the kidnappings were separate (see Brief of Appellee, page 33: "the robberies were clearly distinct, separated in time and location from the kidnappings"), then the minimum mandatories as to the attempted robberies should be made to run concurrently with one another, and the minimum mandatories as to the kidnappings should be made to run concurrently with one another, but the two sets of minimum mandatories could be made to run consecutively to one another, under the principles expressed in Murrav. See also Mosely v. State, 21 Fla. L. Weekly D 1657 (Fla. 1st DCA July 15, 1996).

## CONCLUSION

Based upon the forgoing facts, arguments, and citations of authority, your Appellant, Cruz Marta-Rodriguez, renews his prayer for the relief requested in his initial brief.

## CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, an this 19th day of August, 1996.

Respectfully submitted,

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