Of 7

IN THE SUPREME COURT OF FORIDA

ALFREDCO LETT, :

Petitioner, :

v. : CASE NO. 87,541

STATE OF FLORIDA, :

Respondent. :

_____/

ON REVIEW FROM
THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

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PETITIONER'S BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

This case is before the Court on a certified question from the 1st District Court of Appeal. The Petitioner is Alfredco Lett, defendant and appellant below, who shall be referred to by his name or as Petitioner.

Record designations are as follows:

"R.____" Record on direct appeal including the sentencing transcript. (R.7-21).

"T.____" Transcript of the trial

"PB.___" Petitioner's initial brief in the 1st District Court of Appeal.

"PR.___" Petitioner's reply brief in the 1st District Court of Appeal.

"PMR.__" Petitioner's motion for rehearing to the 1st District Court of Appeal.

"SB.___" State's answer brief in the 1st District Court of Appeal.

"O1.___" First opinion issued by the 1st District Court of Appeal.

"O2.___" Opinion on Rehearing issued by the 1st District Court of Appeal.(Opinion wherein this question was "certified")

All other cites are self-explanatory or will be explained herein.

II. STATEMENT OF THE CASE

The Original appeal in this case was taken from a jury trial in Escambia County, Florida, Circuit Court before J. T. Michael Jones, on October 17 and 19, 1994.

Petitioner was charged with aggravated battery, the information being dated June 21, 1994, (R.1), and aggravated assault on the same person by amended information filed October 19, 1994. (R.2)(T.42-43). Petitioner was tried by jury and found guilty of both charges. (R.5)(T.173).

The petitioner requested placement in a residential treatment program due to his heavy alcohol and drug abuse, (R.15), however, treatment was ordered in prison. (R.18) He was sentenced to five years probation imposed consecutively to the 80 month prison term given in a companion case. (R.18). The main purpose of the probation was to allow appellant to pay restitution for medical bills of the victim.

The 1st District Court of Appeal originally denied all relief in an opinion filed January 23, 1996. (Appendix A)

A Motion for rehearing, rehearing en banc, or certification was filed raising three possible questions, 1) does Coney apply to pipeline cases; 2) must an objection be raised to preserve the Coney issue; and 2) is the state estopped from taking a position that petitioner's absence from the bench was not error? (Appendix B)

Upon rehearing another opinion was issued March 5, 1996, granting relief in part and denying relief in part, with the following question certified to this Court regarding the

application of its decision in Coney v. State, 653 So.2d 1009 (Fla. 1995):

> 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?

(Appendix C).

A motion to invoke discretion of this Court was filed March 7, 1996, (Appendix D), and the 1st District Court of Appeal issued its mandate in this case March 21, 1996. (Appendix E).

III. FACTS OF THE CASE

A. Jury selection.

Facts concerning the voir dire and certified question are set forth in the argument. However, in short, the record does not reflect petitioner's presence at the bench during selection of jurors; nor does it reflect notification, inquiry, or certification concerning any waiver of the right in question; nor does it reflect petitioner being asked to ratify the decisions made by counsel regarding the selection of the jury.

B. Facts adduced at trial.

The victim in this case, Frances Faye Mosley, a cousin of the petitioner, testified that she, the petitioner, and the owner of the house where the incident took place, were on the front porch of the house when an argument she had been having with the petitioner escalated. (T.62-63). She told the petitioner to leave the premises and he refused, saying it was not her place and he did not have to leave. (T.64).

The victim thought the petitioner had a knife or something silver in his hand[1], (T.66,69), so she threw a bottle and hit him, somewhere in the right chest or shoulder. (T.66-67). The victim then took another beer bottle, broke it, and threatened to cut the petitioner with it, (T.68-70, 78), intending to injure him. (T.68, 78).

The victim also testified that as the petitioner was backing away from her, she continued toward him with the broken beer

[1] No such weapon was found in the area, (T.79), nor on Mr. Lett when he was searched incident to his arrest. (T.102).

bottle, backing him off the porch and around the side of the house. (T.69-70).

Once around the side of the house, she testified that she dropped the broken beer bottle THEN the petitioner struck her arm with an automotive jack[2], breaking her arm and leaving scars (which were exhibited to the jury). (T.69-70, 73-74).

After her arm was broken (she was disarmed) she ran toward the porch followed by the petitioner who held the "jack drawed back" as if to hit her, though he never swung it at her. (T.71-73).

The state also presented David "Crow" Walker, part owner of the house where the incident took place. Walker testified that the petitioner had been neither threatening the victim, nor trying to hurt her when she threw the first bottle,(T.92), which hit the petitioner, struck a pole, bounced and hit the petitioner again. (T.88). He also testified that the victim broke a beer bottle and went after the petitioner with the broken neck of the bottle as a weapon, (T.88), and that "knowing her, she would have used it." (T.95).

After the victim and the petitioner went around the corner of the house, Walker does not know what happened, but a few seconds (T.96) later the victim came back to the porch with a broken arm, the petitioner walking (T.98) behind her holding a jack raised as if "fixing to hit her."(T.88-89). However, the

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[2] There are no witnesses except the victim to this critical part of the incident.

petitioner did not try to hit her. (T.95). Instead he placed the jack on Walker's car's trunk. (T.89)

The defense rested without presenting any witnesses. (T.117). The jury returned a verdict of guilty as charged on both counts. (T.173).

The defense moved for judgment of acquittal on the basis of the verdict being against the weight of the evidence -- that it was a clear cut case of self-defense. (T.176). However, the trial court, indicating that it did not necessarily agree with the verdict and was "not saying it would agree if (he were) on the jury" (T.177), indicated that there was enough evidence to go to the jury and denied the motion. (T.177-178).

IV. SUMMARY OF THE ARGUMENT

Two issues were presented to the District Court of Appeal for its consideration. In addition to addressing the question certified to this Court, Petitioner also wishes to address, at least in short form, the other issue which was raised on appeal. While considering the certified question to be of primary importance to this Court, the order in which the issues were presented to the 1st District remains unchanged to prevent confusion of the issues.

First, the evidence presented at trial was not sufficient to convict the petitioner where it is an uncontroverted fact, from the mouth of the victim and the only other eyewitness, that the victim was attacking the petitioner with a dangerous, potentially lethal weapon, and he was retreating when he struck a blow in his defense. The court should have granted the motion for judgment of acquittal on the grounds of reasonable self-defense, and or the Appeal Court should have granted relief in the interest of justice.

Second, is the issue which is before this Court as a CERTIFIED QUESTION. Petitioner was not present at the site of selection when the jury was chosen and therefore was unable to participate in the selection of his jury. Petitioner's case is one of the so-called "pipeline cases," falling between the time of Coney's trial, yet before the decision was rendered in Coney v State, 653 So.2d 1009 (Fla. 1995).

Equal protection under the law, as well as decisions of this and other courts, demands that Petitioner be granted the same

relief as was granted Coney. This is true whether Coney is considered to be "new law" or not. At the very least, the law which preceded Coney, and upon which Coney was decided, mandates that Petitioner be granted the same relief.

The state conceded error in Coney, but the error was held harmless. Here, the state is estopped from arguing that what occurred here -- the same factual scenario -- is not error.

Error has occurred, and it is not harmless, whether peremptory challenges were made or not. If they were made, they may not have been the ones Petitioner wanted. If they were not made, he may have wanted them to have been -- including possible back-strikes. This Court has no way to access the damage done to the Petitioner.

There is error, it is harmful, and as it is impossible to access the consequences, the harmful error is prejudicial. Thus, the answer to the certified question is **YES**, and Petitioner should be granted a new trial.

V. FIRST ARGUMENT

ISSUE PRESENTED: DID THE TRIAL COURT REVERSIBLY ERR IN DENYING THE PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AS THE EVIDENCE CLEARLY ESTABLISHED SELF-DEFENSE AS A MATTER OF LAW.

The alleged victim, Frances Mosley, attacked the petitioner, with a lethal and deadly weapon, and according to a state's witness, would have used it on him. She threw at least one beer bottle at him, and broke another to use as a stabbing/slashing weapon, and attacked the petitioner.

The petitioner retreated, off the porch of the house, and retreated further around the corner under constant attack by the alleged victim. The petitioner was apparently completely unarmed -- until he located a bumper jack.

Alleged VICTIM, Frances Mosley, by her own testimony, committed battery, assault, and assault with a deadly weapon, and perhaps assault with intent to murder or maim -- yet she goes free. Alfredco Lett defended himself, and is in prison. Justice has not prevailed in this case.

It does not matter whether or not Mosley was living at the place where the incident took place. After all, she had driven Mr. Lett off of the porch and then continued to attack him with the broken bottle.

The only question was whether or not "victim" Mosley had ceased her attack when her arm was broken by the petitioner. She said she had dropped the bottle before he struck her. (T.69-70, 73-74). However, she had been the attacker, and her testimony is

suspect in that she claimed that Mr. Lett had a weapon, yet no other weapon was ever found.

The defense moved for judgment of acquittal on the basis of the verdict being against the weight of the evidence -- that it was a clear cut case of self-defense. (T.176).

The trial court, while denying the motion, indicated that it did not necessarily agree with the verdict and was "not saying it would agree if (it) was on the jury." (T.177, 178). Even the State questioned whether Mosley was really a "victim." Why else would a prosecutor place the "victim" on the witness stand and ask: "are you the Frances Mosley that is the alleged victim in this case?" (T.58)(emphasis added).

Section 776.012, Florida Statutes, provides legal justification for the use of force in one's defense if one reasonably believes that such conduct is necessary to defend himself against another's imminent use of unlawful force.

Where the facts establish self-defense as a matter of law, a motion to dismiss should be granted. See Ellis v. State, 346 So.2d 1044 (Fla. 1st DCA 1977). Where the state's evidence actually supports, and does not refute, the defendant's claim of self-defense, the state cannot meet its burden of proof. The legal effect of uncontradicted and unimpeached evidence of self-defense becomes a question of law for the court. Harris v. State, 104 So.2d 739 (Fla. 2d DCA 1958). Thus, the trial court, which admittedly did not agree with the verdict, should have granted the judgment of acquittal.

In McKnight v. State, 341 So.2d 261 (Fla. 3d DCA 1977), the victim, a strong man with a reputation for violence and who had lived with the defendant, severely beat the defendant in a bar earlier that evening. When the defendant returned home, she found the victim there, and he again threatened to beat her. She told the victim to stay away but he came at her muttering profanities. She retreated, again told the victim to stay away, but when he kept coming at her, she removed a pistol from her pocketbook and fired at the victim, killing him. The court held that the facts clearly demonstrated that the defendant acted in self-defense, and reversed her conviction.

Similarly, here, petitioner and Mosley knew each other, they were apparently cousins. Walker's testimony indicates that the victim was the aggressor, and his statement that she would have used the broken bottle on the petitioner indicates that she had a reputation for violence. She attacked the petitioner, much like the victim in McKnight. She kept coming at the petitioner, like the victim in McKnight. Even if we believe the victim, that she was not armed at the instant she was struck, it is still similar to McKnight, in that there was no showing that the victim in McKnight was armed when he was killed -- and yet relief was granted in McKnight.

Here, the force used in self defense was arguable less than that in McKnight, and the "victim" here is still alive -- to tell her version of the "facts." However, the facts herein, like those in McKnight, establish that the petitioner was justified in

his use of force. See also, Andrews v. State, 577 So.2d 650 (Fla. 1st DCA 1991)(self-defense found as a matter of law).

The victim's own testimony establishes the reasonableness of the petitioner's actions. Further, petitioner's defense is consistent with the physical evidence -- and the fact that only one blow was struck against the alleged victim. It was therefore reversible error for the trial court to deny petitioner's motion for judgment of acquittal.

Tibbs v. State, 397 So.2d 1120 (Fla. 1981), established that an appellate court cannot reverse a conviction on the ground that the verdict is contrary to the weight of the evidence. Nonetheless, this Court was specific that, based on Rule 9.140(f), Fla. R. App. P., which provides that "[i]n the interest of justice, the court may grant any relief to which any party is entitled," the appellate court could still reverse in such cases for fundamental injustice occurring at trial. See e.g., Crenshaw v. State, 490 So.2d 1054 (Fla. 1st DCA 1986).

Having jurisdiction on the basis of the certified question, this Court has jurisdiction over all issues. Jacobson v. State, 476 So.2d 1282 (Fla. 1985); Savoie v. State, 422 So.2d 308 (Fla. 1982). See e.g., Feller v. State, 637 So.2d 911, 914 (Fla. 1994).

Justice was not served by the conviction of Alfredco Lett, and the District Court of Appeal should have reversed his conviction and vacated his sentence remanding for discharge of the case "in the interest of justice." This Court is asked to remedy this injustice.

VI. SECOND ARGUMENT

CERTIFIED QUESTION

ISSUE PRESENTED: 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?

Yes. Whether Coney[3] is a clarification of existing law or new law, it must be applied to pipeline cases.[4] Even were Coney not applied to this case, the statute and case law preceding Coney must be applied in the same manner as they were in Coney.

A. Facts of the Case.

The selection of jurors, Voir dire, is on the record, including conferences at the bench, ending at (T. 40) with the notation: "(Bench conference concluded)." What is important to this issue is not so much what appears on the record, as what does not appear:

- Nowhere is it reflected the petitioner was informed of his right to be present at the bench.
- Nowhere is it indicated the petitioner was present at the bench.
- Nowhere does the trial court **inquire** if the petitioner's absence from the bench is voluntary.
- Nowhere does the trial court **certify** that the petitioner's absence from the bench is voluntary.

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[3] Coney v. State, 653 So. 2d 1009 (Fla. 1995).

[4] This Court should also be aware that this issue has been raised and briefed in depth in (Lazaro) Martinez v. State, Case No. 85,450, and addressed at oral argument in Boyett v. State, Case No. 81,971.

- Nowhere does the trial court ask the petitioner to **ratify** the choice of jurors made by his counsel.

These are indications that petitioner was not present during this important conference, thus the record demonstrates that only counsel for the state and the defense were at the bench.

The record is entirely silent regarding whether Petitioner understood the process of jury selection and, in particular, understood that the defense and the prosecution had the right to exercise peremptory challenges. Additionally, it is beyond dispute that lay persons typically do not understand what a "peremptory" challenge is.

The 1st District, in footnote one of its second opinion (02.1) notes "that the trial transcript does not reflect whether Lett was present or absent at voir dire bench conferences" and opines "that even if we assume the record reflects that Lett was not present at voir dire bench conferences, Coney does not require a new trial here." As shown below, this would be wrong even if the 1st District were correct in its opinion that Coney did not apply to "pipeline cases."

B. *Coney* and pre-*Coney* Law.

The law applied in Coney is based upon both a Florida Rule of Criminal Procedure and case law, which in turn is based on both the Florida and U.S. Constitutions.

Rule 3.180(a)(4), of the Florida Rules of Criminal Procedure, requires that a defendant in a criminal case be present "at the beginning of the trial during the examination, challenging,

impanelling, and swearing of the jury" and this Court has ruled that this provision means exactly what it says. Coney, at 1013

A defendant is not present during the challenging of jurors if he is not at the location where the selection process is taking place. Thus, it is not enough that he be present somewhere in the courtroom. He must be able to hear the proceedings and participate in them. If he is seated at the defense table while a whispered selection conference is being conducted at the judge's bench, he cannot be said to be present and participating.

In Coney v State, 653 So.2d 1009 (Fla. 1995) this Court wrote:

> We conclude that the rule means just what it says: The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised. See Francis v. State, 413 So.2d 1175 (Fla. 1982). Where this is impractical, such as where a bench conference is required, the defendant can waive this right and exercise constructive presence through counsel. In such a case, the court must certify through proper inquiry that the waiver is knowing, intelligent and voluntary.
>
> Alternatively, the defendant can ratify strikes made outside his presence by acquiescing in the strikes after they are made. See State v. Melendez, 244 So.2d 137 (Fla. 1971). Again, the court must certify the defendant's approval of the strikes through proper inquiry. 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. Our ruling today clarifying this issue is prospective only.

Id.

A waiver of the right to be present must be certified by the court to be knowing, intelligent, and voluntary. The judge in Mr. Lett's case made no inquiry or certification whatsoever. None of the requirements listed in the above quotation were met in the lower court.

In addition to violating Rule 3.180(a)(4), the absence of the accused at this critical stage of trial also constituted a denial of due process under the state and federal constitutions because fundamental fairness might have been thwarted by his absence. Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982); Snyder v. Massachusetts, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934); Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Rule 3.180 is specifically designed to safeguard those constitutional rights. Thus, when the rule is clearly violated, the constitutional rights it safeguards are also violated.

B1. Only Part of *Coney* Appears to Be "Prospective," and Such Language Has No Effect on "Pipeline Cases" Such as This.

As argued below, the entire Coney decision should apply to Petitioner since his case was on appeal at the time Coney was decided. A fair reading of this Court's opinion in Coney indicates that the only prospective parts of Coney are the requirements that the trial judge **certify** on the record a waiver of a defendant's right to be present at the bench or a **ratification** of counsel's action (or inaction) in the defendant's absence.

However, the state and the 1st District Court of Appeal apparently believe that the defendant's right to be present at bench conferences where peremptory challenges are exercised is also a prospective rule. This is not so, and is refuted by this Court's **reasoning** in Coney.

This Court said Fla. R. Crim. P. 3.180 (a) meant what it says, and has always said, that a defendant has the right to be present at the immediate location where juror challenges are being made. See, Francis v. State, 413 So.2d 1175 (Fla. 1982). The state conceded error in Coney because the defendant was not present at a bench conference where juror challenges were made and the record was silent as to waiver or ratification. Coney, at 1013. SURELY, THE STATE WOULD NOT CONCEDE ERROR BASED ON A RULE YET TO BE ANNOUNCED!

Thus, the **RIGHT** to be present at the bench during the actual selection process pre-existed Coney, and the only "prospective" part must have been the requirements placed on the trial courts that they **inquire** and **certify** concerning alleged waivers, and **ratify** the actions of counsel ON THE RECORD.

B2. State Estopped from Arguing Lack of Error.

The State of Florida is estopped from arguing that Petitioner's absence from the bench conference where challenges to prospective jurors were made was not error. In Coney, when faced with the same facts, the state conceded error. Id. At 1013. The state cannot assert otherwise in this case without violating Petitioner's right to equal protection of the law. See, State v. Pitts, 249 So.2d 47, 48-50 (Fla. 1st DCA 1971)(violation of equal

protection for the **state** to take contrary positions on the same issue in different cases).

This Court pointed out the state's concession of error in its opinion:

> Coney was not present at the sidebar where the initial challenges were made, and the record fails to show that he waived his presence or ratified the strikes. **The State concedes this rule violation was error**, but claims that it was harmless.

Coney, at 1013 (**bold** emphasis added). The case was then decided adversely to Coney on the basis of harmless error because only challenges for **cause**[5] were made in his absence. Ibid.

Petitioner is asking that this Court at least apply the same analysis in his case that was afforded Coney. Equal protection under the law requires no less.

C. *Coney* and the Principles of Law Underlying *Coney* must Be Applied to This, a "Pipeline Case.".

Whether Coney is a clarification of existing law or new law, it must be applied to this case. Furthermore, whether or not Coney itself is applied to this case, the same law upon which the decision in Coney rests must be applied to this case. To do less violates state and federal constitutional priciples

C1. *Coney* as a Clarification of Existing Law.

Both a Florida Rule of Criminal Procedure and the due process clauses of the state and federal Constitutions provide that a criminal defendant has the right to be present during any

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[5] Elsewhere in this brief, Petitioner addresses whether Coney applies even without peremptory challenges having been exercised.

"critical" or "essential" stage of trial. See Fla. R. Crim. P. 3.180; Faretta v. California, 422 U.S. 806, 819 n.5, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Francis v. State, 413 So.2d 1175, 1177 (Fla. 1982).

Although Mr. Lett was present in the courtroom, as was Coney, he was not physically present at the sidebar. Inferentially, Lett could no more hear what was happening at the bench than the jury could, and the jury was also present in the courtroom. Thus, Lett was as effectively excluded from this critical stage of the trial as was the jury. The exclusion of the jury was proper, of course. The absence of the accused was not.

C1-a. Florida Rule of Criminal Procedure 3.180(a)(4).

Rule 3.180(a)(4), Fla. R. Crim. P., expressly provides:

> (a) Presence of Defendant. In all prosecutions for crime the defendant shall be present:
>
> * * *
>
> (4) At the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury; . . .

C1-b. Case law.

In Turner v. State, 530 So. 2d 45, 47-48, 49 (Fla. 1987), this Court stated:

> We recognized in Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982), that the defendant has the constitutional right to be present at the stages of his trial where fundamental fairness **might be** thwarted by his [48] absence. Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed.674 (1934). See also, Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

> Florida Rule of Criminal Procedure 3.180(a)(4) recognizes the challenging of jurors as one of the essential stages of a criminal trial where a defendant's presence is mandated.
>
> * * *
>
> A defendant's waiver of the right to be present at essential stages of trial must be knowing, intelligent and voluntary. Amazon v. State, 487 So. 2d 8 (Fla.), cert. denied, 479 U.S. 914, 107 S. Ct. 314, 93 L. Ed. 2d 288 (1986); Peede v. State, 474 So. 2d 808 (Fla. 1985), cert. denied, 477 U.S. 909, 106 S.Ct. 3286, 91 L.Ed.2d 575 (1986).

Id. [**Bold** added].

Nothing in the record demonstrates that Petitioner, Alfredco Lett knew that he had the right to be physically present and to **meaningfully participate** in this critical function during his trial. Petitioner's involuntary absence thwarted the fundamental fairness of the proceedings. It was a clear violation of Rule 3.180(a)(4), Fla. R. Crim. P.

This Court further addressed the same issue in Coney v. State, 653 So. 2d 1009 (Fla. 1995) holding:

> As to Coney's absence from the bench conference, this Court has ruled:
>
> > [The defendant] has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence. Florida Rule of Criminal Procedure 3.180(a)(4) recognizes the challenging of jurors as one of the essential stages of a criminal trial where a defendant's presence is mandated.
>
> Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982)
>
> * * *

> **We conclude that the rule means just what it says: The defendant has a right to by physically present at the immediate site where pretrial juror challenges are exercised.** See Francis.

Coney, 653 So. 2d at 1013 (**Bold** added).

This Court has repeatedly recognized that jury selection -- at least that portion of voir dire when counsel exercises their peremptory challenges -- is a "critical" stage of the trial, at which time a criminal defendant's fundamental right to be present has fully attached. See e.g., Francis, 413 So.2d at 1177-78; Chandler v. State, 534 So.2d 701, 704 (Fla. 1988).

Numerous decisions of both this Court and the U.S. Supreme Court have recognized that the right to be present is one of the most "fundamental" rights accorded to criminal defendants. "The right to be present has been called a right scarcely less important to the accused than the right to trial itself." 14A Fla. Jur. 2D, *Criminal Law*, Sect. 1253, at 298 (1993)(Citing state and federal cases); see also Mack v. State, 537 So.2d 109, 110 (Fla. 1989)(Grimes, J., concurring)(characterizing a criminal defendant's right to be present, along with right to counsel and right to a jury trial, as one of "those rights which go to the very heart of the adjudicatory process").

C1-c. Plain Language in Coney Indicates That it Is Not New Law.

In Coney, this Court indicated that it relied on the plain language of Rule 3.180 to reach its result, thus, if the rule already existed, it is NOT a "new rule."

> We conclude that **the rule means just what it says**: The defendant has a right to be

> physically present at the immediate site where pretrial juror challenges are exercised.

Id. At 1013 (**bold** emphasis added).

Where, as here, an appellate court's decision is based on the plain language of a statute, the court does not announce a new rule. See Murray v. State, 803 P.2d 225, 227 (Nev. 1990). Furthermore, where, as here, a judicial decision is "merely intrepreting the plain language of the relevant statute," the "rule" is not new and should be applied retroactively. John Deere Harvester Works v. Indust. Comm'n, 629 N.E. 834, 836 (Ill. App. 1994).

This Court's decision in Coney was based on Fla. R. Crim. P. 3.180, Francis and Turner. It was not "new law," but simply explained that the Rule meant what it said. But what is "new law?"

C1-d. "New" Rule or Law Defined.

The underlying legal norm -- the right to be present at all critical stages of trial -- includes being absent from sidebar for jury selection as much as it does being totally absent from the courtroom during jury selection.

> To determine what counts as a new rule,... courts [must] ask whether the rule [that a defendant] seeks can be meaningfully distinguished from that established by [prior] precedent.... If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful, and [the rule in the latter case is not 'new'].

Wright v. West, 505 U.S. 277, 112 S.Ct. 2482, 2497, 120 L. Ed.2d 225 (1992)(O'Connor, J., concurring, joined by Blackmum & Stevens, JJ.).

A rule of law is deemed "new" if it "breaks new ground or imposes a new obligation on the States or the Federal Government.... To put it differently, a case announces a new rule if the result was not dictated by [prior] precedent...." Teague v. Lane, 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Johnson v. United States, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982) refered to the breaking of new ground as being a "clear break" with the past. Johnson was overruled by Griffith v. Kentucy, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) which continued to refer to a new rule as a "clear break" with prior precedent.

C1-e. *Coney* Is Not a Clear Break with Prior Precedent.

The "clarification" of the law announced in Coney was not a "new rule" of law under the definition in Teague: no part of Coney's procedural requirements was a "clear break" with the past. Johnson; Griffith. Florida courts had previously applied the right to be present in the context of bench conferences at which jury selection occurred. See Jones v. State, 569 So.2d 1234, 1237 (Fla. 1990); Smith v. State, 476 So. 2d 748 (Fla. 3rd DCA 1985); cf. Lane v. State, 459 So. 2d 1145, 1146 (Fla. 3rd DCA 1984)(defendant present in court room, but excluded from proceedings where peremptories were exercised in hallway "due to the small size of the courtroom"). In Coney itself, the state conceded that Coney's right to be present **was violated** by his absence from the bench conference. (Id. 1013)

C1-f. "On-the-record" Requirements Announced in *Coney* Are Not New Law. Waiver by Silence Is Not Allowed Where Fundamental Rights Are Involved.

In **Florida**, this Court has repeatedly held that a defendant's waiver of the small class of "fundamental" rights can only be accomplished by a personal, on-the-record waiver. See e.g., Torres-Arboledo v. State, 524 So.2d 403, 410-411 (Fla. 1982); Armstrong v. State, 579 So. 2d 734, 735 n.1 (Fla. 1991).

Additionally, this Court has "strongly recommend[ed]that the trial judge personally inquire of the defendant when a waiver [of the right to be present] is required." Ferry v. State, 507 So.2d 1373, 1375-76 (Fla. 1987); See also Amazon v. State, 487 So.2d 8, 11 n.1 (Fla. 1986)("experience teaches that it is the better procedure for the trial court to make an inquiry of the defendant and to have such waiver [of the right to be present] appear [on the] record"); Mack v. State, 537 So.2d 109, 110 (Fla. 1989) (Grimes, J., concurring)("It is impractical and unnecessary to require an on-the-record waiver by the defendant to anything but those rights which go to the very heart of the adversary process, such as the right ... to be present at a critical stage in the proceeding.")

Courts in **other jurisdictions** have also required on-the-record waivers. See e.g., Larson v. Tansy, 911 F.2d 392, 396 (10th Cir. 1990)("Several circuits have held tht defense counsel cannot waive a defendant's right of presence at trial."); United States v. Gordon, 829 F.2d 119, 124-26 (D.C. Cir. 1987). On-the-record waiver is done in compliance with the constitutional axiom that "courts indulge every reasonable presumption against waiver

of fundamental constitutional rights and that [courts] do not presume acquiescence in the loss of fundamental rights." Carnley v. Cochran, 369 U.S. 506, 514, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962) (citing Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938)).

C2. *Coney* as New Law.

Even assuming for the sake of argument that Coney announced a "new rule" that would not qualify for retroactive application to Petitioner's direct appeal under traditional standards of retroactivity, recent state and federal constitutional cases require that Petitioner be permitted to benefit from Coney.

In Griffith v. Kentucky, 479 U.S. 314 (1987), the Supreme Court abandoned its former retroactivity doctrine[6] and held that all new rules of criminal procedure rooted in the federal Constitution must be applied to all applicable criminal cases pending at trial or on direct appeal at the time that the new rule was announced.

The Supreme Court's bright-line retroactivity rule in Griffith is rooted in the U.S. Constitution and state appellate courts **must** apply the Griffith retroactivity procedure when announcing a new rule that implicates federal constitutional guarantees. The Supreme Court has ruled:

> The Supremacy Clause ... does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own

[6] Stovall v. Denno, 388 U.S. 293, 297 (1967).

> interpretations of state law ... cannot extend to interpretations of federal law.

Harper v. Virginia Department of Taxation, 113 S.Ct. 2510, 2518, 125 L.Ed.2d 74 (1993); See also, James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S.Ct. 2439, 2443, 115 L.Ed.2d 481 (1991)("where the [new] rule at issue itself derives from federal law, constitutional or otherwise,"state courts must apply the new rule to all litigants whose cases were pending at the time that the new rule was decided).

Other state appellate courts have also held that when a state court "new rule" is not **solely** based on state law, or if it **implicates** the federal Constitution, the rule must be applied to all cases pending on direct appeal at the time the new rule is announced. See People v. Mitchell, 606 N.E.2d 1381, 1383-1384, (N.Y. 1992); People v. Murtishaw, 773 P.2d 172, 178-179 (Cal. 1989)(federal retroactivity doctrine applies where new rule of criminal procedure announced by state court is not based **solely** on state law).

Clearly, Coney is based in part on the U.S. Constitution in addition to Fla. R. Crim. P. 3.180. Consider in the plain language of Coney,(and in Turner and Francis which Coney follows), the cites to the Constitution, and to federal cases.

In Coney, this Court ruled:

> [The defendant] has the **constitutional right** to be present at the stages of his trial where **fundamental fairness** might be thwarted by his absence. Florida Rule of Criminal Procedure 3.180(a)(4) recognizes the challenging of jurors as one of the **essential stages** of a criminal trial where a

> defendant's presence is mandated. (citing Francis, at 1177)

Coney, 653 So. 2d at 1013 (**Bold** added).

Turning again to Turner this Court stated:

> We recognized in Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982), that the defendant has the **constitutional right** to be present at the stages of his trial where **fundamental fairness** might be thwarted by his absence. Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed.674 (1934). See also, Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).
>
> * * *
>
> A defendant's waiver of the right to be present at **essential stages of trial** must be knowing, intelligent and voluntary. Amazon v. State, 487 So. 2d 8 (Fla.), cert. denied, 479 U.S. 914, 107 S. Ct. 314, 93 L. Ed. 2d 288 (1986); Peede v. State, 474 So. 2d 808 (Fla. 1985), cert. denied, 477 U.S. 909, 106 S.Ct. 3286, 91 L.Ed.2d 575 (1986).

Turner, 47-48, 49 [**Bold** added].

Furthermore, the procedural requirement of an on-the-record, personal waiver by a defendant also implicates the U.S. Constitution. As noted in section E, infra, such a waiver of the fundamental constitutional right to be present at a critical stage of the trial is itself constitutionally mandated.

Thus, the "new" rule of procedure in Coney does not "rest [] on adequate and independent state grounds [because] the state court decision fairly appears to ... be interwoven with federal law." Caldwell v. Mississippi, 472 U.S. 320, 327, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Under such circumstances, the Equal Protection and Due Process Clauses of the Fourteenth Amendment of

the United States Constitution require this Court to give Coney, retroactive application to Petitioner's direct appeal.

Even if Coney were based only on state law, which it clearly is not, the Equal Protection and Due Process provisions of the Florida Constitution would require that this Court apply the decision retroactively to Petitioner's appeal. This Court has applied the reasoning in Griffith to new state law based rules as well as new federal law based rules.

In Smith v. State, 598 So.2d 1063 (Fla. 1992)[7], this Court agreed with "the principles of fairness and equal treatment underlying Griffith," and adopted the same bright line law as in Griffith. Then, in several subsequent cases, those priciples of fairness and equal treatment seemed to be forgotten, culminating in the decision in Wuornos v. State, 644 So.2d 1000 (Fla. 1994) where this Court refused to apply a (state) "new law" announced in Castro v. State, 597 So.2d 259 (1992) to a pipeline case. See Wuornos, at 107-008.

However, in State v. Brown, 655 So. 2d 82 (Fla. 1995) this Court appears to have embraced the principles of fairness and equal treatment again, holding that Smith "established a blanket rule of retrospective application to all nonfinal cases for new rules of law announced by this Court." Id. at 83. Then, shortly after Brown, in Davis v. State, 661 So.2d 1193 (Fla. 1995), this Court noted that Smith was limited by Wuornos and refused to

[7] It is interesting to note that Smith itself seems to implicate federal law -- by agreeing with the "priciples" of Griffith.

apply a "new rule" to a **collateral** appeal. Despite denial of relief, this Court stated:

> Had Davis's appeal been pending at the time we issued Smith, and had he raised the sentencing error on **direct appeal**, he could have sought relief under Smith.

Id. At 1195 (**bold** emphasis added)

The integrity of judicial review requires this Court, once and for all, to abandon its pre-Smith *ad hoc* approach to retroactivity and adopt the bright-line approach set forth in Smith and Griffith for all significant "new rules," whether based on state or federal law. See Taylor v. State, 422 S.E. 2d 430, 432 (Ga. 1992)(adopting Griffith's approach to retroactivity); State v. Mendoza, 823 P.2d 63, 66 (Ariz. App. 1990)("The reasoning of Griffith applies to a case ... even if the new rule is not of constitutional dimension.)

New law or not, Petitioner's appeal was pending at the time that Coney was issued, he sought releif based on Coney, and relief should therefore be granted by this Court. Failure to do so will violate Petitioner's rights under the U.S. and Florida Constitutions.

C3. Relief Is Mandated by the Law in Existence Before *Coney*.

Even in the absence of the application of the "on-the-record" language in Coney's case, Turner and Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982) require reversal. "[T]he rule means just what it says: The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised." Coney, citing Francis.

Thus, the rule meant what it says **prior** to Coney. It was clearly Petitioner's right to be present at this critical stage of the trial, under Rule 3.180(a)(4), and that right was violated. The rule is specifically designed to protect constitutional rights.

It is not known, and it is impossible to now determine, what input Mr. Lett might have provided to counsel regarding the exercise of his peremptory challenges **at** the sidebar as the process proceeded. However, Lett's absence was clearly error given the strict construction required of Rule 3.180(a)(4).

Prior to Coney, a defendant could personally waive his right to be present prior to leaving the courtroom; such waiver being accomplished through personal questioning by the trial Court. See Chandler v. State, 534 So.2d 701, 704 (Fla. 1988). Defendant's presence could also be waived by counsel -- provided that the defendant subsequently ratified or acquiesced in the counsel's waiver -- on the record if said waiver were made knowingly, voluntarily, and intelligently. State v. Melendez, 244 So.2d 137, 139 (Fla. 1971). Furthermore, a defendant could effectively waive his right to be present though misconduct, such as disrupting the trial. Capuzzo v. State, 596 So.2d 438, 440 (Fla. 1992).

In this case, Petitioner neither absented himself from the courtroom, nor acquiesced or ratified any waiver by counsel, nor did he engage in any misconduct which could have been considered waiver. Thus, under the law as it existed prior to Coney, there

was no waiver, and Petitioner had the right to be present at the bench during jury selection.[8]

D. *Coney* or Pre-*Coney*, the Law must Be Applied to this Case Irrespective of Whether Peremptory Challenges Were Made.

Common sense dictates that the right to be present would be meaningless if it were not applied to the absence of a defendant at side-bar conferences during which peremptory and cause challenges are or should be exercised.

Challenges for cause are a matter of law; however, peremptory challenges are based on many factors and can be exercised in an arbitrary manner. While a defendant may not be qualified to exercise cause challenges due to his lack of knowledge of the law, this is not true of peremptory challenges. Peremptory challenges can be exercised simply because one's personal preference, or even instinct, dictates such a result. These challenges are clearly within the abilities of the defendant and denying him the opportunity to participate deprives him of an important right.

The problem here occurs not only where defense counsel exercises peremptory challenges. It is even more problematic where counsel **fails** to exercise peremptory challengs.

Petioner, Alfredco Lett, may have had contemporaneous input to make to counsel as to the exercise of his peremptory challenges -- because they are often exercised arbitrarily and capriciously, for real or imagined partiality, often on sudden impressions and unaccountable prejudices based only on bare looks

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[8] Again, the state is estopped from arguing that his absence was not error. Infra

or gestures. Francis, 413 So. 2d at 1176. Thus, the very concept of peremptory challenges implies constant imput from the defendant.

The process of the exercise of peremptory challenges by both sides is a dynamic process, and results in a rapidly and ever-changing face of the jury. This depends upon which individuals have been struck and which party exercised the strikes. It is highly fluid, requiring constant evaluation and reevaluation of who should or should not be struck as the dynamic situation unfolds.

When, as here, the accused is absent, he or she is denied the opportunity to contemporaneously consult with counsel and to provide contemporaneous input into the decision-making process as to the exercise of the precious few strikes available to the accused.

In certain situations which cannot be foreseen, as a strategy the accused might prefer not striking an objectionable juror, leaving that person on the jury, rather than exercising the final challenge which would result in the seating another against whom the defendant has more vehement objections. In short, the defendant may prefer to elect the lesser of two evils, as he might see it.

Even though counsel may have consulted with Lett prior to the sidebar, and perhaps even again during the process, that itself is not sufficient. If the defendant were present and contemporaneously aware of how the situation was developing, he may have expressed additional or other preferences. He may have

wished to strike others on the jury who had not been previously discussed with counsel.

The accused may have suggestions to strike or back strike jurors already seated, even though he had not earlier expressed any particular dislike for them, simply in order to force the seating of a juror the defendant would much more prefer. Again, peremptory challenges are often made on the sudden impressions and unaccountable prejudices.

The entire selection process is like a game of checkers or chess in that regard. Not uncommonly a player will intentionally sacrifice a man (exercise a strike) simply in order to force a move which is advantageous to him or disadvantageous to the opponent. That input cannot be made until the situation actively develops in that direction during the dynamic course of the challenging process.

Thus, an accused may have very valuable input as to the exercise of his peremptory challenges, input which is only meaningful where it can be made contemporaneously with the developments during the on-going challenging process.

However, Lett was as effectively excluded from this critical stage of the trial.

E. Petitioner Did Not Waive His Right.

Nothing Alfredco Lett, did or did not do, waived his right to be present. The record fails to show that he even knew of his right such that a voluntary waiver can be found -- and **a waiver cannot be inferred from his silence or from his failure to object**

to the procedure or his absence from the sidebar. See State v. Melendez, 244 So.2d 137 (Fla. 1971).

As noted previously, the absence of the accused at this critical stage of trial constitutes a denial of due process under the state and federal constitutions. Francis, at 1177; Snyder; Faretta. The waiver by inaction of a Constitutional right or presuming waiver by a silent record flies in the face of opinions of the United States Supreme Court. In addressing a similar waiver (of speedy trial) the Court held:

> Such an approach, by presuming waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights. The Court has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." (Cite omitted). Courts should "indulge every reasonable presumption against waiver," (Cite omitted) and they should not presume acquiescence in the loss of fundamental rights." (Cite omitted). In Carnley v. Cochran, 369 US 506, 8 L Ed 2d 70, 82 S Ct 884 (1962), we held:
>
> > "presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not waiver. Id., at 516, 8 L Ed 2d at 77.
>
> The Court has ruled similarly with respect to waiver of other rights designed to protect the accused. (Cites omitted).

Barker v. Wingo, 407 U.S. 514, 525, 92 S.Ct. 2182, 33 L.Ed.2d 101, 114 (1972).

The challenging of the jury is a critical stage of trial. Francis. Petitioner's right to be physically present such that he can meaningfully participate through consultation with his

attorney is absolute -- in the absence of a knowing, intelligent and voluntary waiver. There is no waiver here.

This Court said in Coney that Rule 3.180 means just what it says. This record does not establish, "with the certainty and clarity necessary to support the waiver of constitutional rights Rule 3.180 is designed to safeguard," [9]that Mr. Lett's absence at this critical state of his trial was voluntary. Rule 3.180 was clearly designed to safeguard his constitutional right to be present at this critical stage. The violation of the rule was also a violation of the constitutional right it was designed to protect. His absence was clear error. Coney, Turner, and Francis mandate reversal.

There was no waiver, and no contemporaneous objection should be required to preserve this issue in the absence of a showing on the record that Lett knew he had the right to be present -- such that he knew he might be required to object to the procedure employed or to his absence.

F. No Objection Need Be Made to Preserve this Issue.

The right to be physically present at various critical stages of the proceedings and trial is one which exists without a specific assertion of the right. It, like the right to counsel, exists and is protected by the due process clause of the federal and state constitutions -- guarentees further implimented and protected by Fla. R. Crim. P. 3.180.

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[9] Jarrett v. State, 654 So.2d 973, 975 (1st DCA 1995).

No defendant must stand up and insist that he be presnt at trial or at any critical stage thereof. Compare, e.g., Brown v. Wainwright, 665 F. 2d 607 (5th Cir. 1982)(right to counsel in force until waived, right to self-representation does not attach until asserted). Rather, if the defendant is not present when required, an inquiry and a waiver of the right must be made on the record. This right is not waived by inference or by silence of the defendant (particularly where, as here, there is no affirmative indication that the defendant was ever advised of the existence of the right). Johnson v. Zerbst, 304 U.S. 458 (1938); Brewer v. Williams, 430 U.S. 387 (1977)(every presumption against waiver).

Since the right is not waived by silence, no contemporaneous objection is required to preserve the issue for review. To do otherwise, to require an objection to preserve a right which already exists, would be imposition of waiver by silence.

G. The Burden Is on the State to Prove the Error Harmless.

Petitioner's absence from the bench where, as here, he could have influenced the process, may be considered harmful ***per se*** under certain analysis. See Hegler v. Borg, 50 F.3d 1472, 1476 (9th Cir. 1995)(violation of defendant's right to presence is "structural defect" not amenable to harmless error analysis if the defendant's presence could have "influenced the process" of that critical stage of the trial).

As was conceded by the state in Coney, it was error for the Petitioner not to have been present at the bench, plain and simple. Because there was error, the burden lies upon the state

to show beyond a reasonable doubt that the error could not in any way have affected the fairness of the trial process. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Garcia v. State, 492 So.2d 360, 364 (Fla. 1986)(citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

F. Analysis of Prejudice.

As noted previously, the absence of the accused at this critical stage of trial constitutes a denial of due process under the state and federal constitutions. Francis, at 1177; Snyder; Faretta. Since the trial court also failed to ask Petitioner to ratify the choices of trial counsel, this Court has no way to know what damage was done.

This Court's analysis in Francis v. State, 413 So. 2d 1176-1179, is important on the question of the prejudice flowing from the involuntary absence of the defendant during the challenging of the jury:

> Since we find that the court erred in proceeding with the jury selection process in Francis' absence, we also consider whether this error is harmless. We are not satisfied beyond a reasonable doubt that this error in the particular factual context of this case is harmless. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).
>
> * * *
>
> In the present case, we are unable to assess the extent of prejudice, if any, Francis sustained by not being present to consult with his counsel during the time his peremptory challenges were exercised. Accordingly, we conclude that his involuntary absence without waiver by consent or subsequent ratification was reversible error and that Francis is entitled to a new trial.

Francis, 1176-1179.

There was error. There was prejudice. Thus, the Petitioner is entitled to a new trial (even if properly admitted evidence were sufficient to support the jury verdict) where the court cannot say beyond a reasonable doubt that this error did not affect the fairness of the trial. If this Court is unable to assess the extent of prejudice sustained by Mr. Lett's absence, his involuntary absence was reversible error and the error was by definition harmful. State v. Lee, 531 So. 2d 133 (Fla. 1988); Francis, at 1179. Moreover, the absence of the accused at a critical stage of trial must be presumed harmful unless the state can show beyond a reasonable doubt to the contrary.

Accordingly, because the error in this case is not harmless beyond a reasonable doubt, this Court must reverse Petitioner's conviction and sentence and remand for a new trial.

VII. CONCLUSION

The certified question posed by the 1st District Court of Appeal must be answered, YES. The holdings in Coney must be applied to "pipeline cases" such as this.

Based on the law and facts above, Petitioner, Alfreco Lett, respectfully requests this court to reverse his conviction and sentence, to remand with orders for dismissal of charges or for a new trial, and grant all other relief which this court deems just and equitable.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief on the Merits has been furnished by U.S. Mail to Patrick Martin, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Mr. Alfredco Lett, on this 8th day of April, 1996.

Respectfully submitted,

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IN THE SUPREME COURT OF FORIDA

ALFREDCO LETT,

Petitioner,

v. CASE NO. 87,541

STATE OF FLORIDA,

Respondent.

_____/

APPENDIX

TO

PETITIONER'S BRIEF ON THE MERITS

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

ALFREDCO LETT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

CASE NO.: 94-4211

Opinion filed January 23, 1996.

An appeal from the Circuit Court for Escambia County.
T. Michael Jones, Judge.

Nancy A. Daniels, Public Defender; Raymond Dix, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Patrick Martin, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Alfredo Lett appeals his conviction for aggravated assault and aggravated battery, arguing that the trial court erred in denying Lett's motion for judgment of acquittal and that he is entitled to a new trial under Coney v. State, 653 So. 2d 1009 (Fla. 1995), because the record does not reflect that he was present at bench conferences during voir dire. We affirm.

JAN 29 1996

With respect to the first issue raised by Lett, we agree with the trial court that the unrebutted victim's testimony alone provided sufficient evidence to submit the charges to the jury. With respect to his second issue, even if we assume the record reflects that Lett was not present at voir dire bench conferences,[1] Coney does not require a new trial here. The Coney opinion specifically limits its holding that the "defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised" to prospective application. Id. at 1013. Thus, the Coney ruling does not apply to cases, such as the instant case, that were in the "pipeline" at the time Coney was decided.

AFFIRMED.

JOANOS, WOLF AND VAN NORTWICK, JJ., CONCUR.

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[1]We note that the trial transcript does not reflect whether Lett was present or absent at voir dire bench conferences.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

ALFREDCO LETT,

Appellant,

v. CASE NO. 94-4211

STATE OF FLORIDA,

Appellee.

_____/

MOTION FOR REHEARING, REHEARING EN BANC, OR CERTIFICATION

APPELLANT, Alfredco Lett, through his undersigned counsel, hereby respectfully requests this Court to rehear its decision under Fla. R. App. P. 9.330 and / or 9.331, or to certify a question presented herein to the Supreme Court of Florida under Fla. R. App. P. 9.030 (a) (2) (v and vi), and in support of these motions states as follows:

I.

This Court's opinion of January 23, 1996 affirms appellant's judgment and sentence for aggravated assault and aggravated battery and denies him a new trial under Coney v. State, 653 So.2d 1009. In its opinion, this Court indicates that Coney holds that the defendant's right to be physically present at the immediate site where pretrial juror challenges are exercised is limited to "prospective application. Id. at 1013. Thus, the Coney ruling does not apply to cases, such as the instant case, that were in the 'pipeline' at the time Coney was decided." (Opinion, page 2).

II.

This Court appears to have overlooked and or misapprehended the reasoning, holding, and applicability of Coney under the Constitutions of the United States and Florida, and cases of the Florida Supreme Court which hold that despite the "prospective" language, such holdings as this must be applied to "pipeline" cases. In its opinion, this Court concedes Lett is such a pipeline case.

First, the state should be estopped from arguing that Lett's absence from the bench conference where challenges to prospective jurors were made was not error. In Coney, when faced with the same facts, the State of Florida conceded error. Id. At 1013. The state cannot assert otherwise in this case without offending Lett's right to equal protection of the laws. See, State v. Pitts, 249 So.2d 47, 48-50 (Fla. 1st DCA 1971) (violation of equal protection for the state to take contrary positions on the same issue in different cases). The Florida Supreme Court noted the State's concession of error in its opinion:

> Coney was not present at the sidebar where the initial challenges were made, and the record fails to show that he waived his presence or ratified the strikes. The State concedes that this rule violation was error, but claims that it was harmless.

Coney, at 1013. The case was then decided adversely to Coney on the basis of harmless error because only challenges for **cause** were made in his absence. Ibid. Lett is asking this Court to apply the same analysis in his case that the Supreme Court used in deciding Coney.

Second, a dispute exists as to what portion of the Coney decision is prospective. Lett's position is that the entire Coney decision should apply to him since his case was on appeal at the time Coney was decided. Art. I, Secs. 9, 16 Fla. Constitution; Amends. V. XIV U.S. Constitution; Smith v. State, 598 So.2d 1063 (Fla. 1992). The only prospective part of Coney is the requirement that the trial judge certify on the record a waiver of a defendant's right to be present at the bench or a ratification of counsel's action in the defendant's absence. However, the state and this Court perceive that defendant's right to be present at bench conferences where peremptory challenges are exercised is also a prospective rule. This is not so, and it is refuted by the Supreme Court's reasoning in Coney.

On whether the defendant had the right to be at a bench conference where peremptory challenges were made, the Florida Supreme Court said Fla. R. Crim. P. 3.180 (a) meant what it says, and has always said, that a defendant has the right to be present at the immediate location where juror challenges are made. See, Francis v. State, 413 So.2d 1175 (Fla. 1982). The state conceded error in Coney because the defendant was not present at a bench conference where

juror challenges were made and the record was silent as to waiver or ratification. Coney, 653 So.2d at 1013. Surely, the state did not concede error based on a rule yet to be announced.

The decision in Coney was controlled by precedent existing before Coney came to court. Lett is entitled to a new trial on the same law applied in Coney without regard to the prospective certification requirement announced in the Coney decision. In other cases where the Supreme Court has established new procedural rules to be applied prospectively, the error in the case was evaluated in accordance with the pre-existing law. E.g., Valentine v. State, 616 so.2d 971 (Fla. 1993); State v. Johans, 613 So.2d 1319 (Fla. 1993); Elam v. State, 636 So.2d 1312 (Fla. 1994); Koon v. Dugger, 619 So. 2d 246 (Fla. 1993); Jackson v. Dugger, 633 So.2d 1051 (Fla. 1993); Huff v. State, 622 So.2d 982 (Fla. 1993). Similarly, Lett is simply asking this Court to apply the law which was in existence before the Coney decision.

The prospective rule established in Coney concerning certification on the record of a waiver or ratification of counsel's actions was not applied in Coney. This court need not apply that rule here in order to reverse Lett's conviction.

III.

In footnote one on page 2 of its opinion, this Court notes "that the trial transcript does not reflect whether Lett was present or absent at voir dire bench conferences" and opines that "even if we assume the record reflects that Lett was not present at voir dire bench conferences ..." Fla. R. App. P. 9.200 (f)(2) reads:

> (2) If the court finds the record is incomplete, it shall direct a party to supply the omitted parts of the record. No proceeding shall be determined, because of an incomplete record, until an opportunity to supplement the record has been given.

While a review of the record demonstrates that only counsel for the state and the defense were at the bench, if this Court concludes that the record does not adequately demonstrate that Lett was not present, Lett asks that he be afforded the opportunity to clarify and supplement the record before a decision on this issue is made.

IV.

Appellant further moves this Court for rehearing en banc in this matter as this case is of exceptional importance and that such consideration is necessary to maintain uniformity in the court's decisions. Fla. R. App. P. 9.331 (c)(1). This case involves the application of the laws of the Supreme Court of Florida to the various Districts, specifically the interpretation of the meaning of the word "prospective" as used in Coney.

Equally important however, is the necessity of uniformity in this Court's decisions. Many cases pending before this Court include issues concerning the application of Coney either as a pipeline case, or post Coney decision. Other similar cases rely on the law prior to the Coney decision.. Those cases immediately known to undersigned counsel are:

Case name	DCA Case Number	Notes
Bowicki v. State,	94-3666	PCA 1-29-96
Wm. Roger Brown v. State,	94-4331	Post Coney
Theodoris Bryant v. State,	94-3691	Pipeline
Jeff Butler III. V. State,	95-1146	Post Coney
Frank Greeson v. State,	95-4069	Pipeline - PCA'd 12-7-95, Rehearing denied 1-11-96.
Horn v. State,	95-58	Pipeline
Martinez v. State,	94-2951	Pipeline
Rickie Mathis v. State,	94-2464	
Rickie Mathis v. State,	94-2465	
Carlos Mejia v. State,	95-1182	Post Coney I
Mary Page v. State,	95-454	
Raul Rafael v. State,	94-3887	Pipeline
Lisa Vann v. State,	95-1227	Post Coney

This Court is undoubtably aware that the circuit courts, acting as appellate courts to the counties are also faced with this issue. Consider that undersigned counsel is aware of the following cases in the 2nd Judicial Circuit which raise the issue in question:

Tommy Roebuck v. State,	Circuit Case 94-5220	Pipeline
Johnnie Wilson v. State,	Circuit Case 95-5894	Pipeline

Furthermore, this same issue is before the Florida Supreme Court in the case of Matthew Dale Boyett v. State, Case No. 81,971. Undersigned counsel gratefully acknowledges that he borrowed the majority of the argument above, from Mr. Boyett's reply brief filed February 2, 1996.

The above cases were found with only a cursory inquiry by undersigned counsel. Yet, with even this many cases raising the issue of the application of Coney, pipeline, or pre-Coney law, it is readily apparent that in order to maintain uniformity in the courts's decisions, rehearing en banc is appropriate and necessary. Thus, appellant requests a rehearing en banc under Fla. R. App. P. 9.331 because appellant believes that the panel decision is of exceptional importance. In so requesting, undersigned makes the following representation:

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

/s/ C. Raymond Dix
C. Raymond Dix
Assistant Public Defender

Alternatively, because appellant also believes there is a lack of uniformity in the Court's decisions as shown by the Per Curium Affirmance in at least three cases already, appearing to be in direct conflict with the law as espoused in State v. Pitts, 249 So.2d 47, 48-50 (Fla. 1st DCA 1971) and Smith v. State, 598 So.2d 1063 (Fla. 1992), appellant requests rehearing en banc as to the application of Coney and pre-Coney law to pre-Coney and "pipeline" cases. In so requesting, undersigned counsel makes the following representation:

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of this court and that a consideration by the full court is necessary to maintain uniformity of decision in this court: State v. Pitts, 249 So.2d 47, 48-50 (Fla. 1st DCA 1971) (violation of equal protection for the state to take contrary positions on the same issue in different cases), and Smith v. State, 598 So.2d 1063 (Fla. 1992) (application to be applied retrospectively to every case pending on direct review or not yet final).

/s/ C. Raymond Dix
Assistant Public Defender

V.

In conjunction with the above, or in the alternative, appellant moves this Court to certify the following questions to the Supreme Court for clarification as questions of great importance. Since the Court has before it the issue in Boyett v. State, Case No. 81,971, as noted above, it seems most appropriate that it applies its reasoning to all other similarly situated cases.

Much of the argument concerning this issue involve two particular parts of the Supreme Court's holding in Coney. First is the question of "prospective" application of the holding in Coney (at 1013) which the state and this Court have taken to imply from the date of the Supreme Court's decision forward. This however, is in direct conflict with Smith v. State, 598 So.2d 1063 (Fla. 1992) where the Florida Supreme Court being "troubled by the inconsistency or lack of clarity in various decisions of (the Supreme Court, itself) and others concerning the application of the prospectivity rule." held:

> [A]ny decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final. Art. I, sect's 9, 16 Fla. Const. (Footnote omitted). To benefit from the change in law, the defendant must have timely objected at trial if an objection was required to preserved the issue for appellate review.

Id. at 1066.

The second question involving the application of Coney revolves around whether the appellant must object at the trial level to preserve the issue. The state has argued that it is necessary and this Court has not taken a position on the question as yet. However, the Supreme Court noted that to benefit from a **change** in law, the defendant must have timely objected at trial, but Coney is **not** a change in law. The Court was explicit that it was simply explaining that Fla. R. Crim. P. 3.180 "means just what it says," Id. at 1013, and that it based its reasoning in Coney on a case that was over ten years old -- Francis v. State, 413 So.2d 1175 (Fla, 1982).

Thus, two questions are raised:

> 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?
>
> AND
>
> MUST AN OBJECTION HAVE BEEN RAISED AT TRIAL TO PRESERVE THE ISSUE OF THE DEFENDANT'S RIGHT TO BE PHYSICALLY PRESENT AT THE IMMEDIATE SITE WHERE PRETRIAL JUROR CHALLENGES ARE EXERCISED?

Furthermore, given the state's concession of error in Coney, at 1013, the following certified question appears to be appropriate and necessary:

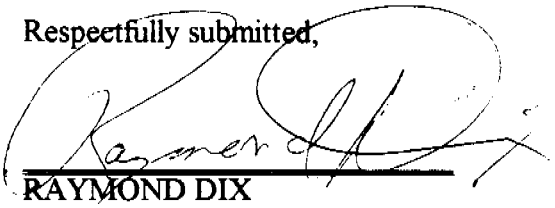
> IS THE STATE OF FLORIDA ESTOPPED FROM TAKING A POSITION CONTRARY TO ITS CONTENTION IN CONEY 635 So.2d 1009, 1013 (Fla. 1995) THAT THE DEFENDANT'S ABSENCE FROM THE IMMEDIATE SITE WHERE PEREMPTORY CHALLENGES ARE EXERCISED VIOLATES FLA.R.CRIM.P. 3.180?

WHEREFORE, appellant, Alfredco Lett, respectfully requests this Court, for the reasons stated above, to grant this motion and rehear this appeal, to rehear it en banc, and/or to certify to the Florida Supreme Court as questions of great public importance, the questions raised herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Patrick Martin, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Mr. Alfredco Lett, on this ___ day of February, 1996.

Respectfully submitted,



RAYMOND DIX
ASSISTANT PUBLIC DEFENDER
ATTORNEY FOR APPELLANT
FLORIDA BAR NO. 919896

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
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TALLAHASSEE, FLORIDA 32301
(904) 488-2458

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

ALFREDCO LETT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

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

CASE NO.: 94-4211

Opinion filed March 5, 1996.

An appeal from the Circuit Court for Escambia County.
T. Michael Jones, Judge.

Nancy A. Daniels, Public Defender; Raymond Dix, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Patrick Martin, Assistant Attorney General, Tallahassee, for Appellee.

ON MOTION FOR REHEARING

PER CURIAM.

We grant the motion for rehearing and, grant, in part, and deny, in part, the motion for certification filed by appellant, Alfredco Lett; withdraw our previous opinion filed in this cause; and substitute the following opinion. Appellant's motion for rehearing en banc is denied.

Alfredco Lett appeals his conviction for aggravated assault and aggravated battery, arguing that the trial court erred in denying Lett's motion for judgment of acquittal and that he is entitled to a new trial under Coney v. State, 653 So. 2d 1009 (Fla. 1995), because the record does not reflect that he was present at bench conferences during voir dire. We affirm, but certify a question of great public importance.

With respect to the first issue raised by Lett, we agree with the trial court that the unrebutted victim's testimony alone provided sufficient evidence to submit the charges to the jury.

With respect to his second issue, even if we assume the record reflects that Lett was not present at voir dire bench conferences,[1] Coney does not require a new trial here. The Coney opinion specifically limits its holding that the "defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised" to "prospective" application. Id. at 1013. The question presented here is whether the supreme court in Coney intended "prospective" application to exclude the application of the Coney decision to defendants in so-called "pipeline" cases; that is, to defendants, such as the defendant in the instant case, whose cases were pending on direct review or not yet final at the time of the issuance of the Coney decision.

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[1]We note that the trial transcript does not reflect whether Lett was present or absent at voir dire bench conferences.

The state argues that the supreme court's use of "prospective" in prior cases precludes the application of Coney to pipeline cases. See, Fenelon v. State, 594 So. 2d 292, 293, 295 (Fla. 1992)("We agree with the State that giving the flight instruction, even if erroneous, was harmless beyond a reasonable doubt. . . .," and "we approve the result below although we direct that henceforth the jury instruction on flight shall not be given."); and Taylor v. State, 630 So. 2d 1038, 1042 (Fla. 1994)("This Court intended that the holding in Fenelon be applied prospectively only, and, since Taylor was tried before our decision in Fenelon was issued, the trial court did not err given the circumstances of this case."). Lett, on the other hand, argues that to exclude pipeline cases from Coney's application would conflict with Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992), where the court held that:

> [A]ny decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final. Art. I, §§ 9, 16 Fla. Const.

(Footnote omitted).

However, in Wuornos v. State, 644 So. 2d 1000 (Fla. 1994), the court addressed this apparent conflict between its holding in Smith and its rulings in cases in which the court has specified prospective application. In Wuornos, the court ruled that its holding in Castro v. State, 597 So. 2d 259 (Fla. 1992),

recognizing a new jury instruction requirement, "was intended to have prospective effect only. . . ." Wuornos, 644 So. 2d at 1007. In a footnote, the court:

> Recognize[d] that this holding may seem contrary to a portion of Smith v. State [citation omitted], 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.

Id. at 1007-1008, n.4 (emphasis added). We read this footnote in Wuornos to mean that, whenever the supreme court specifies that its announcement of a new rule of law will have "prospective" application only, it has "said otherwise" and intends the ruling not to have the retrospective application to pipeline cases provided by Smith. Although we have considerable concern about adopting a rule that would apply the constitutional right recognized in Smith in some cases, while not applying the Smith rule to other cases, without a clear articulation of a rationale to govern its application, such a result seems required by Wuornos. Accordingly, we conclude that the court's express limitation of Coney to prospective application precludes the application of Coney to cases pending on direct appeal or not yet final at the time of the issuance of the Coney opinion. Thus, the Coney ruling does not apply to the instant case, a case in the pipeline at the time Coney was

decided.

Because we recognize that the language in the Wuornos footnote, at least as we read it, limits the application of constitutional rights recognized in Smith and may be susceptible to other interpretations, and that numerous Coney-type cases are in the pipeline, we certify to the Florida Supreme Court the following question:

> 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?

AFFIRMED.

JOANOS, WOLF AND VAN NORTWICK, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

ALFREDCO LETT,	:	
Appellant/Petitioner,	:	
v.	:	CASE NO. 94-4211
STATE OF FLORIDA,	:	
Appellee/Respondent.	:	
	:	

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that ALFREDCO LETT, Petitioner, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered **March 5, 1996.** This decision passes upon a question certified to be of great public importance, and/or it expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

RAYMOND DIX #919896
Assistant Public Defender
Leon County Courthouse
Fourth Floor North
301 South Monroe Street
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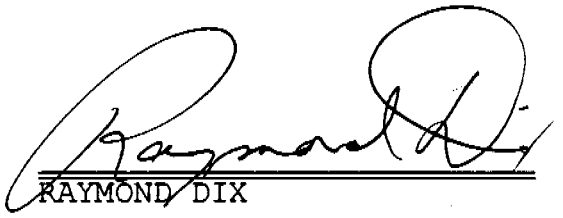
(904) 488-2458
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Patrick Martin, Assistant Attorney General, Department of Legal Affairs, Criminal Appeals Division, The Capital, Plaza Level, Tallahassee, FL, 32301, on this 27th day of March, 1996.



RAYMOND DIX

M A N D A T E

From

DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

To the Honorable, the Judges of the Circuit Court for Escambia County

WHEREAS, in that certain cause filed in this Court styled:

STATE OF FLORIDA

vs.

ALFREDCO LETT AKA
ALFRECO LETT

Case No. 94-4211

Your Case No. 94-2551CFA4P-01
94-3197CFA8-01

The attached opinion was rendered on March 5, 1996

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rules of this Court and the laws of the State of Florida.

WITNESS the Honorable E. Earle Zehmer

Chief Judge of the District Court of Appeal of Florida, First District and the Seal of said court at Tallahassee, the Capitol, on this

21st day of March, 1996.

DISTRICT COURT OF APPEAL
SAT CITO SI RECTE
FIRST DISTRICT
STATE OF FLORIDA

Jon S. Wheeler

Clerk, District Court of Appeal of Florida,
First District