THE SUPREME COURT OF FLORIDA

BRIAN DAVID LEE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO: 87, 715
(DCA NO: 95-56)

ON APPLICATION FOR DISCRETIONARY JURISDICTION

INITIAL BRIEF OF APPELLANT ON THE MERITS

An Appeal From the District Court of Appeal
First District of Florida

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PRELIMINARY STATEMENT

BRIAN DAVID LEE was the Defendant in the trial court and will be referred to in this brief as "Appellant", "Defendant", "Petitioner" or by his proper name. Reference to the Record on Appeal will be by the use of the symbol "R" followed by the appropriate volume and page number in parentheses. Reference to the Transcript will be by the use of the symbol "R" followed by the appropriate book and page number in parentheses. Reference to the Supplemental Record on Appeal will be by the use of the symbol "S" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND THE FACTS

The Appellant was arrested on December 11, 1993 on charges of murder, aggravated battery and shooting into an occupied vehicle. (R-VI-1). The public defender was appointed to represent Appellant on December 13, 1993. (R-VI-4). On December 16, 1993 the public defender was allowed to withdraw and the undersigned was appointed to represent Appellant. (R-VI-7). On January 7, 1994 an information was filed charging Appellant with second degree murder with a firearm, attempted second degree murder with a firearm, and shooting at or into an occupied vehicle. (R-VI-11, 12). On July 21, 1994 the State filed an Amended Information charging Appellant with principal to second degree murder with a firearm, principal to attempted second degree murder, and principal to shooting at or into an occupied vehicle. (R-VI-37-39). On August 31, 1994 the State filed another Amended Information charging Appellant with second degree murder with a firearm (count one), attempted second degree murder with a firearm (count two), attempted second degree murder with a firearm (count three), attempted second degree murder with a firearm (count four), and shooting at or into an occupied vehicle (count five) (R-VI-54-57).

Various pre-trial motions were filed by the State, the Appellant and the two co-defendants, Maurice Horn and Demetrius Holden (R-VI-40-43) and (R-VI-57-76). Most of these motions are not relevant to this appeal. Any which may be relevant will be

fully discussed in the Argument portion of this brief.

Jury trial began on September 12, 1994. (R-BI- 11-183). The Appellant was present in the courtroom but was not present at the bench during the jury selection process. After jury selection and opening statements the State called twenty six (26) witnesses and introduced ninety five (95) items of evidence. After the State rested, the trial court denied the Appellant's motion for judgment of acquittal. (R-BV 918-937).

Appellant then made an opening statement and called five (5) witnesses. Appellant rested (R-BV-1042). Co-defendant Horn testified and then rested his case. (R-BV-1108). Co-defendant Holden presented no testimony and rested his case. (R-BV-1108). The State called one rebuttal witness and then rested. (R-BV-1114). All defendant's renewed their motions for judgment of acquittal which were denied. (R-BV-1121).

The closing arguments are particularly relevant to this brief and relevant portions will be more fully discussed in Issue III herein. On September 23, 1994, after closing arguments and jury deliberations, the jury returned the following verdicts as to Appellant:

> Count I. Guilty of the lesser charge of third degree murder. The jury determined that Appellant or his principal did use a firearm, and that Appellant did personally possess a firearm.
>
> Count II. Guilty of attempted third degree murder with

the same determination regarding the firearm.

Count III. Guilty of attempted third degree murder with the same determination regarding the firearm.

Count IV. Not guilty.

Count V. Guilty as charged of shooting at or into an occupied vehicle. (Appellant's verdict: R-VI-187-192).

Co-defendant, Maurice Horn: Had the same verdict as the Appellant.

Co-defendant, Demetrius Holden: Was found not guilty on all counts.

A motion for new trial was filed on October 3, 1994 (R-VI-193-194) and argued on November 8, 1994, prior to sentencing. (R-VII-342-358). The motion for new trial was denied. (R-VII-358).

A sentencing hearing was held on November 8, 1994. At sentencing the Appellant objected to the enhancement of Appellant's sentence. (R-VII-19). The Court denied Appellant's objection. (R-VII-400). Appellant was sentenced, pursuant to the enhancement, to a term of seventeen (17) years in the department of corrections on count one. On counts two, three, and five the trial court imposed a sentence of fifteen years to run concurrent. The minimum mandatory sentence of three years was imposed on counts 1, 2 and 3 (R-VII- 401-402).

Notice of appeal was timely filed. (R-VII-284-285). The public defender was appointed to handle the appeal (R-VII-341). The First District Court of Appeal subsequently entered an order granting the public defender's motion to withdraw. On April 21,

1995 the trial court appointed the undersigned to represent Appellant on appeal.

On March 25, 1996 the First District Court of Appeal issued its opinion and certified the following questions to this Court:

> 1. 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?
>
> 2. When a defendant is charged with attempted second-decree murder and is convicted by a jury of the category 2 lesser-included offenses of attempted Third degree (felony)murder, do State v. Gray, 654 So.2d 552 (Fla. 1995), and Section 924.34, Florida Statutes (1991), require or permit the trial court, upon reversal of the conviction to enter judgement for attempted voluntary manslaughter, as category 1 necessarily included lesser offense of the crime charged?
>
> If the answer is no, then do lesser-included offenses of the charged offense remain viable for a new trial?

SUMMARY OF ARGUMENT

The Appellant was involuntarily absent from the sidebar when peremptory challenges were exercised. There was no waiver of Appellant's right to be present nor was there a ratification of the jury selection by the Appellant. The involuntary absence of Appellant at a critical stage of trial was a violation of Rule 3.180 and a denial of due process under the State and Federal Constitutions.

This Court should affirm the First District's decision to reverse Appellant's conviction for the non-existent crimes of attempted third degree murder. Additionally, this Court should determine that the trial court cannot, on remend enter a judgment for attempted voluntary manslaughter nor can "lesser included" offense be viable for a new trial.

Finally, the trial court erred in not granting Appellant's objection to the improper comments made by the prosecutor in closing argument. Additionally the trial court erred in not granting appellant's motion for mistrial or in the alternative, motion for a curative instruction. The prosecutor's comments went beyond acceptable bounds of advocacy and evidenced a preoccupation with obtaining a conviction at any cost.

ISSUE I

THE ACCUSED WAS INVOLUNTARILY ABSENT FROM THE SIDEBAR WHEN PEREMPTORY CHALLENGES WERE EXERCISED DURING THE CHALLENGING OF THE JURY. THERE IS NO RECORD OF A KNOWING AND VOLUNTARY WAIVER OF HIS PRESENCE. THERE IS NO RECORD THAT PETITIONER RATIFIED OR APPROVED THE PEREMPTORY STRIKES. THE TRIAL COURT ERRED IN FAILING TO MAKE ANY INQUIRY AS TO WHETHER PETITIONER'S ABSENCE WAS VOLUNTARY OR WHETHER HE APPROVED OR RATIFIED THE STRIKES. THE COURT FURTHER FAILED TO CERTIFY THAT PETITIONER'S ABSENCE WAS VOLUNTARY OR THAT HE RATIFIED THE PEREMPTORY STRIKES. THE INVOLUNTARY ABSENCE OF PETITIONER AT A CRITICAL STAGE OF TRIAL WAS A CLEAR VIOLATION OF RULE 3.180 AND A DENIAL OF DUE PROCESS UNDER THE STATE AND FEDERAL CONSTITUTIONS

The district court 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?

The following argument is taken from the standard brief filed by the Public Defender's office for the Second Judicial Circuit on this same issue.

The First District Court of Appeal concluded that the holding of this Court in Coney v. State, 653 So.2d 1009 (Fla. 1995), that a "defendant has a right to be physically present at the immediate site were pretrial juror challenges are exercised" does not apply retrospectively to pipeline cases. The district court did not discuss whether, notwithstanding the question of whether Coney applied in his case, a new trial is necessary under this Court's decisions in Francis v. State, 413 So.2d 1175 (Fla. 1982), and Turner v. State, 530 So. 2d 45 (Fla. 1987).

In addition to the question certified, Petitioner respectfully

urges this Court to also unambiguously clarify whether it intended its holding in Coney that a "defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised" to be perspective only, or whether the Court's statement that its "ruling today clarifying this issue is prospective only" was meant to apply only to the remainder of the paragraph which follows the first sentence. In Coney, this Court said:

> We conclude that the rule means just what it says: The defendant has a right to be physically present at the immediate site were 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. Our ruling today clarifying this issue is prospective only.

Id. at 1013.

Petitioner contends that whether or not Coney is a clarification of existing law or new law, it nonetheless must be applied to pipeline cases.[1] Even were Coney not applied in this case, the rule of procedure and case law preceding Coney must be applied in the same manner as they were in Coney in the instant case.

A. Facts of the Case.

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[1]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 is it reflected the petitioner was informed of his right to be present at the bench.
- Petitioner was **not** present at the bench.
- Nowhere does the trial court **inquire** if the petitioner's absence from the bench is voluntary.
- Nowhere in the record does petitioner state he is waiving his right to be present.
- Nowhere does the trial court **certify** that the petitioner's absence from the bench is voluntary or that petitioner waived his right to be present after a proper inquiry be the court.
- Nowhere does the trial court ask the petitioner to **ratify** the choice of jurors made by his counsel, nor does petitioner ratify the peremptory challenges made by counsel on the record.

B. Coney and Pre-coney law

The specific holding in Coney - "The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised" - was based upon both an existing Florida rule of criminal procedure and prior case law, both of which in turn were based on both the Florida and U.S. Constitutions. Rule 3.180(a)(4), Fla.R.Crim.P., requires that a defendant in a criminal case be present "at the beginning of the trial during examination, challenging, impanelling, and swearing of the jury" and this Court ruled that this provision means exactly what it says. Coney, at 1013. This rule is to be strictly construed and applied, as Coney makes unequivocally clear. An accused is not present during the challenging of jurors if he or she is not at the location where the process is taking place. Frances v. State, 413 So.2d 1175 (Fla. 1982); Turner v. State, 530 So.2d 45 (Fla. 1987). Thus, it is not enough that an accused be present somewhere else in the courtroom

or in the courthouse when peremptory challenging of the jury is occurring. The accused must be able to hear the proceedings and to be able to meaningfully participate in the process. If the accused is seated at the defense table while a whispered selection conference is being conducted at the judge's bench, he or she cannot be said to be present and meaningfully able to participate.

"The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised." Coney at 1013. Moreover, the Court went on to state that a waiver of the right to be present must be certified by the court to be knowing, intelligent, and voluntary after a proper inquiry. The judge in this case made no inquiry or certification whatsoever. None of the requirements established by the Court in Coney, set forth at p. 14, 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 plain mandate of the rule is so clearly violated, as it was here, the constitutional rights the rule safeguards are also violated.

(1) Only Part of Coney Appears to Be "Prospective," and Such Language Has No Effect

on "Pipeline Cases" Such as This.

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's holding are the requirements that the trial judge **certify** on the record **a waiver** of a defendant's right to be present at the bench and/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 underpinning its hold 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. The court cited the rule and its previous holding in Francis v. State, 413 So.2d 1175 (Fla. 1982), as authority for that proposition. Moreover, the state conceded in Coney that it was error under Francis because Coney was not present at a bench conference where juror challenges were made and the record was silent as to waiver or ratification. See Coney, at 1013. Surely, the state would not concede error based on a rule yet to be announced. The **right** to be present at the bench during the actual selection process pre-existed Coney under the rule and under Francis and Turner, and the only "prospective" part must have been the requirements now placed

on the trial courts that they inquire and certify waivers and ratification of the actions of counsel on the record.

(2) State Is Estopped from Arguing Absence of Error.

Initially, the State of Florida is estopped from arguing that Petitioner's absence from the bench conference where peremptory 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 now 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 clearly pointed out the state's concession of error in its opinion.[2] The case was then decided adversely to Coney on the sole basis of harmless error because only challenges for cause were made in Coney's absence. Ibid. Petitioner is asking this Court to apply the same law in his case that was applied in Coney's case. Equal protection under the law requires no less.

C. Coney and the Principles of Law Underlying Coney Must Be Applied to This "Pipeline Case"

Whether or not Coney is a clarification of existing law or new law, it must be applied to this case. Furthermore, whether or not

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[2] 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).

Coney itself is applied to this case, the prior law upon which the decision in Coney rests must be applied to this case. To do less violates state and federal constitutional principles.

(1) 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 "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 Appellant was present in the courtroom, as was Coney, he was not physically present at the sidebar. Inferentially, Appellant could no more hear what was happening at the bench than the jury could, and the jury was also present in the court-room. Thus, Appellant was 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.

(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; . . .

(b) Prior 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 absence. Snyder v. Massachusetts, 291 U.S. 97, 54 So.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 (1886); Peede v. State, 474 So.2d 808 (Fla. 1985), cert.denied, 477 U.S. 909, 106 So.Ct. 3286, 91 L.Ed.2d 575 (1986).

Id. Nothing in the record demonstrates that Petitioner 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, in any event, a clear violation of Rule 3.180(a)(4)'s unambiguous language mandating his presence.

This Court most recently addressed the issue of the accused's presence during challenging of the jury 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 be physically present at the immediate site where pretrial juror challenges are exercised.** See Francis.

Coney, 653 So.2d at 1013 (**Bold** added). Previously, this Court has repeatedly recognized that jury selection - at least that portion of voirdire 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 also 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, §1253, at 298 (1933)(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").

(c) Plain Language in Coney Indicates That it is Not New LAW

In Coney, this Court indicated that it relied on the plain,

unequivocal language of Rule 3.180 in reaching its result. Thus, if the rule already existed, it is NOT, and cannot be, 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 or rule, 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 interpreting 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 specific holding in Coney, quoted above, was not only based on Fla.R.Crim.P. 3.180, but on its previous decision in Francis. Coney's holding was not "new law," but simply explained that the Rule meant what it said. But what is "new law"?

(d) "New" Rule or Law Defined

The underlying legal norm - the right to be present at all critical stages of trial - precludes 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 [r]prior] precedent. . . If a Proffered factual distinction between the case under consideration and preexisting 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 So.Ct. 2482, 2497, 120 L.Ed.2d 225 (1992)(O'Connor, J. concurring, joined by Blackman & 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), referred to "breading of new ground" as being a "clear break" with the past. Johnson was overruled by Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), but the Griffith Court continued to refer to a new rule as a "clear break" with prior precedent. The result in Coney was clearly dictated by prior precedent, namely Francis and Turner.

(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 or prior precedent. 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 courtroom, but excluded from

proceedings where preemptory 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. at 1013.

(f) "On-the-record" Procedural Requirements Announced in Coney Was Not New Law; and Waiver by silence or Acquiescence is Not Allowed Where Fundamental Rights Are Involved.

This Court has repeatedly held that a defendant's waiver of the small class of "fundamental" rights can only be accomplished by a personal, affirmative, 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).[3]

Courts in other jurisdictions have also required affirmative, on-the-record waivers of fundamental rights. See e.g., Larson v. Tansy, 911 F.2d 392, 396 (10th Cir. 1990) ("Several circuits have held that 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 subject to the

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[3] 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 preceding")

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. Cockran, 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).

(2) If Coney is Considered "New Law"

If it is assumed arguendo that Coney announced a "new rule," recent state and federal constitutional cases require that Petitioner be permitted to benefit from the Court's holding in Coney. In Griffith v. Kentucky, 479 U.S. 314 (1987), the Supreme Court abandoned its former retroactivity doctrine[4] 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. Consequently, state appellate courts **must** apply the Griffith retroactivity standard when announcing a new rule that implicates federal constitutional guarantees. The Supreme Court 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. What ever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law . . . cannot extend to interpretations of federal law.

Harper v. Virginia Department of Taxation, ____ U.S., 113 S.Ct.

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

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, 1443, 115 L.Ed.2d 481 (1919)("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's "new rule" is not solely based on state law, or if it implicates or is interwoven with the federal Constitution, the rule must be applied to all cases pending on direct appeal at the time the new rule is announced. See, e.g., 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 the plain language in Coney, and in Turner and Francis which Coney follows, and the citations to the federal 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 states** of a criminal trial where a defendant's presence is mandated. (citing Francis, at 1177)

Coney, 653 So.2d at 1013 (**Bold** added). In turn, this Court stated in Turner:

> 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).
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> 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 a personal, affirmative waiver on the record 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 rule 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, as well as the parallel provisions of the Florida Constitution, require this Court to give Coney retroactive application to Petitioner's direct appeal.

Even if Coney were based solely on state law (which it clearly is not), the Equal Protection and Due Process provisions of the

Florida Constitution would require that this Court to apply the decision retroactively to Petitioner's appeal. Griffith v. Kentucky, 479 U.S. 314 (1987). This Court has adopted and applied the reasoning in Griffith to new state-law based rules as well as new federal-law bases rules. In Smith v. State, 598 So.2d 1063 (Fla. 1992), this Court agreed with "the principles of fairness and equal treatment underlying Griffith," and adopted the same bright line rule in Griffith.[5] Then, in several subsequent cases, those principles 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 "new[state]law" announced in Castro v. State, 597 So.2d 259 (1992), to a pipeline case. See Wuornos, at 1007-1008.

However, later, in State v. Brown, 655 So.2d 82 (Fla. 1995), this Court appears to have re-embraced the principles of fairness and equal treatment in Griffith, holding that Smith "established a blanket rule of retrospective application to all non-final 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 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

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[5]It is critical to note that Smith itself, therefore, implicates federal law by agreeing with and adopting the "principles" of Griffith, a case based upon the federal constitution.

appeal, he could have sought relief under Smith. Id. at 1195.

The integrity of judicial review requires this Court, once and for all, to abandon its bewildering on-again-off-again ad hoc approach to retroactivity and adopt and adhere to the bright-line standard 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 (Arz. 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 Coney was decided. He sought relief 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.

(3) Relief Is Mandated by Law in Existence Before Coney

Even in the absence of the application of the rules in Coney's case, Turner v. State, 530 So.2d 45 (Fla. 1987) and Francis v. State, 413 So.2d 1175, 1177 (Fla. 1982) require reversal and the granting of anew trial. "[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," this Court said in Coney, citing Francis for support of that proposition. Clearly, the rule has always meant what it said long prior to Coney saying it means what it says. 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 to due process and, in some instances, to rights of confrontation.

It is not known, and it is impossible to now determine, what input petitioner might have provided to counsel regarding the exercise of his peremptory challenges at the sidebar as the process proceeded.[6] However, petitioner's absence was clearly error given the very strict construction required Rule 3.180(a)(4).

Prior to Coney, a defendant could personally waive his right to be present before leaving the courtroom; such waiver being accomplished through personal questioning by the trial Court. See Chandler v. State, 534 So.2d 701, 104 (Fla. 1988). The defendant's presence could also be waived by counsel - provided that the defendant subsequently ratified or acquiesced in counsels 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 through 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, or acquiesced to 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

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[6]Not all of the petitioner's available strikes were exercised in this case.

was no waiver, and Petitioner had the right to be present at the bench during jury selection.[7] Francis; Turner.

D. Coney or Pre-Coney, the Law Must Be Applied to this Case Because 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 challenges.

Petitioner 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

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[7]Again, the state is estopped from arguing that his absence was not error under Francis, a point which it conceded in Coney. See supra at p.17.

prejudices based only on bare looks or gestures. Francis, 413 So.2d at 1176. Thus, the very concept of peremptory challenges necessitates constant input 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 has exercised the strikes. It is highly fluid situation, requiring constant evaluation and reevaluation about who should or should not be struck and that 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 the client 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 wish to

strike others on the jury who had not been previously discussed with counsel. The accused also 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 or back-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, the accused was excluded from this critical stage of the trial.

E. Petitioner Did Not Waive His Right

Nothing petitioner did nor 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 v. Massachusetts; Faretta V. California. A waiver by inaction of a fundamental constitutional right - or presuming a waiver by acquiescence on a silent record - flies directly in the face of opinion of the United States Supreme Court to the contrary. In addressing a similar waiver (of speedy trial) the Supreme 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." [Citation omitted]. Courts should "indulge every reasonable presumption against waiver," [Citation omitted] and they should not presume acquiescence in the loss of fundamental rights." [Citation omitted]. In Carnley v. Cochran, 369 U.S. 506, 8 L.Ed.2d 70, 82 S.Ct. 884 (1962), we held:
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> > "presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that a 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. [Citations 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 and essential 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 was no such 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,"[8] that Mr. Lees 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.

F. No Objection Need Be Made to Preserve this Issue

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 Lee 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.

What is critical to understand is that the right to be physically present at critical stages of the trial is one which exists without the necessity of an affirmative assertion of the right, just as the right to trial counsel or to a jury trial, for example, exists without a specific assertion of the right. This right, like the right to counsel or to a jury, exists and is protected by the due process clause of the federal and state constitutions, constitutional guarantees further implemented and

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

protected by Rule 3.180. The right to be present also exists without a specific assertion as a matter of the rights established by Rule 3.180. No accused must stand up and insist that he be present 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 accused is not present when mandated, particularly when required under the rule, a waiver of the right - one which is voluntarily, freely and intelligently given after a proper advisement of the right and inquiry - must be spread upon the record. In the absence of a waiver, or evidence thereof, appearing on the record, there is no waiver of the right. The right is not waived by inference or by silence of the accused (particularly where there is no affirmative showing that the accused was ever advised by the court of the existence of the right). See, State v. Melendez, 244 So.2d 137 (Fla. 1971).

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; it is a simple matter of due process. The notion that this right exists without the requirement of a specific assertion of the right is further confirmed by Coney's specific holding that where the accused is absent, the trial court in such cases must certify through proper inquiry that there was waiver which is knowing, intelligent, and voluntary. Coney, 653 So.2d at 1013. See also, State v. Melendez; Johnson v. Zerbst, 304 U.S. 458 (1938); Brewer v. Williams, 430

U.S. 387 (1977)(every presumption against waiver); Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), quoted supra at p. 31.

The notion that this right must be affirmatively waived on the record (as opposed to specifically asserted by an objection to the procedure) was similarly expressed by this Court in Turner v. State, 530 So.2d 45, 19 (Fla. 1987), where the issue of the defendant's absence during challenging of the jury was addressed on appeal. The opinion in Turner evidences no indication that an objection to Turner's absence was ever lodged with the trial court. The Court held:

> We cannot agree that Turner waived his right to be present during the exercise of challenges or that he constructively ratified or affirmed counsel's actions. A defendant's waiver of the right to be present at essential stages of trial must be knowing, intelligent and voluntary. . . . The record does not indicate that the trial court informed Turner of his right or questioned him as to any ratification of counsel's exercise of challenges in his absence. A defendant cannot knowingly and intelligently waive a right of which he is unaware. Silence is insufficient to show acquiescence. Francis.

Turner, 530 So.2d at 49 (Emphasis Added).

Since the right is not waived, and cannot be waived, by silence, no contemporaneous objection should be required to preserve the issue for review. To require a specific, contemporaneous objection to preserve the right - one which already exists as a matter of law - would be tantamount to imposing a waiver by silence or acquiescence, rather than requiring evidence of an affirmative, intentional relinquishment or abandonment of a known right or privilege on the record, as this Court has mandated

in Turner and Francis, and indeed again in Coney, and as the United Supreme Court also requires. Barker v. Wingo.

Equally significant is that in the opinions in Coney, Francis, and Turner is it not recorded that there were contemporaneous objections made to the defendants' absence. It is particularly clear that this was so in Coney's case. The initial opinion in Coney issued January 13, 1995 (found at 20 Fla.L.Weekly S16), contained a sentence which said: "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." At S67-17.[9] Although struck from the final opinion issued in April 1995, this sentence clearly shows that no contemporaneous objection was made by Coney to his physical absence at the site of the challenging of the jury at trial. Likewise, there is nothing in the opinions in Francis or Turner to suggest that either of those defendants made contemporaneous objections to their absence. Nevertheless, this Court in each case fully addressed the issue on its merits without discussing or imposing a procedural bar.

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 as a structural defect in the trial. See Hegler v. Borg, 50 F.3d 1477, 1476 (9th Cir. 1995)(violation of defendant's right to presence is

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[9]Opinions in Coney were actually published in the Florida Law Weekly three times: 20 Fla.L.Weekly S16, 20 Fla.L.Weekly S204, 20 Fla.L.Weekly S255.

"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). The Supreme Court has divided the class of constitutional errors that may occur during the course of a criminal proceeding into two categories: trial error and structural error. Structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302, 310 (1991). Where a criminal proceeding is undermined by a structural error, the "criminal trial cannot reliably serve the function as vehicle for determination of guilt or innocence, and the defendant's conviction must be reversed. Id, On the other hand, trial error is error "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless." Id. at 307-308, 111 S.Ct. at 1263-64. The accused's absence from the challenging of the jury through peremptory challenges is a structural error. See e.g., Hays v. Arave, 977 F.2d 475 (9th Cir. 1992) (in absentia sentencing is structural error requiring automatic reversal); Rice v. Wood, 44 F.3d 1396 (9th Cir. 1995) (defendant's absence at return of verdict fundamental and a structural error; but where defendant has no role to play, absence is not structural error). Being a structural defect, harmless error does not apply. Fulminante.

H. Analysis of Prejudice

While it is contended that the absence of the accused constitutes a structural error not subject to harmless error analysis under Fulminante, clearly this Court previously has applied a harmless error analysis to the error, finding a clear distinction regarding harmfulness where the matters discussed in the accused's absence were strictly legal ones. see Coney and Turner. Thus, prejudice needs to be discussed here. As we conceded by the state in Coney, it was error under Francis 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. DeFuilio, 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)). 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. Frances, 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 or what prejudice ensued.

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. Presumptively, there was prejudice. Moreover, the error was structural, the right to be present at this critical stage of the proceedings being fundamental. Thus, the Petitioner is entitled to a new trial because 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. Lee'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. Moveover, the absence of the accused at a critical stage of trial must be presumed harmful because it is structural error, unless the state can show beyond a reasonable doubt that the defendant has no role whatsoever to play in the exercise of his peremptory challenges or that his presence could not have "influenced the process" of that critical stage of the trial. Hegler v. Borg; Arizona v. Fulminante. The state can make no such showing.

I. Conclusion

Accordingly, the Court is requested to answer the certified questions in the affirmative, reverse petitioner's conviction and remand for a new trial.

However, should the question be answered in the negative, and should Coney not apply in this case, Petitioner nonetheless requests the Court to reverse his conviction and remand for a new trial because his absence from the bench during peremptory challenging of the jury was a clear violation of Rule 3.180(a)(4) and relief is required under Francis and Turner.

Because the error in this case is not harmless beyond a reasonable doubt, based upon the trilogy of cases -Francis, Turner and Coney - this Court must reverse and remand for a new trial.

ISSUE II

THIS COURT SHOULD AFFIRM THE DECISION OF THE FIRST DISTRICT REVERSING THE DEFENDANT'S CONVICTION FOR THE NONEXISTENT CRIMES OF ATTEMPTED THIRD DEGREE MURDER AND THIS COURT SHOULD ANSWER BOTH CERTIFIED QUESTIONS IN THE NEGATIVE.

The First District Court of Appeal certified the following questions to this Court:

> WHEN A DEFENDANT IS CHARGED WITH ATTEMPTED SECOND-DEGREE MURDER AND IS CONVICTED BY A JURY OF THE CATEGORY 2 LESSER-INCLUDED OFFENSES OF ATTEMPTED THIRD DEGREE (FELONY) MURDER, DO STATE V. GRAY, 654 So.2d 552 (Fla. 1995), AND SECTION 924.34, FLORIDA STATUTES (1991), REQUIRE OR PERMIT THE TRIAL COURT, UPON REVERSAL OF THE CONVICTION TO ENTER A JUDGMENT FOR ATTEMPTED VOLUNTARY MANSLAUGHTER, A CATEGORY 1 NECESSARILY INCLUDED LESSER OFFENSE OF THE CRIME CHARGED?
>
> IF THE ANSWER IS NO, THEN DO LESSER-INCLUDED OFFENSES OF THE CHARGED OFFENSE REMAIN VIABLE FOR A NEW TRIAL?

On direct appeal, the Appellant challenged his convictions of attempted third degree felony murder on the grounds that same was not a crime in the State of Florida. On March 25, 1996, the First District Court of Appeal entered its decision reversing Appellant's convictions for attempted third degree felony murder pursuant to this Court's decision in State v. Gray, 654 So.2d 552 (Fla. 1995).

The Appellant's co-defendant, Maurice Morsells Horn, is also before this Court on the same certified questions from the First District Court of Appeal. The First District entered its opinion reversing Mr. Horn's case on the same grounds as Appellant's reversal. (Horn v. State, First District Court of Appeal, Case No. 95-58). The state will argue that the trial court should be required or permitted to enter a judgement for attempted voluntary manslaughter or, in the alternative, that lesser included offenses

remain viable for a new trial.

Both Appellant's case and Horn's case were remanded to the trial court by the First District pursuant to Pratt v. State, 21 Fla.L.Weekly D311 (Fla. 1st DCA Jan. 31, 1996). The Pratt case is now pending before this Court. As to the first certified question the First District in Pratt stated:

> Were we to adopt the state's position and direct entry of judgment for attempted manslaughter (an intent crime) pursuant to section 924.34, we necessarily would be acting as the fact finder and would have to assume the presence of the requisite intent. Such a result would encroach impermissibly upon the province of the jury. We conclude that the appellant would be effectively denied his constitutional right to trial by a jury if we, sitting in an appellate capacity, were to presume a finding of intent that the jury itself did not have to make.

Pratt v. State, 21 Fla.L.Weekly D311, 312 (Fla. 1st DCA Jan. 31, 1996).

As stated in Pratt it is not for this Court "sitting in an a appellate capacity . . . to presume a finding of intent that the jury itself did not have to make."

As noted in the First District's opinion in the Horn case, there is no crime of attempted manslaughter by culpable negligence in Florida. Reid v. State, 656 So.2d 191, 192 (Fla. 1st DCA), review denied, 663 So.2d 632 (Fla. 1995). Intent is a necessary element.

Both certified questions before this Court were addressed by the Third District Court of Appeal in a case now before this Court (State v. Gilberto Alfonso, Supreme Court case No. 86, 739). In response to the State's argument that the appellate court should

have remanded the case to the trial court with directions to adjudicate the defendant guilty of one of the lesser included offenses, or in the alternative, remand the case back to the trial court for a new trial on one of the lesser included offenses, the Third District stated:

> The State moves for rehearing or certification, arguing that on remand there should either be anew trial on lesser included offenses or that the defendant's conviction for attempted first degree felony murder should be reduced to a lesser included offense. We cannot agree. We interpret the Florida Supreme Court's decision in State v. Gray, 654 So.2d 552 (Fla. 1995), to require an outright reversal, rather than a reduction to a lesser included offense or a new trial on lesser included offenses. Moreover, we see no principled basis for such reduction or new trial because, as a matter of law, there can be no lesser included offenses under a non-existent offense such as attempted first degree felony murder. . . . (emphasis supplied)

The Third District then certified the question to this Court as follows:

> When a conviction for attempted first degree felony murder must be vacated on authority of State v. Gray, 654 So.2d 552 (Fla. 1995), do lesser included offenses remain viable for a new trial or reduction of the offense?

The jury in Appellant's Case was instructed on all lesser included offenses. The Jury after due deliberation, determined the appropriate offense. This Court subsequently decided that the offense chosen by the jury was a non-existent crime in Florida (Gray). As stated in Alfonso there is no basis for a new trial, because, as a matter of law there can be no lesser included offenses.

This Court should affirm the First District's decision in reversing Appellant's convictions of non-existent crimes and hold

that the trial court cannot enter judgment for attempted voluntary manslaughter nor does the "lesser included offense" remain viable for a new trial.

ISSUE III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S OBJECTION, MOTION FOR CURATIVE INSTRUCTION AND MOTION FOR MISTRIAL WHEN THE PROSECUTOR MADE CERTAIN REMARKS IN CLOSING ARGUMENT THAT WERE BOTH IMPROPER AND UNETHICAL.

In his closing argument the prosecutor became so preoccupied with winning that he went far beyond any acceptable bounds in his comments to the jury. The following excerpts from the record are direct quotes from the prosecutor's argument:

> "I anticipate these defense attorneys will be pointing you in every direction to things that just don't matter when you go to what the elements of the crime are and what the State has to prove." (R BII 1212, Lines 4-8)
>
> "Don't be robbed of your common sense." (R BII 1212, Lines 11-12)
>
> "Don't be robbed of your reasonableness. Don't be robbed of your common sense by a bunch of innuendos and pointing fingers." (R BII 1244, Lines 16-19)
>
> "Don't be robbed of your common sense. Don't do something that is not reasonable or get your mind off in some ozone where they want you." (R BII 1249, Lines 11-13)

All of the above comments were made in the opening portion of the prosecutor's closing argument. Admittedly, there was no objection made at this time. However, these comments at this point in time were getting more egregious with each additional comment. It might be helpful to note that there were three (3) co-defendants, i.e., Appellant, Horn and Holden. The order of closing argument was as follows: Horn's attorney, Holden's attorney, the prosecutor, Appellant's attorney, the prosecutor, Holden's attorney and finally Horn's attorney. The following comments were made by the prosecutor after Appellant's attorney had made his closing

argument. The first quote below was the prosecutor's statement immediately following Appellant's closing argument.

> "Mr. Harrison told you that he wasn't going to get too far out there in left field. He got way out there. He got outside this courtroom. He said complete untruths for lack of a better word". (R BII 1302, Lines 15-19)

> "So, when Mr. Harrison comes in and tells you to look at the newspapers in a few weeks and he's going to get some kind of reduced charge and all this, no. That is a complete untruth and I think you know what that means". (R BII 1303, Lines 12-16)

> "Again, they're making up evidence. They're taking stuff that's outside the courtroom that hasn't even been presented and they're trying to put that in your mind to poison your mind. Like I said, don't let them rob you of your common sense". (R BII 1303, Lines 17-22)

The above three quotes were comments on the issue of witness Freddie McLaughlin and whether he had been given immunity. Again, Appellant's attorney did not object at this point in time. The comments, however, are now becoming even more improper.

The following comment by the prosecutor was on a different subject altogether. It was made in the context of discussing who was around the "streets" and around a crowd of people in the vicinity of the shooting on the night in question. And, who, in that crowd, might have had guns. Additionally the following quote from the prosecutor was immediately after the prosecutor commented that certain people were not even there and didn't have guns that night, specifically one, Keith Shanklin. Also at issue was one, Tracy McLaughlin. What makes the next quoted comment from the prosecutor so egregious is that he claims the Appellant's attorney was telling the jury that we were making up evidence and things that weren't even true to poison their minds, when, in fact it was

the prosecutor who was mistaken about what was in evidence. The State called Freddie McLaughlin as a witness. In his testimony he said that he'd been to the area earlier in the evening and had seen several persons. He specifically mentioned Tracy McLaughlin (R BII 329-330). In his statement to the police he names several persons as being involved in the incident. Again he specifically mentions Tracy McLaughlin (R BII 346). Another State witness, Faye Bryant, testified that earlier in the night of the incident Keith Shanklin had a gun. (R BII 524). She also testified that Keith Shanklin was in the crowd of people just before the shooting. (R BII 548). She also testified the gun Keith Shanklin had could have been a .357 (R BII 549). This is very important because the State alleged that Appellant used a .357. All of this was in evidence, yet the prosecutor made the following comment to the jury.

> "Its hard to argue lack of evidence although they're trying, even by bringing evidence that's not in the trial. It's real hard, the things that aren't even true, to poison your mind. That's all I can call that. (R BII 1306, Lines 4-8).

At this point in time, Appellant's attorney approached the bench and objected as follows: "I need to make an objection at this time. I've let it go on longer than I should have. Now he's accused us of fabricating evidence, lying to the jury and that's per se reversible error". Appellant's attorney then requested the trial court to give a curative instruction or to declare a mistrial. (R BII 1306, Lines 18-22). The trial court denied the request for a mistrial and declined to give a curative instruction (R BII 1307, Lines 11-12). In further discussions, the Appellant's

attorney argued to the trial court that the prosecutor had not limited his comments to the issue of witness Freddie McLaughlin but had also said that counsel fabricated evidence regarding other matters (i.e. who was present at the time of the shooting and who had guns). Defense counsel argued to the trial court that these comments were a direct reflection on the Appellant and on the Appellant's defense. (R BII 1307, Lines 23-25 and 1308, Lines 1-2). The trial court again denied the objection and stated it would not give a curative instruction at all and again, denied the motion for mistrial. (R BII 1308).

During the course of these discussions even the State requested a curative instruction. (R BII 1309, Lines 16 - 19). There were some discussions between the trial court and the prosecutor about the prosecutor telling the jury that he overstepped and the prosecutor making an apology. Finally, again, the trial judge stated "at this point I'm going to deny both motions of all three of you and not give a curative instruction." (R BII 1310, Lines 4-6).

Immediately after leaving the bench the prosecutor's so called "apology" was as follows:

> "Ladies and gentlemen, I just want to sincerely apologize to you because in responding to what Mr. Harrison said, I've talked about some things that are not in evidence in this case. But I felt it necessary to cover that because he covered it, on both of those issues". (R BII 1310 Lines 9-15).

There was no further "apology" from the prosecutor. He did not tell the jury that it was improper and unethical for him to call defense counsel a liar. He did not tell the jury that it was

improper and unethical for him to tell them that defense counsel was trying to poison their mind. His "apology" was not an apology at all. It was simply another opportunity for him to improperly comment and say "I felt it necessary to cover that because he covered it..." He might as well have said "because Mr. Harrison lied, I needed to set you straight". That's no apology! It made the prior improper and unethical comments even more improper and unethical.

It is patently obvious from the case law that the comments of the prosecutor were error. The trial court should have declared a mistrial or, at the very least, provided the jury with a curative instruction.

In Jenkins v. State, 563 So.2d 791 (1st DCA 1990) the prosecutor accused defense counsel of further victimizing the victim and of seeking an acquittal at all costs rather then searching for the truth. The First District Court of Appeal held that such remarks constitute a personal attack on opposing counsel and are clearly improper. The Jenkins court cited Ryan v. State, 457 So. 2d 1084, 1089 (4th DCA 1984) which held that such comments were an improper tactic which can poison the minds of the jurors. The Jenkins court also cited Briggs v. State, 455 So.2d 519, 521 (1st DCA 1984) (wholly inconsistent with the prosecutor's role) and Redish v. State, 525 So.2d 928, 931 (1st DCA 1988) (clearly beyond bounds of proper closing argument).

In Valdez v. State, 613 So.2d 916 (4th DCA 1993) the Fourth District Court of Appeal held that the prosecutor improperly

attacked the credibility of defense counsel by arguing to the jurors that "the defense" failed to give them an "accurate story". Valdez is significant in that it also cites to Briggs v. State, 455 So.2d 519 (1st DCA 1984). In Briggs the First District held that it is both improper and unethical for either the prosecutor or defense counsel to attack the personal integrity and credibility of opposing counsel.

Many other courts in Florida have held it to be error when the prosecutor ridicules a defendant or his theory of defense or when the prosecutor indulges in personal attacks upon the accused, his defense or his counsel.Riley v. State, 560 So.2d 279 (3rd DCA 1990); Rosso v. State, 505 So.2d 611 (3rd DCA 1987); McGuire v. State, 411 So.2d 939 (4th DCA 1982);Williamson v. State, 459 So.2d 1125 (3rd DCA 1984); Jackson v. State, 421 So.2d 15 (3rd DCA 1982); Gomez v. State, 415 So.2d 822 (3rd DCA 1982); Bass v. State, 547 So.2d 680 (1st DCA 1989); Murray v. State, 443 So.2d 955 (Fla. 1984). The prosecutor in this case did all of these things. In looking at the quotes from his closing argument cited herein its almost as if he read all these cases telling him what was improper and then used them in this case. There can be no doubt that the prosecutor committed gross prosecutorial error in this case.

CONCLUSION

As to Issue I, this Court should answer the certified question in the affirmative and reverse Appellant's conviction and remand for a new trial. However, should the question be answered in the negative, this Court should still reverse the conviction and remand for a new trial based on Rule 3.180(a)(4), Francis and Turner.

Additionally, based on the preceding analysis and authorities cited herein in Issue III Appellant contends reversible error has occurred. As a result of said error Appellant requests that this Court remand the case for a new trial.

Finally, based on the analysis and authorities cited in Issue II herein, this Court should answer both certified questions in the negative. The convictions for third degree murder should be reversed and the Appellant should be discharged on those counts.

Respectfully submitted,

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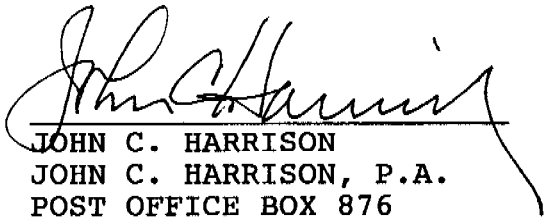
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished to the Office of the Attorney General, Attorney for Appellee, The Capitol, Tallahassee, Florida 32301; and to the office of the Public Defender, attorney for co-defendant Horn, Second Judicial Circuit, Leon County Courthouse, Suite 401, 301 S. Monroe Street, Tallahassee, Florida 32301 by regular U.S. Mail this 3rd day of May, 1996.



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