In The Supreme Court of Florida

NO. 87,716

BRUCE H. BELL,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW OF A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S MERIT BRIEF

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IN THE SUPREME COURT OF FLORIDA

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_____/

PRELIMINARY STATEMENT

Citations in this brief to designate record references are as follows:

"R. ___" — Record on Direct Appeal to this Court, Vol. I.

"T. ___" — Transcript of proceedings, Vols. II through IV.

All cited references will be followed by the relevant page number(s). All other citations will be self-explanatory or will otherwise be explained. State of Florida was the plaintiff in the trial court and the appellee in the district court, and will be referred to as the "state." Petitioner was the defendant in the trial court and the appellant in the district court, and will be referred to as "petitioner" or as the "defendant" or by name.

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STATEMENT OF THE CASE AND THE FACTS

1. Introduction

The First District Court of Appeal certified the following question to this Court regarding the application of this Court's 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?

2. History of Proceedings

Based upon an affidavit [R. 3-4], on April 27, 1994, a judge of the Circuit Court issued a search warrant for Apartment #4 at 604 West 18th Street in Jacksonville, Florida [R. 1-2]. The warrant was executed on that day by law enforcement officers [R. 5]. On that date, Mr. Bell was arrested [R. 6-7].

On May 11, 1994, an Information was filed charging Mr. Bell with trafficking in morphine, opium, heroin or their derivatives (4 grams or more, but less than 14 grams, thereof) in violation of § 893.135(1)(c)(1)(a), Fla. Stat. [R. 11]. On July 19, 1994, the state filed an Amended Information, which entirely replicated the charge in the previous information [R. 17]. On the 20th of July, the state filed a Second Amended Information, again replicating the allegations of trafficking in morphine, opium, heroin or their derivatives (4 grams or more, but less than 14 grams, thereof), but changing the statute alleged to have been violated to § 893.135(1)(f), Fla. Stat. [R. 19]. The state then filed a Third Amended Information on August 23, 1994, alleging two counts: Trafficking in

morphine, opium, heroin or their derivatives in violation of § 893.135(1)(f),[1] as previously alleged in the Second Amended Information, and possession of a firearm by a convicted felon (§790.23, Fla. Stat.) [R. 21].

On October 20, 1994, Mr. Bell moved to sever the trial of Count I from Count II [R. 24]. The motion to sever the trial of the counts was granted on October 31, 1994 [R. 28].

On that date, Mr. Bell also filed a motion in limine (I) to prohibit the state from introducing any evidence or testimony relating to firearms, clips or bullets recovered [R. 29]. A further motion in limine (II) sought to prohibit the introduction of any evidence or testimony that an item (plastic bags) tested positive for cocaine residue [R. 31]. A final motion in limine (III) sought preclusion of evidence and testimony relating to a (a) a police scanner, (b) U.S. Currency and (c) an 8-mm video cassette [R. 33]. Motion I and II were granted [R. 39-40]. Motion III was granted as to item (c), but denied as to items (a) and (b) [R. 41].

At trial on November 3, 1994, Mr. Bell filed a motion to invoke sanctions due to the state's non-disclosure of a purported statement to a police officer by the defendant until after a jury had been selected, and seeking the exclusion of that statement. The motion was granted by stipulation. [R. 43-44; T. 86-93]. The state agreed that it would not elicit testimony from Bates as to that statement [T. 92-93].[2]

On November 4, 1994, the jury rendered a verdict of guilty of trafficking in heroin

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[1]§ 893.135(1)(f), as alleged in this information, will later be asserted as relating to amphetamines, not morphine, opium or heroin, in a motion for judgment of acquittal [T. 181].

[2]That statement purported was an admission by Bell to Detective Bates that he resided in this particular apartment [T. 87].

(Count I). [R. 45].

Mr. Bell filed a motion for new trial on November 10, 1994 [R. 46]. The motion for new trial was subsequently denied on November 28, 1994 [R. 51; T. 273].

On November 14, 1994, the state filed a further, formal response to discovery regarding records of the "Tax Collector/JEA" indicating who was paying power bills for the apartment, and a statement of the defendant to Det. Bates that the apartment was his [R. 48].

On November 28, 1994, Mr. Bell entered into a plea agreement with respect to Count II (possession of a firearm by a convicted felon) [R. 52-53]. On that date, Mr. Bell was sentenced to 82 months on Count I (trafficking), with credit for 216 days incarceration. He was also sentenced to 72 months on Count II (possession of a firearm by convicted felon) based upon his plea agreement, to run concurrent with Count I. [R. 54-59]. A 1994 Sentencing Guidelines Scoresheet resulted in a sentencing range of 55 to 91 months [R. 60-61]. The court further imposed costs totaling $353.00, including the sum of $100.00, identified as "FCLTF," but without notation to a statutory authority for imposition of this cost.[3] [R. 56]. The court made no inquiry at sentencing into Mr. Bell's ability to pay costs [T. 278]. Defense counsel also filed a Request for Lien pursuant to § 27.56 in the sum of $750.00 [R. 64A].[4]

Mr. Bell filed a timely Notice of Appeal on December 14, 1994 [R. 65].

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[3]On the Uniform Commitment to Custody form, this cost is reflected as a "Controlled substance assessment." [R. 62].

[4]The court stated it would impose a Public Defender lien at the close of all the proceedings [T. 278]. The present record does not contain a judgment or lien order, however.

2. Statement of the Facts

Peremptory Challenging of the Jury

Challenges to the jury panel were conducted at a side-bar. The transcript record does not reflect that Mr. Bell was actually present at the bench during the challenging of the jurors. [T. 62, *et seq.*]. The defense exercised 5 of its 6 peremptory challenges. The state exercised a peremptory strike as to Ms. Bryant. The defense make a Neil objection to the striking of Ms. Bryant. The prosecutor stated she was black, but unemployed, and noted that he also struck Ms. Edwards, who was also unemployed [T. 65-66]. The court made no inquiry or findings as to the Neil objection, but allowed the state's peremptory strike.

The Evidence at Trial

Charles Bates, a detective with the Jacksonville Sheriff's Office and assigned to the narcotics unit, came into contact with Mr. Bell, whom he identified in court, when Bates and other officers served a search warrant at 604 West 18th Street, Apartment 4 [T. 103]. Upon arrival, there were five or six officers at the front door and two in the back. The officers were dressed in jeans and T-shirts, but all had raid vests which were lettered "POLICE." At the door, they yelled "Police, search warrant." [T. 104]. They waited 5 to 10 seconds and when they received no response, used a ram to break open the door [T. 104]. Bates stated they heard people running around inside; a lot of running around [T. 104].

Bates stated that as soon as they were going through the door, they could hear the toilet flushing and water running in the sink in the bathroom [T. 105]. When they entered, the door to the bathroom was open [T. 132]. Detectives Brannen and Thomas

went straight to the bathroom. Bates was behind them. Mr. Bell, Bates stated, was found standing over a toilet that was flushing. There was a plate in the sink. [T. 105]. Bates stated that a single piece of aluminum foil that contained heroin was found in the bathroom [T. 106].[5] Bell was never observed in the kitchen, east bedroom, or west bedroom [T. 149].

George Harrison was found in the west bedroom. In the dresser drawer in that bedroom was "a large amount of heroin." Bates said it was approximately 10 grams in aluminum foil. [T. 105]. Also found in the dresser were some small pieces of foil cut unto squares, which are referred to as "decks." [T. 106]. A sifter, of the kind used for sifting flour, was also in the dresser [T. 106].

In the cabinets in the kitchen was found a block of mannitol, which is used as a cut or mixer for heroin. There were also scissors, a stapler, a box of staples and small zip lock baggies in the kitchen cabinets. [T. 106, 114]. A digital scale was on the kitchen counter [T. 112] as well as gloves [T. 122]. Spoons with residue were found in the cabinets [T. 118].

On the living room table were numerous papers with Mr. Bell's name on them [T. 106]. They were receipts for dry cleaning [T. 115; 120]. Later, Bates acknowledged that other papers on the table bore the name of George Harrison with the apartment's West 18th Street address on them. The papers with Bell's name on them had an address on 27th Street [T. 146]. There was also a business card for "R.C. Burress." [T. 146].[6]

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[6]The defense, without state objection, admitted that business card into evidence as Defendant's Exhibit 1 [T. 116].

A jar of muriatic acid was found in front of the couch. Bates stated that this was fairly common when heroin is involved [T. 107]. Bates stated that muriatic acid has a violent reaction with aluminum foil [T. 108]. Bates identified $510.00 cash, which he stated he "believed" he found on "the suspect." [T. 109]. A "Realistic" police scanner was retrieved from the bedroom [T. 113, 133]. Bates further asserted that the apartment was Mr. Bell's [T. 120].

During a proffer, Bates testified that he Mirandized Mr. Bell [T. 125-126]. Bates stated that Mr. Bell told him everything in the apartment belonged to him [T. 128]. The court found the statement free and voluntary [T. 127]. Bates then testified in the same fashion before the jury [T. 127-130]. Mr. Bell's statement was not recorded and never written down [T. 145].

On cross, Bates admitted that he had listed J.P. Clarkson in his report as present in the raid, but that Clarkson was not there. Clarkson was Bates' partner and, "99 percent of the time he is there." [T. 136]. Sgt. Kirkland was there, but was not listed in Bates' report [T. 137]. No evidence technician was called to the scene [T. 137]. No fingerprints were taken [T. 138].

On cross-examination, Detective Bates was asked if he knew who the landlord of the building was. Bates responded, "No," but then said, "But I know the Jacksonville Electric Authority, who I have access to their files. Mr. Bell is the one who actually obtained the electricity in that apartment." [T. 138]. Counsel objected and moved for a mistrial [T. 138]. The statement was not solicited, counsel argued, and was highly prejudicial. A curative instruction would be of limited value. Further, that information, counsel objected, was hearsay and it had never been disclosed to the defense. [T. 138-139].

The court sustained the objection as to hearsay and struck the answer. The court stated it would give a curative instruction. [T. 139]. The court denied the motion for mistrial because counsel "opened the door" to it [T. 139, 140]. The court then instructed the jury to disregard the last answer of the witness [T. 141]. The court made no inquiry into counsel's objection that this information had never been disclosed to the defense.[7]

Daniel Brannen ran through the living room of the apartment once the door was forced open, then continued toward the back of the apartment. He came upon a little hallway with a bathroom and there encountered Mr. Bell. Bell was standing over the toilet, which was gurgling. There was a plate in the sink and the water running. The bathroom door was open. [T. 155].

William Thomas was on the entry team. They yelled and then waited 5 to 20 seconds, then forced the door. Thomas said the apartment was set up so that when you come into the living room, if you go straight, there is a kitchen. If you veer right, there are two bedrooms and a bathroom. Thomas went to the right and heard water running in the bathroom. He saw the defendant standing by the toilet in the bathroom. The sink was running also. [T. 160]. When Thomas first saw Bell, he had just turned to face them because they were coming in and yelling police. Bell walked to them, starting to come out of the bathroom. Bell did not resist. [T. 162]. Thomas had his pistol in his hand at the time [T. 163].

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[7]Defense counsel later revisited the matter [T. 164], reminding the court that it had previously excluded an alleged statement by Bates that the apartment was his due to a discovery violation. Because of that, counsel argued that the additional statement regarding the electric service was egregiously prejudicial. The state argued that it was harmless [T. 165]. The court stated it did not make any difference whose apartment it was because the issue was whose stuff it was [T. 165]. The court again denied the motion for mistrial [T. 166].

Neil Bernstein, a laboratory analyst at FDLE, tested the substance submitted to him and found it to be heroin weighing 5.4 grams [T. 176-177]. The heroin in the foil retrieved from the bathroom was a very insignificant amount, less than a gram [T. 178]. Bernstein performed only one weighing procedure [T. 180].

At the close of the state's case-in-chief, Mr. Bell moved for a judgment of acquittal, renewed all objection and motions for mistrial, and all pretrial motions [T. 181]. As to the motion for judgment of acquittal, counsel raised the issue that the Amended Information charged a violation of §893.135(1)(f), which relates to amphetamines, not morphine, opium or heroin as charged, and asked for acquittal on that ground as there was no evidence of amphetamines [T. 181-182].

The state moved to amend the information [T. 182], which the court granted by interlineation to a violation of § 893.135(1)(c) [T. 183]. The motion for judgment of acquittal as well as all renewed motion were denied [T. 184]. These motion were all renewed later, and again denied [T. 205 and 213].

In defense, **Mr. Bell** testified that in early afternoon of the day in question, he was sitting in Rodney's apartment at 604 West 18th Street waiting for Rodney to finish working on Bells' car [T. 187-188]. Bell had been there twice before. Bell was not sure of Rodney's last name; it was probably Johnson, but Bell was not sure of that. Rodney was a handyman mechanic who was fixing his car. [T. 188]. Bell was in the bathroom when the police entered. He did not hear them knock, but heard the door being broken down. He was standing at the sink washing his hands at the time. [T. 189]. Bell had been in the apartment about an hour before the police arrived. He had not been into the kitchen and had not opened any of the cabinets. He did not notice a small piece of tinfoil on the floor

by the toilet. [T. 191]. Bell denied making any statement that everything in the apartment was his. He knew Det. Bates; Bates had arrested him before. "He kind of harassed me on breach of the peace." Bell stated he had $510 in his possession. He had gotten a $723 tax refund about four days prior to this incident. He was suppose to take his car to a body shop to be painted after it was repaired. [T. 191].

At the bench, the state asserted that Bell's reference to Bates harassing him on an earlier occasion opened the door to a showing of the complete circumstances of that arrest. The state asserted that Bell had been arrested for breach of the peace, resisting without violence, and also giving a false name at the time. The prosecutor did not know the outcome of the incident, however. [T. 192]. The court ruled to allow the inquiry on cross-examination [T. 194].

On cross, Bell testified he had been arrested for breach of the peace on September 17, 1993. He stated to the best of his knowledge, that was the only charge. He acknowledged that he gave the name of Eric Newton at the time of that arrest. [T. 197]. Bell admitted he was also charged with giving a false name. He denied he used profanity to the officer and denied bumping into Bates. He stated he had just moved into the rooming house where this incident occurred. [T. 198]. Bell denied being forcibly handcuffed. He stated he did not like Bates. [T. 199].

Bell stated he did not know Rodney's last name and denied telling the officers that everything was his. [T. 199; 202]. Bell did not know if Rodney's name was Burress [T. 203]. Bell stated there was no plate in the bathroom sink, but the water was running to wash his hands. Bell stated that after he finished using the bathroom, he had opened the door and started washing his hands. [T. 200]. Bell said the cleaning bills were in his

pocket and denied they were on the living room table [T. 201]. Bell stated that when in the bathroom, he could not see the shelf or dresser in the west bedroom.

In rebuttal, the state recalled Brannen, who said that when standing in the bathroom, you could see into the bedroom [T. 207]. Thomas was recalled in rebuttal. He also stated that you could see into the bedroom from the bathroom [T. 208]. In rebuttal, the state also presented the testimony of Det. Bates. [T. 209, *et seq.*]. Bates stated he had reviewed the report of the previous arrest. Bell was charged with resisting without violence, and giving a false name. Bates was not sure about the third charge. [T. 209]. At the time of the prior arrest, Bell's address was 1630 West 27th Street [T. 212-213]. Bates said Bell used profanity toward him and bumped into him [T. 210].

Bates also stated you could see into the bedroom from the bathroom [T. 211]. On redirect, Bates stated that in his experience people dealing with narcotics used numerous addresses [T. 213].

SUMMARY OF ARGUMENT

ISSUE I — This 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 after Coney's trial, yet before the final decision was rendered in *Coney v. State*, 653 So. 2d 1009 (Fla. 1995), in April 1995. Mr. Bell was not present at the sidebar when peremptory challenges were made by counsel. There is no record of a voluntary waiver by appellant of his presence at the challenging of the panel. Appellant's absence at a critical stage of the trial violated Rule 3.180(a)(4) and constituted a denial of due process. It cannot be shown by this record that his absence was not harmful; thus the court must reverse the conviction. 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. In *Coney*, the state conceded that Coney's absence during for-cause challenging of the jury was error under *Francis v. State*, 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. The answer to the certified question must be in the affirmative, and Petitioner should be granted a new trial.

ISSUE II — The trial court failed to conduct a *Richardson* inquiry once Detective Bates unexpectedly stated that the records of the Jacksonville Electric Authority showed that appellant was the subscriber to the electric service at the apartment where drugs were found. The defense objected that the statement was hearsay and had not been disclosed to the defense, and moved for a mistrial. The failure to conduct the inquiry was presumptively harmful. The record fails to demonstrate, and the state cannot show, that the defense was not procedurally prejudiced in its trial preparation or strategies by the non-disclosure. This Court must reverse.

ISSUE III — The court erred in denying the motion for mistrial. A mistrial is one of the available remedies if there was a discovery violation. However, in determining it would deny the motion, the court only considered that counsel "opened the door" to the undisclosed, unknown information. By asking the detective if he knew the name of the landlord of the apartments did not open the door to the unsolicited statements regarding the contents of the records of the utility provider. Counsel did not open the door and the reason relied upon by the court was insufficient to justify a denial of the motion. The defense was prejudiced when the information was unexpected volunteered in front of the jury. Further, and critically, the court failed to address the allegation of a discovery violation and failed to weigh and consider the procedural prejudice that it may have caused the defense when ruling on the motion for mistrial. A discovery violation may well have required a mistrial in these circumstances and given both the resulting substantive and procedural prejudice to the defendant. This Court must reverse.

ARGUMENTS

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 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 where pretrial juror challenges are exercised" does not apply retrospectively to pipeline cases. The district court did not reach or discuss the issue raised by petitioner that, 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 prospective 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 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. 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.[8] 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.

Challenges to the jury panel were conducted at a reported side-bar. The transcript record does not reflect that Mr. Bell was actually present at the bench during the challenging of the jurors. [T. 62, *et seq.*]. The defense exercised 5 of its 6 peremptory challenges. The state exercised a peremptory strike as to Ms. Bryant. The defense make a Neil objection to the striking of Ms. Bryant. The prosecutor stated she was black, but unemployed, and noted that he also struck Ms. Edwards, who was also unemployed [T. 65-

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[8]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.

66]. The court made no inquiry or findings as to the Neil objection, but allowed the state's peremptory strike.

- 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 by 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 the 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. *Francis 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 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 Mr. Bell's 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.

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*'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 unpinning its holding 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 was error under *Francis* because Coney 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.[9] 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 *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 *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 Mr. Bell was present in the courtroom, as was Coney, he was not

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[9] 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).

physically present at the sidebar. Inferentially, Bell 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, Mr. Bell 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.

(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 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.
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> * * *
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> A defendant's waiver of the right to be pre-sent 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. 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 by 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 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 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 (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").

(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 [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 Blackmun & 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 "breaking 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 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.* at 1013.

(f) "On-the-record" Procedureal 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).[10]

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 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.

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[10] 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").

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[11] 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. Whatever 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. 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's "new rule" is not *solely* based on state law, or if it *implicates* or is interwoven with the federal Constitution,

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

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 stages** 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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> * * *
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> A defendant's waiver of the right to be pre-sent 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 based 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*.[12] 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

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[12]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.

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 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 (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 *Coney* was decided. He sought relief based on *Coney* (as well as on *Francis* and *Turner* as independent grounds), 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 a new 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.[13] However, petitioner's absence was clearly error given the very strict construction required of 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, 704 (Fla. 1988). The defendant's presence could also be waived by counsel — provided that the defendant subsequently ratified or acquiesced in 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 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 was no

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

waiver, and Petitioner had the right to be present at the bench during jury selection.[14] *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 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

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[14]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.

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 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 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 express 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 advanta-

geous 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 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 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 opinions 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 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.
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> 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,"[15] that Mr. Bell'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.

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 Bell 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

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

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 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 a cases must certify through proper inquiry that there was a 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 affirmative 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, 49 (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.[16] 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 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). 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

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[16]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.

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 its function as a 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 accuse'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 was 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. 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)). 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 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).
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> * * *
>
> 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. Bell'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 because it is structural error, unless the state can show beyond a reasonable doubt that the defendant had not 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. Conclusions

Accordingly, the Court is requested to answer the certified question 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

THE TRIAL COURT FAILED TO CONDUCT A RICHARDSON INQUIRY ONCE APPELLANT OBJECTED TO NON-DISCLOSURE OF INFORMATION REGARDING THE ELECTRIC SERVICE FOR THE APARTMENT WHICH WAS ONLY FIRST REVEALED BY THE STATE DURING TESTIMONY IN FRONT OF THE JURY

On cross-examination, Officer Bates was asked by defense counsel who the landlord of the building was. Bates responded, "No." Officer Bates then volunteered, "But I know

the Jacksonville Electric Authority, who I have access to their files. Mr. Bell is the one who actually obtained the electricity in that apartment." [T. 138].[17]

Counsel immediately objected and moved for a mistrial [T. 138]. The statement was not solicited, counsel argued, was highly prejudicial, and a curative instruction would be of limited value. That information, counsel stated, was hearsay and it also had never been disclosed to the defense by the state. [T. 138-139].

Without ever addressing the asserted discovery violation, the court sustained the objection as hearsay and struck the answer. The court stated it would give a curative instruction. [T. 139]. The court denied the motion for mistrial because counsel "opened the door" to this response [T. 139, 140]. The court then instructed the jury to disregard the last answer of the witness [T. 141].[18]

First, the court erred in failing to conduct any *Richardson* inquiry once the defense told the court that this information had not been disclosed during discovery. Such an inquiry may have necessitated a mistrial as once of the available remedies if a discovery

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[17]On November 14, 1994, *following trial and following the filing of a motion for new trial*, the state filed a formal written response to discovery regarding records of the "Tax Collector/JEA" indicating who was paying power bills for the apartment, and a statement of the defendant to Det. Bates that the apartment was his [R. 48]. The later statement had been previously excluded at trial due to the state's discovery violation. The former information was not disclosed prior to trial and only revealed during trial and in front of the jury when Detective Bates unexpectedly volunteered the information.

[18]It should also be recalled that Mr. Bell filed a motion to invoke sanctions due to the state's non-disclosure of a purported statement to a police officer by the defendant until after a jury had been selected, seeking the exclusion of that statement. The motion was granted by stipulation. [R. 43-44; T. 86-93]. The state agreed that it would not elicit testimony from Bates as to that statement [T. 92-93]. The statement excluded purportedly was an admission by Bell that he resided in that apartment [T. 87]. The salient question in the trial was one of possession of the contraband. Whether or not Mr. Bell rented or lived in that apartment would have been significant evidence regarding actual or constructive possession of the contraband found there.

violation was found. Second, the trial court erred in denying the motion for mistrial on the only ground, which is unsupported, that the defense "opened the door" to the undisclosed and unsolicited response.

Had a *Richardson* inquiry been conducted, the trial court would have had available to it a panoply of possible sanctions and remedies if a discovery violation is found, depending upon whether the violation was found to be unintentional or intentional, and depending upon the prejudice to the accused in preparing his defense. *In re Amendments to Florida Rules of Criminal Procedure*, 606 So. 2d 227, 302 (Fla. 1992). Fla. R. Crim. P. 3.220(n) provides:

> (1) If, at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or with an order issued pursuant to an applicable discovery rule, the court may order the party to comply with the discovery or inspection of materials not previously disclosed or produced, grant a continuance, grant a mistrial, prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances.

In *Barrett v. State*, 649 So. 2d 219 (Fla. 1994), the Court stated:

> When a defendant elects to participate in the discovery process, the State has an ongoing duty to disclose and provide discovery. Fla.R.Crim.P. 3.220(j). (Footnote omitted) When the State's failure to comply with the rules of discovery is brought to the court's attention, the court must conduct a *Richardson* hearing to determine if that failure has prejudiced the defendant. While the trial court has discretion to determine whether a discovery violation would result in harm or prejudice to the defendant, "the court's discretion can be properly exercised only after the court has made an adequate inquiry into all of the surrounding circumstances." *Richardson v. State*, 246 So.2d 771, 775 (Fla.1971).
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> * * *
>
> As this Court explained in *Smith*, "[o]ne cannot determine whether the state's transgression of the discovery rules has prejudiced the defendant (or has been harmless) without giving the defendant the opportunity to speak to the question." 500 So.2d at 126.

> Had the judge conducted an adequate inquiry, he could have chosen from a "panoply of remedies ... including, if the evidence warrants, finding no prejudice or 'harmless error' and proceeding with the trial." *Id.* at 126. However, absent such an inquiry, the record is devoid of "the very evidence necessary to make a judgment on the existence of prejudice or harm." *Id.* "A review of the cold record is not an adequate substitute for a trial judge's determined inquiry into all aspects of the state's breach of the rules." *Cumbie v. State*, 345 So.2d 1061, 1062 (Fla. 1977).

The rule also places the burden upon the trial judge rather than the parties to initiate the *Richardson* hearing. *Brazell v. State*, 570 So.2d 919, 921 (Fla. 1990).

Until very recently, the failure to conduct a *Richardson* inquiry constituted *per se* reversible error. *See*, e.g., *Smith v. State*, 500 So. 2d 125 (Fla. 1986); *Banks v. State*, 648 So. 2d 766 (Fla. 1st DCA 1994). However, in *Schopp v. State*, 653 So. 2d 1016 (Fla. 1995), the Court receded from the *per se* reversible rule — which was premised upon the assumption that "no appellate court can be certain that errors of this type are harmless" — and recognized:

> While in the vast majority of cases this assumption holds true, we now recognize that there are cases, such as this, where a reviewing court can say beyond a reasonable doubt that the defendant was not prejudiced by the underlying violation and thus the failure to make adequate inquiry was harmless error.

Id., at 1020. The Court also noted, however, that *Schopp* was "clearly the exception to the [per se reversible error] rule." As to harmless error, the Court affirmed that it remains the state's burden to show that the error was harmless beyond a reasonable doubt.

> [I]f the record is insufficient for the appellate court to determine that the defense was not prejudiced by the discovery violation, the State has not met its burden and the error must be considered harmful.
>
> In determining whether a *Richardson* violation is harmless, the appellate court must consider whether there is a reasonable possibility that the discovery violation procedurally prejudiced the defense. As used in this context, the defense is procedurally prejudiced if there is a reasonable possibility that the defendant's trial preparation or strategy would have been

> materially different had the violation not occurred. Trial preparation or strategy should be considered materially different if it reasonably could have benefitted the defendant. In making this determination every conceivable course of action must be considered.

Schopp, at 1020.

The appellant is not required to establish that the failure to conduct a *Richardson* inquiry was harmful. It ever remains the state's burden to show that the error could not have been harmful beyond a reasonable doubt. Because there was no *Richardson* inquiry, the record fails to show whether the non-disclosure was inadvertent or intentional, and in what manner and to what extent the defense was prejudiced by the non-disclosure in the preparation of its defense.

However, the defendant in this case elected to testify. He thereby necessarily put his credibility at issue and exposed himself to impeachment and to rebuttal evidence. In fact, in response to the defendant's testimony, the state presented a series of rebuttal witnesses. One of them, Bates, actually presented rebuttal evidence on an impermissible collateral matter — Bell's prior arrest incident — as well as impermissible rebuttal to a collateral matter not actually in dispute — because Bell had admitted he gave a false name to Bates at the time of the prior arrest. But the major thrust of Bell's testimony that he was only visiting the apartment at the time while his car was being repaired and he denied residing there.

To what extend was Bell's decision to testify necessitated by a need to refute the previously undisclosed information to show that he resided in that apartment? To what extent was his decision to testify compelled by the undisclosed information unexpectedly volunteered by Bates? We are limited to the four corners of the record, and this record cannot answer these questions in the absence of any *Richardson* inquiry by the trial court.

But, despite the so-called curative instruction to disregard the statement, the jury had heard it and Bell knew the jury had heard it. The impact of this undisclosed information on the defendant's trial preparation and strategy cannot be calculated on this record. It can be only suggested that there is a reasonable possibility that the undisclosed information unexpectedly changed or adversely impacted upon the trial preparation or strategy. Until the state's witness unexpectedly volunteered highly damaging, undisclosed information before the jury which tended to establish Bell's connection with the apartment as its resident, Bell might have elected not to testify in consideration of the dangers involved in putting his credibility directly at issue and his exposure to impeachment by a prior felony conviction.

Before this undisclosed information surfaced unexpectedly mid-trial, there was little independent evidence to actually establish that Bell was the tenant. The papers bearing his name at the apartment had a different address than that of the apartment. No other evidence clearly established that he was the actual tenant at the apartment. To the contrary, there was evidence that the apartment was occupied by Harrison; his papers in the apartment bore that address, while Bell's did not. Even the substantial quantity of drugs found were found in a dresser in a bedroom occupied by Harrison. Nothing showed that Bell occupied that bedroom or had ever been in it or would have known of the presence of contraband in Harrison's bedroom. There were no fingerprints of Bell's in the apartment, much less in Harrison's bedroom. There were no other seized documents or records or clothing, or anything else, to convincingly establish any permanent connection between Bell and the apartment or, for that matter, with the drugs in Harrison's bedroom. And the legal issues to that point in the trial were Bell's knowledge of the presence of the

drugs and the ability to control them: i.e., whether he had actual or constructive possession of them.

The wind reversed direction when, unexpectedly, Bates threw this dead skunk into the jury box. "This is precisely the type of trial by ambush that Florida's discovery rule is designed to prevent." *Barrett v. State*, 649 So. 2d 219 (Fla. 1994); *Cuciak v. State*, 410 So. 2d 916, 917 (Fla. 1982) ("A basic philosophy underlying discovery is the prevention of surprise and the implementation of an improved fact finding process."); *Kilpatrick v. State*, 376 So. 2d 386, 388 (Fla. 1979). The state has the burden of showing the absence of prejudice." *State v. Sobel*, 363 So. 2d 324 (Fla. 1978). *See also*, *Carter v. State*, 21 Fla. L. Weekly D94 (Fla. 4th DCA January 3, 1996). The state had a duty under the discovery rules to disclose this information to the defense. It did not. The State Attorney is responsible for evidence which is withheld by other state agents, such as law enforcement officers, and is charged with constructive knowledge and possession of that evidence. *State v. Coney*, 294 So. 2d 82 (Fla. 1974); *State v. Del Gaudio*, 445 So. 2d 605, 612 n. 8 (Fla. 3d DCA 1984). The state of federal law relating to the state's obligations under due process and *Brady* was recently recapitulated by the Supreme Court in *Kyles v. Whitley*, 8 Fla. L. Weekly Fed. S686 (April 19, 1995). The knowledge of law enforcement is clearly imputed to the state. *Griffin v. State*, 598 So. 2d 254 (Fla. 1st DCA 1992); *Hutchinson v. State*, 397 So. 2d 1001 (Fla. 1st DCA 1981). *See also Gorham v. State*, 597 So. 2d 782 (Fla. 1992); *Hasty v.State*, 599 So. 2d 186 (Fla. 5th DCA 1992); *Tarrant v. State*, 21 Fla. L. Weekly D298 (Fla. 4th DCA January 31, 1996).

But there are no clear answers to the rhetorical questions asked above concerning the prejudice to the defense's trial preparation or strategies because the trial court failed

to make the necessary *Richardson* inquiry once counsel clearly asserted that the information had never been disclosed during discovery. Counsel did not have the opportunity, as he would have had an inquiry been made, to state to the trial court how his trial preparation and strategy had been prejudiced. Thus, the record fails to show beyond a reasonable doubt that the failure to make the *Richardson* inquiry was harmless. There was error and it cannot be shown to have been harmless. This Court must reverse and remand for a new trial.

ISSUE III

THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL WHEN THE STATE'S WITNESSES VOLUNTEERING INADMISSIBLE HEARSAY INFORMATION BEFORE THE JURY WHICH HAD NOT BEEN PREVIOUSLY DISCLOSED TO THE DEFENSE

This issue is intertwined with the non-disclosure of evidence argued above and the prejudice which resulted when the trial court failed to inquire into the discovery matter. The primary trial issue, and the most hotly disputed issue, in this case became whether the apartment was Bell's. If Bell occupied the apartment as a tenant, rather than being a mere visitor as Bell later testified, this would have a significant if not overwhelmingly bearing upon the jury's decision whether Bell had actual or constructive possession the drugs found in the apartment.[19] Due to a discovery violation, the court had already excluded an alleged statement by Bell to Bates that purportedly admitted this was his apartment. Then, Bates suddenly volunteered equally damaging information regarding occupancy of the apartment which also had not been disclosed in discovery. Defense counsel later revisited the matter [T. 164], reminding the court that it had previously

[19]This is particularly so because the drugs were found in a bedroom then occupied by Harrison.

excluded an alleged statement by Bates that the apartment was his due to a discovery violation. Because of that, counsel argued that the additional statement regarding the electric service was egregiously prejudicial. The state argued that it was harmless [T. 165]. The court stated it did not make any difference whose apartment it was because the issue was whose stuff it was [T. 165]. The court again denied the motion for mistrial [T. 166].

While the court properly struck the volunteered testimony as hearsay and properly instructed the jury to disregard the statement, that did not cure the substantive or procedural prejudice to Mr. Bell. The Court in *Geralds v. State*, 601 So. 2d 1157 (Fla. 1992), found that "Although the judge gave a so-called curative instruction for the jury to disregard the question, such instructions are of dubious value. Once the prosecutor rings that bell and informs the jury that the defendant is a career felon, the bell cannot, for all practical purposes, but "unrung" by instruction from the court"). *See also Malcolm v. State*, 415 So. 2d 891, 982 n. 1 (Fla. 3d DCA 1982)(labeling curative instructions as being "of legendary ineffectiveness"). With respect to curative instructions, their salutary effect was aptly summed up by the trial judge in *O'Rear v. Fruehauf Corp.*, 554 F.2d 1304, 1309 (5th Cir. 1977), when he said,

> [Y]ou can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn't do any good.

See also Walt Disney World Co. v. Blalock, 640 So. 2d 1156, 1159 (Fla. 5th DCA 1994). Despite the instruction to disregard this volunteered statement, the jury could hardly ignore it when considering whether this was Bell's apartment. The odor of that dead skunk was ineluctably present in the jury room during deliberations. This jury could hardly ignore the very information which clearly resolved for them the question whether this was actually Bell's apartment and that fact had a tremendous bearing on the jury's

determination on the element of possession.

First, the court denied the motion for mistrial on the ground that defense counsel, by asking who was the landlord, opened the door to the statement Bates blurted out after answering the question. The subject matter of the question was whether Bates knew who was the landlord. The subject matter was not the electric service or in whose name it stood. Had Bates stated he knew the name of the landlord, counsel might not have inquired on that matter beyond obtaining the landlord's name.[20] Asking if Bates knew who the landlord was did not "open the door" to or invite the hearsay information about the electric service. Counsel could hardly have knowingly invited undisclosed information when he did not know it existed. Further, Bates fully answered the question propounded to him ("No."). His subsequent statement regarding the content of the records of the Jacksonville Electric Authority was not responsive to the question asked and answered. Officer Bates simply volunteered it. Counsel did not elicit it, nor did counsel, based on his simple question to Bates, open the door to that response. Thus, the denial of the motion for mistrial because counsel "opened the door" does not hold water, and was not a sufficient basis for denial of the motion.

To properly address the motion for a mistrial, the trial court should have determined, weighed and considered the non-disclosure of that information and should have conducted a *Richardson* inquiry to determine whether there had been an inadvertent or unintentional discovery violation, and what prejudice flowed from it. In the absence of such an inquiry, the trial court (and this Court) cannot determine the extent of the

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[20]He might later argue, of course, the state's failure to call the landlord to establish whether or not Bell was the tenant of the apartment.

prejudice involved. One of the available remedies due to a belated disclosure (particularly when the disclosure is made unexpectedly before the jury where there is no really effective damage control that applies) is the granting of a mistrial. Fla. R. Crim. P. 3.220(n). Counsel asked for that remedy. Clearly, the defense was caught by surprise by, and both procedurally and substantively damaged by, the information which was so unexpectedly volunteered by Detective Bates. The defense simply did not open the door to or seek to elicit this information. Probing preliminarily the subject of the identity of the landlord has no relationship to, and did not open the door to, the subject of the contents of the records of the Jacksonville Electric Authority.

The substantive damage to the accused was irrevocable, however, once the jury heard it. It could never be taken back. Because the jury heard it, it was all the more important for the court to conduct a *Richardson* inquiry once counsel told the court that the information had not been disclosed. Had the information Bates knew been disclosed to the defense, counsel could have moved in advance to cut off the introduction of this hearsay information, at least so long as it was based solely on inadmissible hearsay, and could have prevented the jury from improperly hearing it in that context. If it were shown upon a *Richardson* inquiry that the information was intentionally withheld from the defense, that should, of course, have a significant bearing upon whether a mistrial ought to be granted once the state's witness sprang it in surprise for the jury to hear. It was never determined whether the non-disclosure was intentional or otherwise, however. To properly determine whether a mistrial must be granted, the both the procedural and substantive prejudice to the defense should have been considered in this context, but were not. Even if it was an inadvertent non-disclosure, it may have had, nonetheless, a highly

prejudicial impact upon defense counsel's trial preparation and strategy, including, but not limited to, the decision of the defendant to testify. But, where the state's witness springs this kind of damaging, undisclosed information concerning the most disputed issue in the trial in front of the jurors by ambush, the defendant is deprived of a fair trial by the revelation of that information to the jury. Sustaining the hearsay objection and giving the curative instruction was simply not adequate to remove the prejudice to Mr. Bell as a result of the state's conduct once the jurors heard it. It could not be erased then. The jury was improperly prejudiced against Mr. Bell, and would be significantly influenced when determining the issue of actual or constructive possession of the drugs, which was a crucial element of the charge of trafficking.

"Motions for mistrial are addressed to trial court's discretion and should be granted only when necessary to insure that defendant receives fair trial. *Gorby v. State*, 630 So.2d 544, 547 (Fla. 1993). The trial court's failure to grant a mistrial was an abuse of discretion in the absence of a *Richardson* inquiry into the asserted discovery violation and in the absence of a sufficient weighing of the procedural prejudice to the defendant coupled with the substantive prejudice caused, not simply by the belated disclosure of this information, but because it was actually disclosed before the jury. That disclosure denied Mr. Bell a fair trial. The trial court abused its discretion in denying the motion for a mistrial for the reasons presented above. This Court must reverse and remand for a new trial.

CONCLUSION

Petitioner, BRUCE H. BELL, based on all of the foregoing, respectfully urges the Court to answer the certified question in the affirmative, to vacate his conviction and sentence, to remand the case for a new trial, and to grant all other relief which the Court deems just and equitable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by delivery to: Jean-Jacques A. Darius, Esq., Assistant Attorney General, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to the Petitioner by U.S. Mail, first-class postage prepaid, on April 22, 1996.

Fred P. Bingham II