IN THE SUPREME COURT OF FLORIDA

ERIC SCOTT BRANCH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 87,717

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

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Eric Scott Branch, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Petitioner or his proper name.

The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of the trial court's proceedings; "IB" will designate the Initial Brief of Petitioner. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State agrees with petitioner's statement of the case and facts, with the following additions, corrections, or, qualifications.

Issue I

Petitioner did not object to the procedures employed by the Court in selecting jurors to hear the case. (T 65-66)

Petitioner did not object to the jury that was empaneled. (T 65-70)

Issue II

During cross-examination, defense counsel asked the victim about her use of the word "lacerations," as opposed to the words she used in previous accounts of the crime, such as "cuts" or "scratches."

> DEFENSE COUNSEL: And in the past you always referred to these marks as scratches, didn't you, and not lacerations?
>
> MS. HUMPICH: I'm not sure on my exact description on them.
>
> DEFENSE COUNSEL: Okay let me ask you, do you have a lawyer?
>
> PROSECUTOR: Your Honor, I object to the relevance of this. May we approach?

(T. 175-76)

At the sidebar the following transpired.

> PROSECUTOR: I object to the relevancy. She has filed a lawsuit against the State of Indiana along - (inaudible words) - in Pensacola. I don't think we ought to go into that area. That's the only lawyer I know she has.

DEFENSE COUNSEL: Unless she'd been coached by her lawyer as to terminology.

PROSECUTOR: I think that's getting into a very dangerous area. All kinds of misconceptions with the jury about her having a lawyer.

THE COURT: I'll sustain the objection as to relevancy as to does she have a lawyer.

DEFENSE COUNSEL: Ad I think I'm entitled to ask who this lawyer is and why.

THE COURT: I said I'm going to sustain the objection.

DEFENSE COUNSEL: I can leave it alone about the other lawyer.

THE COURT: I was going to say right now if she has another lawyer it's irrelevant and I'll sustain it on that basis.

DEFENSE COUNSEL: While you're here I'll ask about how she picked up these terms.

THE COURT: That's fine.

DEFENSE COUNSEL: Okay.

(T. 176-7).

Following the sidebar conference, defense counsel proceeded:

DEFENSE COUNSEL: I was discussing, Ms. Humpich, about this laceration term. How did you pick up these terms? Laceration.

MS. HUMPICH: I - I'm understandable of what a laceration is, but I have seen the term laceration in a medical report.

(T. 177)

SUMMARY OF ARGUMENT

ISSUE I.

The question certified by the district court has already been answered and does not rise to the level of a question of great public importance. Thus, discretionary review should be denied. The Court should also decline review because the petitioner is not a member of the pipeline class who could benefit from an affirmative answer to the certified question, as he did not raise the issue at trial.

Finally, the state urges that if this Court answers the question, that it answer the question in the negative. The question should be answered in the negative because the issue has been decided, because this Court has the authority to make its decisions prospective, and because modifications of rules of procedure are appropriately prospective only.

ISSUE II

This Court should decline to review this issue which involves an issue the lower tribunal dismissed as without merit. The lower tribunal was correct as the issue involves the routine application of settled law and the issue was not preserved by proper objection in the trial court.

If this Court decides to review this issue, the decision of the lower tribunal should be affirmed as the claim of bias was not the basis for the objection, was not presented to the trial court and no proffer was made of the witnesses testimony.

Moreover, the trial court's ruling based on the question asked and the argument made was not error. The question asked for an answer which was irrelevant to any issue presented. Trial counsel chose not to pursue the issue further and has waived any claim of error. Finally, if error occurred it was harmless. Therefore, this Court should deny relief.

ARGUMENT

ISSUE I

"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?"

Jurisdiction

Pursuant to Article V § 3(b)(4) Florida Constitution this Court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be one of great public importance." The District Court of Appeal of Florida, First District has certified the above stated question, therefore, this Court has discretion to exercise jurisdiction.

Exercise of Jurisdiction

While this Court has jurisdiction to answer this question certified by the lower tribunal, it also has the discretion to decline to do so. State v. Burgess, 326 So.2d 441 (Fla. 1976), Stein v. Darby, 134 So.2d 232 (Fla. 1961) The state urges this Court to exercise its discretion and decline to review this case. Coffin v. State, 374 So.2d 504, 508 (Fla. 1979)

The District Court of Appeal, First District of Florida, granted rehearing of its original opinion in order to certify this question. The certified question improperly asks this Court to conduct a rehearing of its decision in Coney v. State, 653 So.2d 1009, 1013 (Fla. 1995). In Coney, this Court interpreted rule 3.180(a) F. R. Crim. P. and stated that:

> Our ruling today clarifying this issue is prospective only.

Id. at 1013

In certifying its question, the district court acknowledged that it understood the meaning of the language used by this Court in Coney: prospective means the decision does not apply to cases tried prior to the decision. The decision below questioned how the Coney decision can be reconciled with Smith v. State, 598 So.2d 1063 (Fla. 1992). In order to resolve what it perceived as an unanswered issue, the district court certified the question.

The district court's perception that an issue remains to be resolved is erroneous. Subsequent to the Smith decision, this Court has answered the question of how decisions of this Court are to be applied by the courts of this state. The issue was specifically addressed in Wuornos v. State, 644 So.2d 1000 (Fla. 1994), where this Court addressed the proper reading of Smith and

held that Smith means that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise. The issue was discussed in Domberg v. State, 661 So.2d 285 (Fla. 1995) a case dealing with retroactivity. In Domberg, this Court referred to Smith in the following way:

> Smith v. State, 598 So.2d 1063 (Fla. 1992), limited by Wuornos v. State, 644 So.2d 1000, 1008 n.4 (Fla. 1994)(Smith read to mean that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise), cert. denied ___ U.S. ___, 115 S.Ct. 1705, 131 L.Ed.2d 566 (1995), State v. Jones, 485 So.2d 1283 (Fla. 1986)

Domberg at 287

Thus, the issue of how Smith is to be read has been decided.

Since the issue presented by the certified question has been put to rest by recent decisions of this Court, it cannot be said that the certified question is one of any public importance. Therefore, this Court should decline to exercise its jurisdiction to answer the already decided question presented by this case. See Stein.

There is a second reason why this Court should decline to exercise its jurisdiction in this case. As part of its reason to certify the issue, the district court noted that there were

numerous Coney-type cases in the pipeline. This statement misapplies the definition of a pipeline case entitled to obtain the benefit from a new decision. A pipeline case is one in which the issue is properly preserved in an appeal which is not final at the time the change in law occurs. In order to be a pipeline case, an appellant must establish that he is similarly situated and his issue is properly preserved. This was made clear by this Court's holding in Gibson v. State, 661 So.2d 288 (Fla. 1995). There this Court held that issues relating to a defendant's presence during jury voir dire (like other jury voir dire issues) must be preserved in the trial court by contemporaneous objection. The Gibson case presented this Court on appeal with the following issue:

> Gibson claims error in two respects. First, he argues that the trial court violated his right to be present with counsel during the challenging of jurors by conducting the challenges in a bench conference. Second, he argues that the trial court violated his right to the assistance of counsel by denying defense counsel's request to consult with Gibson before exercising peremptory challenges.

This Court specifically held that:

> In Steinhorst v. State, 412 So.2d 332 (Fla. 1982), we said that, "in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." In this case, we find that Gibson's lawyer did not raise the issue that is now being asserted on

> appeal. If counsel wanted to consult with his client over which jurors to exclude and to admit, he did not convey this to the trial court. On the record, he asked for an afternoon recess for the general purpose of meeting with his client. Further, there is no indication in this record that Gibson was prevented or limited in any way from consulting with his counsel concerning the exercise of juror challenges. On this record, no objection to the court's procedure was ever made. In short, Gibson has demonstrated neither error nor prejudice on the record before this Court. Cf. Coney v. State, 653 So.2d 1009, 1013 (Fla. 1995)

Gibson at 290-291

Thus, Gibson's attempt to raise for the first time on appeal a Coney issue was rejected because it was not properly preserved. This rule of law operates independently of Coney and applies even to cases where the trial takes place after Coney issued. Likewise, petitioner did not object in the trial court and his case is indistinguishable from Gibson. Indeed, the record does not reflect that petitioner was not at the sidebar during the exercise of peremptory challenges. (T 62)

This Court should discourage the promiscuous certification of irrelevant questions by declining to exercise its discretionary jurisdiction and by instructing the district courts that unpreserved claims cannot be the basis for "an issue of great public importance." Misapplication of the designation "this is an issue of great public importance" when the issue certified

could not provide the defendant with relief is all too common. In fact, this "Coney" issue has been repeatedly certified by the lower tribunal in cases which do not contain any objection to the trial court procedure. See Branch v. State, No 87,717, Bell v. State, No. 87,716, Lett v. State, No. 87,541, Lee v. State, No. 87,715, Horn v. State, No. 87,789 Continuation of this practice should be discouraged.

Merits

This Court, if it exercises discretionary review, should answer the certified question in the negative.

This Court specifically answered the question of how its decisions are to be applied in, e.g., Wuornos v. State, 644 So.2d 1000 (Fla. 1994), where this Court addressed the proper reading of Smith and held that Smith means that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise. The Court noted that it had repeatedly held that it had the authority to make new rules prospective and cited a series of cases in which it had dictated that the new rule was to be prospective only.

The issue was again addressed in Domberg v. State, 661 So.2d 285 (Fla. 1995) a case dealing with retroactivity. In Domberg, this Court referred to Smith in the following way:

> Smith v. State, 598 So.2d 1063 (Fla. 1992), limited by Wuornos v. State, 644 So.2d 1000, 1008 n.4 (Fla. 1994)(Smith read to mean that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise), cert. denied ___ U.S. ___, 115 S.Ct. 1705, 131 L.Ed.2d 566 (1995), State v. Jones, 485 So.2d 1283 (Fla. 1986)

Domberg at 287

Petitioner's arguments are based on a fundamental misunderstanding of the nature and scope of this Court's authority. Unlike the United States Supreme Court, this Court has the authority to promulgate procedural rules and modify them when necessary. For obvious reasons, changes to procedural rules are almost always prospective. Tucker v. State, 357 So.2d 719 (Fla. 1978) Thus, there will be many occasions for this Court's rulings to be prospective only. Adopting a rule akin to the United States Supreme Court rule in Griffin v. Kentucky, 479 U.S. 314 (1987) would be inappropriate given this Court's rulemaking authority and would unduly restrict the Courts ability to modify the rules.

This approach is also appropriate given the subject of this litigation. Like the decision in R.J.A v. Foster, 603 So.2d 1167 (Fla. 1992) where the Court found the procedural rule superseded the statutory juvenile speedy trial provision, rule 3.180 superseded the provisions of § 914.01 Fla. Statutes. See Thomas v. State, 65 So.2d 866, 868(Fla. 1953) Thus, the rule is a procedural mechanism to implement a substantive right.

It must also be recognized that the rights provided in the rule and the rights mandated by the constitution are not synonymous. In Shriner v. State, 452 So.2d 929 (Fla. 1984) this Court held that it was not fundamental error when a defendant was absent from bench conferences because he was present in the courtroom. Likewise, in Jones v. State, 569 So.2d 1234, (Fla. 1990), this Court found no error when Jones was not at the sidebar during selection of the jury even though the record did not reflect an affirmative waiver.

Thus, the Coney interpretation of the term present is not constitutionally mandated but a modification of a rule of procedure setting out the manner in which the constitutional right should be implemented. See R.J.A.

Reading the rule in this fashion is in accord with federal practice. The United States law regarding this issue was

summarized in United States v. McCoy, 8 F.3d 495, 496 (7th Cir. 1993):

> [2] A defendant's right to be present at trial derives from several sources. First, the defendant has a sixth amendment right to confront witnesses or evidence against him. See United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 1484, 84 L.Ed.2d 486 (1985) (per curiam); Verdin v. O'Leary, 972 F.2d 1467, 1481 (7th Cir.1992); United States v. Shukitis, 877 F.2d 1322, 1329 (7th Cir.1989). That right is not implicated here, because no witness or evidence against McCoy was presented at any of the conferences. See Verdin, 972 F.2d at 1481-82.
>
> [3] The defendant also has a due process right to be present " 'whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.' " Gagnon, 470 U.S. at 526, 105 S.Ct. at 1484 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934)). But " 'the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.' " Id. (quoting Snyder, 291 U.S. at 107-08, 54 S.Ct. at 333); see also Verdin, 972 F.2d at 1481-82; United States v. Moore, 936 F.2d 1508, 1523 (7th Cir.), cert. denied, --- U.S. ----, 112 S.Ct. 607, 116 L.Ed.2d 630 (1991); Shukitis, 877 F.2d at 1329-30. That determination is made in light of the record as a whole. Gagnon, 470 U.S. at 526-27, 105 S.Ct. at 1484.
>
> In Gagnon, the Supreme Court found that defendants' due process rights were not violated when they were excluded from an in camera conference between the judge, defense counsel and a juror regarding the juror's possible bias. The Court based its holding on the fact that the defendants "could have done nothing had they been at the conference, nor would they have gained anything by attending." Id. at 527, 105 S.Ct. at 1485. In Shukitis, we similarly held that a

defendant's due process rights were not implicated when he was excluded from an in camera conference that addressed a separation of witnesses order. We reasoned that the absence did not affect the court's ability to decide the issue or otherwise diminish Shukitis' ability to defend against the charges, and that Shukitis' interests were adequately protected by his counsel's presence at the conference. 877 F.2d at 1330. See also Moore, 936 F.2d at 1523.

As in Gagnon and Shukitis, McCoy's absence from the conferences did not detract from his defense or in any other way affect the fundamental fairness of his trial. Indeed, McCoy seems to have conceded this point, having offered no argument to the contrary. Like Shukitis, McCoy's interests were sufficiently protected by his counsel's presence at the conferences. McCoy therefore had no due process right to attend.

[4] Finally, Fed.R.Crim.P. 43 entitles defendants to be present "at every stage of the trial including the impaneling of the jury...." (FN1) This right is broader than the constitutional right (Shukitis, 877 F.2d at 1330), but is waived if the defendant does not assert it. Reversing the Ninth Circuit in Gagnon, the Supreme Court explained:

We disagree with the Court of Appeals that failure to object is irrelevant to whether a defendant had voluntarily absented himself under Rule 43 from an in camera conference of which he is aware. The district court need not get an express "on the record" waiver from the defendant for every trial conference which a defendant may have a right to attend.... A defendant knowing of such a discussion must assert whatever right he may have under Rule 43 to be present.

470 U.S. at 528, 105 S.Ct. at 1485; cf. Taylor v. United States, 414 U.S. 17, 18-20, 94 S.Ct. 194, 195-96, 38 L.Ed.2d 174 (1973) (per curiam). A defendant may not assert a Rule 43 right for the first time on appeal. Gagnon, 470 U.S. at 529, 105 S.Ct. at 1485; Shukitis, 877 F.2d at 1330. Because McCoy did

not invoke Rule 43 either during trial or in a post-trial motion, he has waived any right under that rule. (FN2)

Because of the availability of consultation between a lawyer and his client present for trial, there is no due process violation when a defendant is not present at the bench during a sidebar for peremptory challenges. See, McCoy, United States v. Gayles, 1 F.3d 735 (8th Cir. 1993), United States v. Moore, 936 F.2d 1508, 1523 (7th Cir. 1991), United States v. Bascaro, 742 F.2d 1335 (11th Cir. 1984) Therefore, the only legitimate conclusion is that the Coney decision was not one of constitutional magnitude.

In United States v. Gagnon, 470 U.S. 522, 526-530 (1985) the Supreme Court indicated that the right of the defendant to be present under Rule 43 of the Federal Rules of Criminal Procedure (similar to our rule) is broader than the constitutionally based right to be present. In Gagnon, the Court held that such claims must be preserved at trial and that waiver of the benefits of the Rule 43 right to be present may be inferred by a defendant's failure to assert the right at trial. Thus, the United States Supreme Court recognizes that the Rule 43 right must be asserted

at trial by the defendant; our rule should follow the federal rule.

Finally, to state the problem and analysis in a slightly different form. The district court and the petitioner fail to distinguish between the Coney decision and the prospective rule announced in that decision. Coney is applicable to all pipeline cases, including the one at hand. However, Coney by its terms plainly announces that the new procedural rule established therein is only applicable to trials which occur after the announcement of the new rule. By its terms it does not provide relief to any appellant/petitioner whose trial occurred before the Coney decision became final. Not only is it uncontroverted that the issue was not preserved below, it is also uncontroverted that the trial occurred before the issuance of Coney. The district court is simply misapprehending the plain language of Coney in perceiving a conflict with Smith. None exists.

Summary

The question certified by the district court has already been answered and does not rise to the level of a question of great public importance. Thus, discretionary review should be denied. The Court should also decline review because the petitioner is not a member of the pipeline class who could benefit from an

affirmative answer to the certified question, as he did not raise the issue at trial. Gibson

Finally, the state urges that if this Court answers the question, that it answer the question in the negative. The question should be answered in the negative because the issue has been decided, because this Court has the authority to make its decisions prospective, and because modifications of rules of procedure are appropriately prospective only.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY PRECLUDING THE PETITIONER FROM CROSS-EXAMINING THE VICTIM ABOUT WHETHER SHE HIRED A LAWYER. (Restated)

In the trial court, petitioner's lawyer asked the victim if she had a lawyer. The state objected and after discussion that question was held to be irrelevant. Petitioner now raises a claim of bias, a claim which he raised for the first time in the District Court. This claim was not discussed in the lower court's opinion, it was summarily rejected as having no merit. Therefore, this Court should deny review.

Procedural Matters

Jurisdiction

Pursuant to Article V § 3(b)(4) Florida Constitution this Court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be one of great public importance." When the Court obtains jurisdiction over a case, it obtains jurisdiction over all issues in the case. The District Court of Appeal of Florida, First District has certified a question, therefore, this Court has jurisdiction.

Exercise of Jurisdiction

While this Court has jurisdiction to answer this question, this Court has the discretion to decide whether it should exercise its jurisdiction and hear the case. State v. Burgess, 326 So.2d 441 (Fla. 1976), Stein v. Darby, 134 So.2d 232 (Fla. 1961) The state urges this Court to exercise its discretion and decline to review this case. Coffin v. State, 374 So.2d 504, 508 (Fla. 1979)

This Court should decline review of this issue because the lower tribunal's decision was a routine application of settled principles to the facts of the case. This issue contains no legal issue warranting this Court's review.

Preservation

Petitioner's bias claim raised in this issue was not properly preserved by specific objection in the trial court.
During cross-examination, defense counsel asked the victim about her use of the word "lacerations," as opposed to the words she used in previous accounts of the crime, such as "cuts" or "scratches."

> DEFENSE COUNSEL: And in the past you always referred to these marks as scratches, didn't you, and not lacerations?

MS. HUMPICH: I'm not sure on my exact description on them.

DEFENSE COUNSEL: Okay let me ask you, do you have a lawyer?

PROSECUTOR: Your Honor, I object to the relevance of this. May we approach?

(T. 175-76)

The State specifically objected to admittance of evidence that the victim hired a lawyer (T. 176), and the trial court sustained the State's objection and specifically ruled that evidence of whether the victim hired a lawyer was irrelevant (T. 177). However, the trial court did not prohibit the petitioner from inquiring as to whether the victim had been coached on how to testify (T. 177). Following the sidebar conference, defense counsel proceeded:

DEFENSE COUNSEL: I was discussing, Ms. Humpich, about this laceration term. How did you pick up these terms? Laceration.

MS. HUMPICH: I - I'm understandable of what a laceration is, but I have seen the term laceration in a medical report.

(T. 177)

The record on appeal does not reflect that defense counsel's question, whether the victim had a lawyer, was an attempt to show the victim's bias as affected by a civil lawsuit. As shown

above, when taken in contest, defense counsel's line of questioning was an attempt to show that the victim had been coached on how to testify (T. 175-6). At the side-bar conference held upon the State's objection, defense counsel did not raise the issue of the witness's bias as affected by the filed lawsuit:

> PROSECUTOR: I object to the relevancy. She has filed a lawsuit against the State of Indiana along - (inaudible words) - in Pensacola. I don't think we ought to go into that area. That's the only lawyer I know she has.
>
> DEFENSE COUNSEL: Unless she'd been coached by her lawyer as to terminology.
>
> PROSECUTOR: I think that's getting into a very dangerous area. All kinds of misconceptions with the jury about her having a lawyer.
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> THE COURT: I'll sustain the objection as to relevancy as to does she have a lawyer.
>
> DEFENSE COUNSEL: Ad I think I'm entitled to ask who this lawyer is and why.
>
> THE COURT: I said I'm going to sustain the objection.
>
> DEFENSE COUNSEL: I can leave it alone about the other lawyer.
>
> THE COURT: I was going to say right now if she has another lawyer it's irrelevant and I'll sustain it on that basis.
>
> DEFENSE COUNSEL: While you're here I'll ask about how she picked up these terms.
>
> THE COURT: That's fine.
>
> DEFENSE COUNSEL: Okay.

(T. 176-7).

The record on appeal does not support the petitioner's statement that defense counsel below tried to open an inquiry as to whether the victim's civil attorney had structured the victim's testimony or terminology to benefit her position as to the civil litigation. Defense counsel never argued to the trial court that the petitioner was entitled to show the jury that the victim filed a civil lawsuit, thereby making her biased against him. Thus, the arguments made by the petitioner in his initial brief regarding the victim's bias as affected by the civil lawsuit were raised for the first time on appeal. The issue, therefore, is precluded from appellate review. Torres-Arboledo v. State, 524 So. 2d 403 (Fla. 1988); Esty v. State, 642 So.2d 1074 (Fla. 1994) Strapp v. State, 588 So. 2d 27 (Fla. 3d DCA 1991) (the defendant was precluded from arguing that the trial court erred by refusing to permit cross-examination of victim concerning being on probation at the time of the charged incident when the record was unclear and there was no offer of proof).

In the case at bar, not only did the petitioner fail to present the issue of bias to the trial court, but he also failed to make a proffer of what he was precluded to show. In his initial brief, the petitioner claims that the victim filed a

civil lawsuit against him. There was virtually no discussion of the victim' civil lawsuit, but what little there was shows that the petitioner is wrong. The record indicates that the civil lawsuit filed by the victim was against the State of Indiana, not the petitioner. The petitioner made no showing or proffer of the details of the lawsuit or how it affected the victim's testimony. There was, then, no showing to the trial court of the relevancy of the civil lawsuit. Further, petitioner never proffered any other questions it desired the victim to answer concerning the alleged coaching or alleged bias, therefore, all such claims are waived.

Because the petitioner never presented to the trial court any assertion or proffer showing potential bias, there can be no meaningful appellate review of the issue. For this Court cannot review a decision the trial court was never asked to make. State v. Barber, 301 So.2d 7 (Fla. 1974) Thus, due to the petitioner's failure to properly preserve the issue, this Court should refrain from reaching the merits of whether the petitioner was entitled to cross-examine the victim concerning whether she has a lawyer or the civil lawsuit filed against the State of Indiana.

Again, the specific objected to question posed by defense counsel was whether the victim had a lawyer (T. 176).

Therefore, the claim presented in this issue is not preserved by specific objection or proffer and should not be addressed by this Court. Steinhorst v. State, 412 So.2d 432 (Fla. 1982),

Standards of Review

If this Court decides to review the trial court's ruling, certain standards need discussion. A trial court's has a great deal of discretion in admitting or excluding evidence and its decision in these matters will not be reversed unless the decision amounted to an abuse of discretion. This standard applies to decisions relating to cross examination issues.

Abuse of discretion was defined in Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980), as:

> Discretion in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way o saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

While a court cannot preclude a defendant from confronting the witnesses against him, the confrontation clause does not preclude some limits being placed on cross examination. Steinhorst v. State, 412 So.2d 432 (Fla. 1982); Livingston v. State, 565 So. 2d

1288 (Fla. 1988) Finally, if a Court abuses its discretion by improperly limiting cross examination the issue becomes whether such action was harmless error.

Merits

During cross-examination, defense counsel asked the victim about her use of the word "lacerations," as opposed to the words she used in previous accounts of the crime, such as "cuts" or "scratches."

> DEFENSE COUNSEL: And in the past you always referred to these marks as scratches, didn't you, and not lacerations?
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> MS. HUMPICH: I'm not sure on my exact description on them.
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> DEFENSE COUNSEL: Okay let me ask you, do you have a lawyer?
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> PROSECUTOR: Your Honor, I object to the relevance of this. May we approach?

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The State specifically objected to admittance of evidence that the victim hired a lawyer (T. 176), and the trial court sustained the State's objection and specifically ruled that evidence of whether the victim hired a lawyer was irrelevant (T. 177). However, the trial court did not prohibit the petitioner from inquiring as to whether the victim had been coached on how to

testify (T. 177). Following the sidebar conference, defense counsel proceeded:

> DEFENSE COUNSEL: I was discussing, Ms. Humpich, about this laceration term. How did you pick up these terms? Laceration.
>
> MS. HUMPICH: I - I'm understandable of what a laceration is, but I have seen the term laceration in a medical report.

(T. 177)

Thus, the petitioner was not precluded from questioning the witness regarding her use of the term "laceration" and whether she was coached into using that term. The trial court only precluded the petitioner from asking the victim whether she hired a lawyer.

The question asked by the lawyer, whether she has a lawyer? was irrelevant. A victim could have numerous reasons to obtain a lawyer unrelated to any issue of bias. Additionally, Petitioner could have proffered a series of questions to the witness and developed the factual situation to where the question might have become relevant, but, he did not.

Even if this Court finds that, through this question, the petitioner presented the issue of the victim's bias, the trial court properly sustained the State's objection. The petitioner did not show how the evidence was relevant, how having a lawyer

or a civil lawsuit against the State of Indiana biased the victim's testimony.

Even if this Court finds this issue was properly preserved, and that the trial court abused its discretion by sustained the State's objection, the record on appeal shows the error was harmless. Livingston

There was no question of what the defense would be in this case. The DNA evidence along with the other physical evidence established sexual intercourse. The victim's testimony that she did not consent, but rather that the petitioner used physical force to coerce the commission of the sexual battery was corroborated by the physical evidence and testimony of several witnesses regarding the injuries suffered by the victim. Patricia Ault and Officer Colbert both testified that the petitioner's inner mouth area had been gouged and how this made it difficult for the petitioner to speak (T. 211, 245). This testimony was consistent with the victim's testimony regarding her escape attempt

> When I tried to go, run out the front door, he threw me into the wall, which there's a wall there, and we slid down the wall and fought. And I was screaming and I just wanted to get out of there. When I started screaming is when he stuck his hand down my throat and I thought he was going to pull out my vocal chords, but in reality what he did was stuck his finger down as far

as he could get it and he ripped and he gouged a large canal area in my mouth.

(T. 131).

Furthermore, both Dr. Tracey and Nurse Caswell described the anal tears suffered by the petitioner, and how the "spoke wheel" type injury was consistent with the "spoke wheel" end to the flashlight used by the petitioner to penetrate the victim anally (T. 299, 335).

If any error occurred regarding a mundane question relating to whether her description of her cuts and scratches became lacerations due to the influence of a lawyer, it was harmless beyond any reasonable doubt.

Summary

This Court should decline to review this issue which involves an issue the lower tribunal dismissed as without merit. The lower tribunal was correct as the issue involves the routine application of settled law and the issue was not preserved by proper objection in the trial court.

If this Court decides to review this issue, the decision of the lower tribunal should be affirmed as the claim of bias was not the basis for the objection, was not presented to the trial court and no proffer was made of the witnesses testimony.

Moreover, the trial court's ruling based on the question asked and the argument made was not error. The question asked for an answer which was irrelevant to any issue presented. Trial counsel chose not to pursue the issue further and has waived any claim of error. Finally, if error occurred it was harmless. Therefore, this Court should deny relief.

CONCLUSION

Based on the foregoing, the State respectfully submits that this Court should decline to review this case. If the case is reviewed, the certified question should be answered in the negative, and the judgement and sentence entered in the trial court should be affirmed.

Respectfully submitted,

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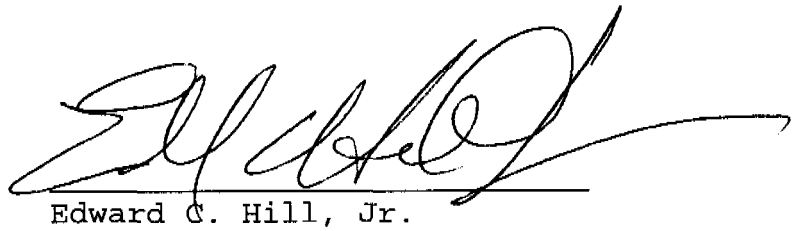
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Mr. Fred Parker Bingham, II, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401, North; 301 South Monroe Street; Tallahassee, Florida 32301, this 18th day of June, 1996.



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