In The Supreme Court of Florida

NO. 87,717

ERIC SCOTT BRANCH,

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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April 22, 1996

IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,717

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THE STATE 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, Vol. II through VIII.

"SR." — Supplemental Record of Exhibits, Vol. X.

All cited references will be followed by the relevant page number(s). All other citations will be self-explanatory or will otherwise be explained. Respondent, 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 district court 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?

The district court did not address the issue, denominated "Issue II" herein, in its opinion although the issue was argued to that court. Petitioner also seeks review of that issue.

The district court further determined that the Indiana crime of "sexual battery" was not analogous to the crime of sexual battery for the purposes of imposing a habitual violent felony offender sentence because each crime requires elements that the other does not. The district court reversed the imposition of the habitual violent felony offender sentence, remanding for resentencing. Petitioner does not seek review of that decision.

2. History of Proceedings

Mr. Branch was charged with sexual battery, in violation of § 794.011(5), Fla. Stat., by Information on January 20, 1993 [R. 11]. The Public Defender was appointed to represent Mr. Branch on January 23, 1993 [R. 17]. However, until March 3, 1993, appellant was represented by Christopher N. Patterson [R. 92]. Patterson moved to withdraw [R. 91-92], which was granted and the Public Defender appointed [R. 97].

An amended information charging sexual battery, in violation of § 794.011(3) was filed on March 1, 1993 [R. 96].[1]

On March 5, 1993, appellant moved for an order appoint an expert to assist the defense regarding issues of competency and sanity [R. 99]. The motion was granted April 2, 1993, appointing Dr. Harry McLaren [R. 101].

A waiver of speedy trial was filed by the defendant on May 18, 1993 [R. 104].

On June 21, 1993, the court ordered the accused to undergo HIV testing [R. 106].

On July 14, 1994, the defendant filed a motion for statement of particulars [R. 113]. On August 8, 1994, the court took the motion for bill of particulars under advisement [R. 120].

On August 9, 1994, the state filed a "Notice of Violet [sic] Habitual Felony Offender Status." This notice did not identify the prior convictions upon which the state would rely to establish eligibility for sentencing as a habitual violent felony offender. [R. 121].

On September 19, 1994, the defendant filed a motion to suppress evidence ("blood and other body samples," and evidence seized from a motor vehicle) [R. 124].[2]

On that date, the defendant also filed a motion to dismiss the amended

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[1]This information charged oral, anal and vaginal penetration by an object (a flashlight) and/or penile union with the use of force likely to cause serious personal injury [R. 96].

[2]This motion was denied by a written order on October 10, 1994 [R. 141], following a hearing on the motion on September 27, 1994 [T. 229-240].

information as it alleged force "likely to cause serious personal injury" wherein the original information had alleged force "not likely to cause serious personal injury." [R. 126].

On September 27, 1994, the state filed another Amended Information, alleging sexual battery in violation of § 794.011(3), Fla. Stat., with the actual use of physical force likely to cause serious personal injury.[3]

On October 4, 1994, the defendant filed another Motion for Statement of Particulars [R. 138].

On October 12, 1994, the defendant filed a motion in limine to exclude any testimony or purported results of DNA testing [R. 145-46].[4] The state moved to strike the motion as untimely [R. 157-58]. On October 18, 1994, the state filed a written response to the defendant's motion in limine regarding DNA [R. 163-167].

Following a trial by jury, Mr. Branch was found guilty of sexual battery without physical force, a lesser included offense (2d degree felony) on October 21, 1994 [R. 186].

On October 31, 1994, the defendant filed a motion for new trial [R. 189-190].

On November 15, 1994, the court found that the defendant did not receive the state's notice of habitual violent felony offender status, but that the defendant was given notice thereof as of that date. The court denied the motion for new trial. [R. 193].

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[3]This information alleged penile union of penetration with the anus, vagina or mouth, or the penetration of the anus or vagina by an object [R. 129].

[4]The motion was also refiled on October 13, 1994 [R. 155-56].

On November 18, 1994, the court found the defendant to be a habitual violent felony offender. The court's finding that the defendant was a habitual *violent* felony offender was based upon a conviction for the offense of "sexual battery" in the Vanderburgh (Indiana) Circuit Court (Case No. 82CO1-9110-CF-0628) on April 30, 1992 [*see* SR., State's Exhibit 2 and 3].[5]

On November 18, 1994, the court imposed a sentence of 30 years with a minimum sentence of 10 years as a habitual violent felony offender, with credit for 666 days. The sentence was ordered served consecutive to any other active sentencing being served. [R. 197-202]. On November 21, 1994, the court entered an order determining the defendant to be a habitual violent felony offender. The order is noted

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[5]The information in Indiana Case No. 82CO1-9110-CF-0628 alleged as to Count 5, that:

> [O]n or abut October 15, 1991, Eric S. Branch, did with the intent to arouse and satisfy his own sexual desires, touch another person, to-wit: Tiffany Pierce, the said Tiffany Pierce being compelled to submit to the touching by force, to-wit: covering the mouth of Tiffany Pierce and forcing her to the ground and telling Tiffany Pierce not to scream, contrary to the form of the statutes in such cases made and provided by I.C. 35-42-4-8 . . . .

[SR., State's Exhibit 3, page 1].

As to Indiana Case 82D02-8909-CF-00392, the state provided two certified "Abstract of Judgment." One shows a conviction of robbery and theft on May 22, 1990. The other in the same case shows only a conviction of theft (count II), with robbery dismissed (count I). The accompanying docket entries in that case for May 22, 1990, show that the robbery count was dismissed and Mr. Branch was convicted of theft upon entry of a plea of guilty to that count only. [SR, State's Exhibit 3, pages 8, 9 and 11].

as "nunc pro tunc November 18, 1994." [R. 203].[6]

On November 30, 1994, Mr. Branch filed a timely Notice of Appeal [R. 205]. Appellant was found insolvent and the public defender was appointed to represent him on appeal on December 1, 1994 [R. 213].

2. Statement of the Facts

Challenging of the Jury

The record shows that during jury selection, the court requested that **counsel** approach the bench. Mr. Adams, defense counsel, requested a moment with his client. [T. 65]. Then, at the bench, the defense exercised peremptory challenges. At one point, defense counsel, when asked if he would strike more people, stated, "[L]et me talk to my client. I'll be right back." [T. 66]. Counsel then exercised further peremptory strikes [T. 66]. After announcing the names of those excused to the jury, the court inquired whether the jury was acceptable to defense counsel [T. 69]. The record affirmatively shows that no inquiries were made to Mr. Branch regarding the jury or the strikes made by defense counsel or regarding Mr. Branch's presence at the sidebar during the challenging process.

The Facts Concerning the Incident[7]

At trial the contested issue was whether sex between the victim and the

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[6]The written order fails to specifically identify the prior convictions upon which the court's findings are based [R. 203].

[7]The testimony and evidence was much more extensive than that summarized her, but the other testimony and evidence is not relevant to the issues raised in this case, thus is not detailed here.

defendant was consensual. In his opening statement to the jury, defense counsel stated that the evidence would show that the sexual relations between the victim and defendant were consensual [T. 111]. Both the victim and the defendant testified on the question of consent, taking opposing positions.

The victim testified she met Mr. Branch at the "Spinnaker," a bar and eatery, on New Year's Eve [T. 122-123]. She had gone there with friends, but later was in need of a ride home [T. 164]. She was to leave with a Bill Mallory, but Mallory had met another woman that evening [T. 124, 167-168]. Her other friends had already left [T. 170]. Mr. Branch offered to take her home [T. 124]. She had enough money for cab fare home [T. 169]. She had met Mr. Branch twice before and knew his first name [T. 124, 164]. They left together about 3:30 a.m. [T. 125]. They proceeded to Mr. Branch's condominium [T. 126]. Branch suggested she come up. She did. [T. 127]. They walked up three flights to the apartment [T. 174].

Branch ate some salad, offering Ms. Humpich something to eat, which she declined [T. 129]. Branch put on some music [T. 195]. She testified the music was fine [T. 196]. She stated that Branch shoved her down on a couch, during which she received a laceration on her face [T. 130]. She went into the bathroom to wipe the blood off on a washcloth [T. 130]. She was fully dressed when she went into the bathroom [T. 181].

She said she then tried to run out the front door, but Branch caught her and they fought; she was screaming and Branch put his hand in her mouth, gouging an area inside her mouth [T. 131]. She then took all of her clothes off because, she said,

she did not want him ripping or tearing her clothes [T. 133, 182]. She took off her pantyhose and panties while standing [T. 182]. She took off her skirt. She took off her bustier[8] [T. 188]. Then Mr. Branch also took off his clothes [T. 133]. When Mr. Branch took off his pants, she was fully unclothed and standing [T. 199].

They had vaginal sexual intercourse on the couch [T. 133]. He also place his penis in her mouth and anus. She did not know if he ejaculated. [T. 134]. Then, she said, Branch sodomized her with a flashlight [T. 135]. Afterward, she dressed, except for her pantyhose, and allowed Branch to drive her home [T. 136-137, 190].[9]

During the cross-examination of the victim, defense counsel established that Ms. Humpich had always previously referred to her injuries as scratches, but now called them lacerations [T. 176]. Counsel then asked Ms. Humpich whether she had a lawyer, to which the state objected. At the bench, the prosecution noted that the victim had filed a lawsuit in Indiana and in Pensacola. Defendant counsel stated that he wanted to determine whether the victim had been coached as to certain terminology used during her testimony, saying lacerations as opposed to scratches. [T. 176]. The objection was sustained [T. 177]. Defense counsel also argued that he was entitled to ask about the lawyer and why. The court against sustained the objection [T. 177]. Ms.

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[8]This item of apparel is spelled variously throughout the transcripts. The word used here appears to the be correct terminology for this garment, courtesy of *Victoria's Secret*.

[9]She said she actually had him drop her off about three houses away from her home [T. 137].

Humpich then stated she had seen the term "lacerations" in a medical report about her [T. 177].

Defense counsel moved for a judgement of acquittal as to the charge of sexual battery with great physical injury arguing there had been no evidence of great bodily harm or pain or permanent disability or disfigurement adduced to support that charge, and arguing that only simple sexual battery without great bodily harm should be submitted to the jury [T. 517]. The motion was denied [T. 520].[10] Counsel requested two special instructions on consent, which the court took under advisement [T. 520].

Mr. Branch testified. He stated he recognized Lisa Humpich, who had testified [T. 529]. Essentially, Mr. Branch testified that while at his apartment he kissed her and it went from that. She didn't stop kissing. She never said no. She never said she didn't want it. [T. 551]. He had been rubbing on her and kissing her [T. 552 After they started kissing, she asked if he wanted he clothes off, and Branch said yeah. [T. 551]. She took her own clothes off [T. 552]. He had sex with her. [T. 556]. They had sex in different positions, starting on the couch, but ended up on the floor [T. 564]. He did not remember the anal sex, but said it evidently happened [T. 556]. He denied using a flashlight on her [T. 556].

They got dressed. He helped her fasten her bustier because she couldn't snap it [T. 557]. He took her home, which was about a block away [T. 558].

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[10]The court thereafter instructed the jury on sexual battery with great bodily injury or force [T. 632-633]. During deliberations, the jury sent out a note stating, "We need a clarification of the charges and the question is what is the charge of sodomy?" [T. 644]. With the defendant's agreement, the court re-read the instructions defining the offenses (including lesser offenses) [T. 646-651].

The jury returned a verdict of guilty of sexual battery without actual physical force likely to cause serious personal injury, a lesser included offense [T. 652].

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 between the time of Coney's trial, yet before the decision was rendered in *Coney v State*, 653 So. 2d 1009 (Fla. 1995).

Equal protection under the law, as well as decisions of this and other courts, demands that Petitioner be granted the same relief as was granted Coney. This is true whether *Coney* is considered to be "new law" or not.

At the very least, the law which preceded *Coney*, and upon which *Coney* was decided, mandates that Petitioner be granted the same relief.

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.

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

ISSUE II — The trial court improperly restricted the appellant's cross-examination of the victim for interest or bias when the court precluded appellant from eliciting that the victim's testimony had been structured by her civil attorney and that the victim had filed civil suits for monetary damages against the appellant. The credibility of the victim and the appellant were the disputed issues in the case given that the defense to the charges of sexual battery was one of consent.

ARGUMENT

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.[11] 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.

The record shows that during jury selection, the court requested that **counsel**

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[11]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.

approach the bench. Mr. Adams, defense counsel, requested a moment with his client. [T. 65]. Then, at the bench, the defense exercised peremptory challenges. At one point, defense counsel, when asked if he would strike more people, stated, "[L]et me talk to my client. I'll be right back." [T. 66]. Counsel then exercised further peremptory strikes [T. 66]. After announcing the names of those excused to the jury, the court inquired whether the jury was acceptable to defense counsel [T. 69]. The record affirmatively shows that no inquiries were made to Mr. Branch regarding the jury or the strikes made by defense counsel or regarding Mr. Branch's presence at the sidebar during the challenging process.

- 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. Branch's case made no inquiry or certification whatsoever. None of the requirements established by the Court in *Coney*, set forth at p. 13, 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 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.[12] 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

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[12] 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).

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. Branch was present in the courtroom, as was Coney, he was not physically present at the sidebar. Inferentially, Branch 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. Branch 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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> * * *
>
> 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) <u>Plain Language in Coney Indicates That it Is Not New Law</u>

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" Procedural Requirements Announced in *Coney* Was Not New Law; and Waiver by Silence or Acquiescence Is Not Allowed Where Fundamental Rights Are Involved

This Court has repeatedly held that a defendant's waiver of the small class of "fundamental" rights can only be accomplished by a personal, affirmative, on-the-record waiver. *See e.g., Torres-Arboledo v. State*, 524 So. 2d 403, 410-411 (Fla. 1982); *Armstrong v. State*, 579 So. 2d 734, 735 n.1 (Fla. 1991).[13]

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. 1019, 82 L.Ed.2d 1461 (1938).

(2) If *Coney* is Considered "New Law"

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[13] 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").

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[14] 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

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

Constitution, the rule must be applied to all cases pending on direct appeal at the time the new rule is announced. *See, e.g., People v. Mitchell*, 606 N.E.2d 1381, 1383-1384, (N.Y. 1992); *People v. Murtishaw*, 773 P.2d 172, 178-179 (Cal. 1989)(federal retroactivity doctrine applies where new rule of criminal procedure announced by state court is not based **solely** on state law).

Clearly, *Coney* is based in part on the U.S. Constitution in addition to Fla. R. Crim. P. 3.180. Consider the plain language in *Coney*, and in *Turner* and *Francis* which *Coney* follows, and the citations to the federal constitution and to federal cases. In *Coney*, this Court ruled:

> [The defendant] has the **constitutional right** to be present at the stages of his trial where **fundamental fairness** might be thwarted by his absence. Florida Rule of Criminal Procedure 3.180(a)(4) recognizes the challenging of jurors as one of the **essential 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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> 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*.[15] 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"

[15]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.

announced in *Castro v. State*, 597 So. 2d 259 (1992), to a pipeline case. *See Wuornos*, at 1007-1008.

However, later, in *State v. Brown*, 655 So. 2d 82 (Fla. 1995), this Court appears to have re-embraced the principles of fairness and equal treatment in *Griffith*, holding that *Smith* "established a blanket rule of retrospective application to all non-final cases for new rules of law announced by this Court." *Id.* at 83. Then, shortly after *Brown*, in *Davis v. State*, 661 So. 2d 1193 (Fla. 1995), this Court noted that *Smith* was limited by *Wuornos* and refused to apply a "new rule" to a collateral appeal. Despite denial of relief, this Court stated:

> Had Davis's appeal been pending at the time we issued *Smith*, and had he raised the sentencing error on direct 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.[16] 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

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

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 waiver, and Petitioner had the right to be present at the bench during jury selection.[17] *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

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[17]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.

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 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 advantageous to him or disadvantageous to the opponent. That input cannot be made until the situation actively develops in that direction during the dynamic course of the challenging process.

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

E. Petitioner Did Not Waive His Right

Nothing petitioner did 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:
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> > "presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that 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,"[18] that Mr. Branch'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 Branch knew he had the right to be present — such that he knew he might be required to object to the procedure employed or to his absence.

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

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

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. 32.

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.[19] 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 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

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[19]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.

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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> * * *
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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. Branch'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 COMMITTED REVERSIBLE ERROR WHEN IT PRECLUDED THE DEFENSE FROM IMPEACHING THE VICTIM BY SHOWING HER BIAS AND INTEREST WITH EVIDENCE THAT SHE HAD FILED CIVIL LITIGATION FOR MONETARY DAMAGES AGAINST THE DEFENDANT

During cross-examination of the victim, defense counsel began to open a line of questioning to elicit evidence regarding the victim having sued the defendant for damages as a result of the same incident giving rise to the criminal prosecution. Counsel had already established that in all previous statements, she had referred to her injuries as scratches, but was now testifying that they were "lacerations." The court sustained the objection. The court also sustained an objection to a question which was intended to open an inquiry as to that issue and whether the victim's civil attorney had structured the victim's testimony or terminology to benefit her position as to the civil litigation.

The defendant is entitled to inquire into any matters which would disclose the interest or bias of a witness, particularly that of the alleged victim in the criminal case who is the only other eye-witness and where consent is the disputed issue. It is well established that great latitude is allowed the defense in the cross-examination of a witness to determine his interest, his opportunities for observation, his disposition to speak truthfully, and his ability to speak accurately. *Cruz v.tate*, 437 So. 2d 692, 694 (Fla. 1st DCA 1983); *Killingsworth v. State*, 90 Fla. 200, 105 So. 834 (1925). Moreover, the opportunity to fully and completely cross-examine "critical witnesses is fundamental to a fair trial." *Jennings v. State*, 413 So. 2d 24, 26 (Fla. 1982); *Schwab v. State*, 636

So. 2d 3, 5 (Fla. 1994). "Especially is this true if a key state witness is the subject of the cross-examination." *Taylor v. State*, 623 So. 2d 832 (Fla. 4th DCA 1993); *Cox v. State*, 441 So. 2d 1169 (Fla. 4th DCA 1983). The rule is well-settled that "limiting the scope of cross-examination in a manner which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony constitutes error, especially where the cross-examination is directed to the key prosecution witness." *Clark v. State*, 567 So. 2d 1070, 1071 (Fla. 3d DCA 1990); *Stradtman v. State*, 334 So. 2d 100, 101 (Fla. 3d DCA 1976), *approved*, 346 So. 2d 67 (Fla. 1977); *accord Jaggers v. State*, 536 So. 2d 321 (Fla. 2d DCA 1988); *Williams v. State*, 386 So. 2d 25 (Fla. 2d DCA 1980). "Moreover, "[w]henever a witness takes the stand, he ipso facto places his [or her] credibility in issue." *Mendez v. State*, 412 So. 2d 965, 966 (Fla. 2d DCA 1982); *Baxter v. State*, 294 So. 2d 392 (Fla. 4th DCA), *cert. denied*, 303 So. 2d 26 (Fla.1974), *cert. denied*, 420 U.S. 981, 95 S.Ct. 1412, 43 L.Ed.2d 664 (1975); *Clark*, at 1071. *See also Pompa v. State*, 635 So. 2d 114 (Fla. 5th DCA 1994); *Lewis v. State*, 653 So. 2d 1107 (Fla. 3d DCA 1995); *United States v. Abel*, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984).

The trial court improperly precluded defense counsel's line of questioning which (1) would have revealed that the witness's terminology regarding her scratches as "lacerations" may have been structured by civil counsel for heightened effect, and (2) would have revealed to the jury that the victim stood to gain monetarily by appellant's conviction through damages garnered through a civil suit. Both of these matters related to the witness' interest or bias, in short, her credibility, a crucial issue in the

case given that the dispute was whether or not there had been consent. *Carmichael v. State*, 21 Fla. L. Weekly D797 (Fla. 3d DCA April 3, 1996)("refusal, in a criminal prosecution, to allow cross-examination of a witness concerning a pending civil action between that witness and defendant is error"); *Wooten v. State*, 464 So. 2d 640 (Fla. 3d DCA), *review denied*, 475 So. 2d 696 (Fla. 1985).

The preclusion of this inquiry was error. Given who the witness was and that the credibility of this witness would substantially determine the ultimate outcome of the case, the error cannot be found harmless. The burden lies upon the state to show beyond a reasonable doubt that the error could not in any way have contributed to the verdict. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

> The focus is upon the effect on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

Id., at 1139. *State v. Lee*, 531 So. 2d 133 (Fla. 1988), held that the defendant is entitled to a new trial even though properly admitted evidence was sufficient to support the jury verdict where the court could not say beyond a reasonable doubt that the erroneously admitted, or erroneously precluded, evidence did not affect the verdict. If the court cannot say beyond a reasonable doubt that the erroneous admission of evidence did not affect the verdict, the error is by definition harmful.

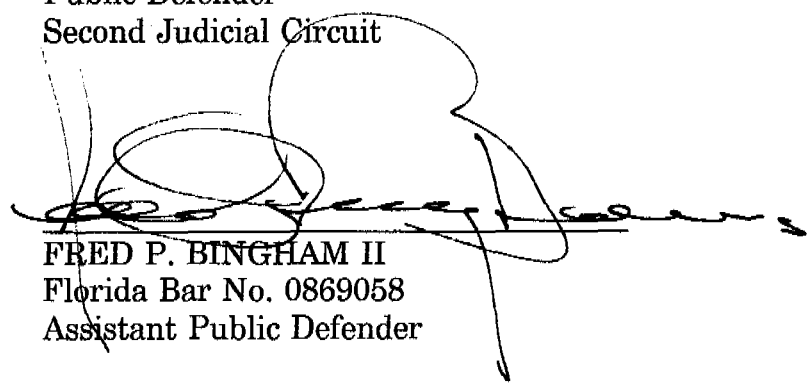
This Court must reverse the conviction and grant a new trial.

CONCLUSION

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

Respectfully submitted,

NANCY A. DANIELS
Public Defender
Second Judicial Circuit



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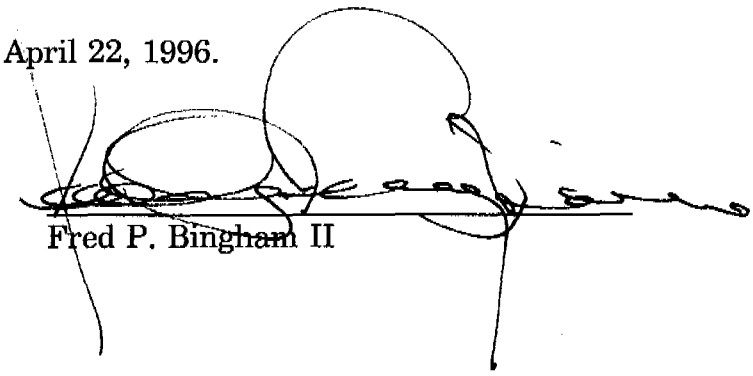
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by delivery to: Patrick Martin, 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