In The Supreme Court of Florida

CASE NO. 87,720

REGINALD DONALD GAINER,

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

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_____/

PRELIMINARY STATEMENT

This case is before the Court on a certified question by the First District Court of Appeal following a decision on petitioner's direct appeal from petitioner's convictions and habitual offender sentences for sale or delivery of a controlled substance and possession of a controlled substance. This appeal was consolidated with the appeals of the sentences imposed upon revocation of probation in four prior cases. Sentencing in all cases occurred in a single proceeding. The four earlier cases were the subject of a prior appeal. *See Gainer v. State*, 590 So. 2d 1001 (Fla. 1st DCA 1991).

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

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

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

"SR. ___" — Supplemental Record on Appeal.

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 First 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?

1. History of Proceedings

For general background, this case involved a trial in the newest case, No. 94-1315, and sentencing as the result of violation of probation in four prior cases, Nos. 88-1029, 90-713, 90-2878 and 90-2916.

(a) Case No. 94-1315

Petitioner was arrested on July 6, 1994, for sale of cocaine, possession of cocaine and possession of a police scanner in a vehicle [R. 65-66].

On August 26, 1994, the public defender filed a certification of conflict of interest and moved for the appointment of separate counsel [R. 111]. *See also* R. 118. The court then appointed Jeffrey Whitton to represent Mr. Gainer as to all pending cases [R. 112, 119-120].

On September 14, 1994, Mr. Gainer was charged by Information as a principal in the sale of a controlled substance (cocaine) and with possession of cocaine for the offenses alleged to have occurred on July 6, 1994 [R. 122].

Following a jury trial, he was convicted of both offenses as charged [R. 125-126].

(b) The Prior History of Case Nos. 88-1029, 90-2916, 90-2878 and 90-713[1]

On July 28, 1989, Mr. Gainer entered a plea of no contest to a charge of sale of cocaine, a second-degree felony, in Case No. 88-1029. He was sentenced to 30 months DOC followed by 12 years of probation. On May 6, 1991, he was found to have violated probation and was sentenced to DOC for 7 years, to be followed by three years probation in the 1988 case following entry of his pleas resulting in adjudications of guilt the three 1990 cases [See R. 89].[2] Mr. Gainer was also sentenced in the same proceedings on the 1990 cases.

Those sentences were appealed, *Gainer v. State*, 590 So. 2d 101 (Fla. 1st DCA 1991). The appeal court found that the scoring of the scoresheet was error due to multiplication of legal constraint points by the number of the new offenses. This Court affirmed, but without prejudice to Gainer moving to withdraw the pleas or to file a 3.850 motion.

(c) The New Pleas and Sentences in Case Nos. 88-1029, 90-

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[1]Identified hereafter as the 1988 case and 1990 cases respectively

[2]The sentencing guidelines scoresheet for May 6, 1991, is found at SR 303. It was used in the simultaneous sentencing in Case No. 87-880, 88-1029, 90-713, 90-1878 and 90-2916, with 90-2878 offenses scored as the primary offenses. This scoresheet was the one addressed on appeal. It scores "legal constraint" at 14 points multiplied by the number of primary and additional offenses pending sentencing as new offenses. It resulted in a recommended range of 5 1/2 - 7 years with a permitted range of 4 1/2 to 9 years [R. 303].

That scoresheet, without the erroneous multiplication of the "legal constraint" points, would have resulted in a recommended range of 3 1/2 to 4 1/2 years, with a permitted range of 2 ½ to 5½ years.

2916, 90-2878 and 90-713 in December 1991

On December 20, 1991, Mr. Gainer was permitted to withdraw his pleas in each of these cases, including the 1988 case. He entered new pleas of nolo contendere. He was adjudicated guilty in each of the four cases and was then sentenced under a corrected sentencing guidelines scoresheet [R. 1]. He was sentenced to 5 1/2 years, followed by 3 years of probation, with credit for 30 months plus 228 days in Case No. 88-1029 after being adjudicated guilty based upon entry of his new plea of nolo contendere [R. 2-6].

In Case No. 90-2916, on a new plea of nolo contendere, Mr. Gainer was adjudicated guilty of the sale of a controlled substance and sentenced to 5 1/2 years followed by 3 years probation [R. 16-20]. On new pleas, Mr. Gainer was also adjudicated guilty and identical concurrent sentences of 5 1/2 years with 3 years probation were simultaneously imposed in Case No. 90-2878 [R. 30-34], and Case 90-713 [R. 47-51]. All sentences imposed were to run concurrent with the sentence in 88-1029 and with each other.

(d) The 1994 Sentencing (or Resentencing) in All Cases

On December 12, 1994, following a jury trial in Case No. 94-1315, the trial court determined that Mr. Gainer was a habitual felony offender based upon judgments of convictions entered in the following cases: Sale or delivery of a controlled substance, Case No. 88-1029, May 6, 1991; Possession of controlled substance and battery on a law enforcement officer, Case No. 87-880, December 20, 1991; Possession of controlled substance with intent to distribute, Case No. 90-713, December 20, 1991; Sale of

controlled substance, Case No. 90-2878, December 20, 1991; and Sale of a controlled substance, Case No. 90-2916, December 20, 1991 [T. 291].

Case Nos. 88-1029, 90-713, 90-2878, and 90-2916 were also pending before the court for sentencing on probation violations due to the convictions on new offenses in Case No. 94-1315. An affidavit of violation of probation had been filed in each of these earlier cases on July 27, 1994 [R. 84]. On December 12, 1994, following Mr. Gainer's convictions of new offenses in Case No. 94-1315, Mr. Gainer was resentenced under the guidelines[3] in the 1988 and 1990 cases upon revocation of probation, to 9 years incarceration, consecutive to the sentence in Case No. 94-1315, but concurrent with each of the sentences as to the older cases [R. 181-185; 26-29; 42-46; 61-64, respectively].[4] The order of revocation of probation recites that revocation was predicated upon Mr. Gainer's convictions in Case No. 94-1315. The order of revocation also recites that Mr. Gainer pled nolo contendere to the allegations of violations of probation in the earlier cases. This order was rendered on December 19, 1994. It is noted as "nunc pro tunc: 12/12/94." [R. 189].

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[3]At this sentencing, the court used a previously scored guidelines sentencing scoresheet which has as its primary offense Case No. 90-2878 [T. 294; R. 14-15]. The scoresheet was originally filed May 6, 1991 [R. 14], but had been corrected as to the point total.

This corrected scoresheet shows 143 points in category 7. This scoresheet, however, recorded an erroneous recommended range of 5 1/2 - 7 years with a permitted range of 4 1/2 - 9 years [R. 14]. One hundred forty-three (143) points should have resulted in a recommended range of 3½ - 4½ years with a permitted range of 2½ - 5½ years, the fourth cell of category seven. Fla. R. Crim. P. 3.988(g).

[4]In 88-1029, he was credited with 5 1/2 years plus 160 days county jail time. In the 90-713, 90-2878 and 90-2916, he was credited with 160 days plus unforfeited DOC gain time.

Mr. Gainer was sentenced as a habitual felony offender to five (5) years on each count in Case No. 94-1315, the counts to run concurrent with each other, and consecutive to the sentences imposed in the 1988 and 1990 cases, with credit for 160 days [T. 298].

On January 4, 1995, Mr. Gainer filed a separate Notice of Appeal in each case [R. 192-196].

2. Statement of the Facts - Case No. 94-1315

In a letter Judge Sirmons dated on or about October 13, 1994, petitioner advised the court that he was afraid of Mr. Whitton. He stated that Whitton had refused to investigate his witnesses and had refused to see him while he was being held in custody pending trial [R. 135-136]. Mr. Whitton then moved to withdraw as counsel [R. 138-139]. At a hearing on the matter on October 20th, Whitton indicated that while he would continue to represent Mr. Gainer if the court required him to, he "would just as soon not." [T. 220]. Mr. Gainer indicated that he did not want to represent himself and that he needed an attorney [T. 223]. Gainer stated that he did not want counsel whom he could not contact or talk to regarding his witnesses [T. 224; 230]. Gainer stated he needed to give his attorney his witnesses [T. 225]. Gainer stated that he had called Whitton several times, and had asked his mother to call Whitton, but he had not given Whitton the names of any witnesses because he had not been able to get together with Whitton and to talk to Whitton about witnesses [T. 227; 230]. Whitton stated that Gainer had been given every piece of paper concerning the investigation as the result of discovery through the "rocket docket." At pretrial,

Whitton spoke to Gainer and Gainer did not identify any witnesses to investigate [T. 225].

The court told Gainer that if he had witnesses to provide to counsel, he could communicate that to Whitton by mail, but found no basis to relieve Whitton as counsel [T. 230-231; 232].

On November 8, 1994, following jury selection, Mr. Whitton again advised the court that Gainer had declined to come into the courtroom from the annex, but Gainer was brought by force and had been persuaded to come across from the jail to the courthouse, but Gainer refused to dress out and was not dressed for court in civilian attire [T. 4].

Mr. Gainer stated that he had not received the depositions (transcripts) in this case, and that he was not getting adequate representation. He stated he needed a disclosure of the discovery depositions before going into trial; he wanted to read them. He stated he did not know what was going on, that he had not seen the transcripts, and still had not received the FDLE lab results [T. 12-13; 22].[5] Whitton stated that Gainer had been furnished the discovery, he had been given a memorandum from FDLE identifying the reports and he had given Gainer a written synopsis of the witnesses' testimony in depositions [T. 13-14]. Whitton had not had the depositions transcribed because of the cost, as that was policy [T. 21]. Gainer responded he wanted the evidence disclosed to him and had asked for the deposition transcripts [T.

[5]Mr. Gainer had also complained about not receiving the FDLE lab results at the previous hearing. Counsel had then represented that he had not yet received them.

15; 21]. The court concluded that no ineffective assistance claim had been shown [T. 18]. The court stated it was the practice of that circuit not to transcribe depositions and that it was not necessary to do so [T. 22]. Gainer then agreed to dress out in civilian clothes for the trial, but was still protesting the trial because information had not been disclosed to him by counsel [T. 25].

Challenging of the Jury

The exercise of challenges to jurors was done at an unreported side bar [T. 276]. That proceeding has been reconstructed. During selection of the jury, and upon conclusion of voir dire of the panel, defense counsel conferred with Mr. Gainer concerning the exercise of peremptory challenges. Mr. Gainer was physically present in the courtroom and located at counsel table. Peremptory challenges were exercised during a "side bar" conference at which Mr. Gainer was not physically present. He was, throughout that time, in the courtroom, seated at the counsel table. Following the exercise of peremptory challenges, counsel returned to the counsel table and defense counsel stated that the jury was acceptable. The defendant made no comment. The defendant did not personally, or through counsel, object to this procedure. The trial court did not specifically address this procedure with Mr. Gainer nor was Mr. Gainer asked whether he desired to be present at the side bar or whether he waived his presence at the side bar [SR. 304-305, Settled and Approved Statement of Proceedings; SR. 306, Order Settling and Approving Statement].

The Evidence Adduced During Trial in Case No. 94-1315

Douglas Pierce, a Panama City police officer, was working undercover on July

6th making purchases of narcotics [T. 35]]. He had a truck which had been wired with a transmitter so other members of the team could hear what was going on. They had currency with the serial numbers recorded [T. 36].

Pierce contacted a female at the Midnight Lounge who came up to his vehicle. He asked her for a "twenty," a $20 rock of crack cocaine [T. 37]. She appeared high at the time [T. 65]. She said, "Wait a minute," and went over toward the 6-10 Jiffy store on the corner, talked to a guy and came back [T. 37-38]. There was no exchange made between the woman and the man that Pierce saw [T. 38]. She said she could not get any drugs and they would have to go to the Safari Lounge. She got into Pierce's truck. [T. 38].

As they proceeded, Pierce saw an older model Cadillac coming. The woman waved and said to stop the truck. Pierce stopped. The woman walked over to the Cadillac, which had stopped alongside the truck [T. 39-40]. She went to the driver's side of the Cadillac, talked to the driver, then came around and got into the passenger's side of the Cadillac [T. 63]. The door of the Cadillac was pulled to, but not closed, with the window open [T. 63]. Pierce had now given the woman a recorded $20 bill [T. 40].

Pierce could not hear the conversation, but he said he saw the driver hold out crack cocaine in his hand. The woman picked out one and gave him the $20 bill [T. 40-41]. Pierce said he could see what was in the man's hand, 12 or 13 rocks [T. 41]. The woman then got out of the car, returned to the side of Pierce's vehicle, and handed him a rock through the driver's side window. The woman then walked away [T. 41]. The driver of the Cadillac started driving north on McArthur Avenue [T. 42].

Pierce gave a description of the car, the tag number and direction of travel over his wire, and began following the Cadillac. He saw Sgt. Pitts and the others in an unmarked car pull in behind the Cadillac and stopped the vehicle [T. 43]. Pierce circled the block. When he got back to the location, the other officers had started a search of the vehicle [T. 44]. Recovered was the $20 bill. They also found an RF detector that picks up transmitters. Mr. Gainer was arrested at the scene [T. 45]. Only one piece of crack was found in the seat of the car [T. 46]. The driver had had no contact with any other persons prior to being stopped [T. 43].

At the station, Pierce took swabs of Gainer's hands and mouth. Pierce testified he does not always get positive results from the swabs [T. 47]. Pierce identified Exhibit 1 as the rock he purchased from Gainer [T. 50]. Exhibit 2 was the piece of rock cocaine Officer Clarkson turned over to him, which Clarkson found in the seat of the car [T. 51]. Pierce identified swabs used to swab Gainer's hands and mouth (Exhibits 3 and 4 respectively). [T. 51-51]????. Exhibit 5 was identified as a scanner of police frequencies, including Panama City Beach [T. 53]. Exhibit 6 was identified as an RF detector which is used to pick up a body wire [T. 54]. Exhibit 7 was a copy of a $20 bill recovered from Gainer's vehicle [T. 56]. The original $20 bill, Pierce said, had been put back "in service." [T. 56]. Pierce identified Mr. Gainer in court as the driver of the vehicle [T. 61].

Pierce did not search Porter at any time before the incident [T. 62]. Pierce said he ultimately learned that the woman was Melanie Porter, and she was also arrested and charged [T. 61]. After Gainer was arrested, Pierce located Porter, took her down

to the station and she agreed to cooperate with him. Pierce released her and she failed to cooperate; he then re-arrested her.

Randy Squire, a narcotics investigator, stated he found a scanner under the front seat on the driver's side [. 67]. It was off [T. 69]. Robert Clarkson, a police officer, found a small crack rock in the foam of the driver's seat where the seat cover had split [T. 71, 72]. The rock, which since had gotten crumbled, was originally about the size of the tip of a roller-ball pen [T. 73]. At the station Clarkson searched Mr. Gainer and found the RF detector, which the officer thought at first was a pager [T. 71]. Clarkson did a field test on the rock recovered from the car seat and got a positive reaction [T. 72]. Sgt. Pitts recovered a $20 bill from the driver's side floorboard of the Cadillac [T. 76].

Donald Walker, an analyst from FDLE, was qualified as an expert in the analysis of narcotics [T. 79-80]. He determined that Exhibits 1 and 2 contained cocaine [T. 80-81]. He also tested Exhibits 3 and 4 (swabs) [T. 80]. Exhibit 3 contained no narcotics. Exhibit 4 (mouth swab) contained cocaine [T. 81].

The defense moved for a directed verdict of acquittal as to Count II [T. 85], arguing that no evidence established that the car was Mr. Gainer's or someone else's car or how long Gainer had had the car; also, that the rock was minuscule and found buried in and surrounded by the foam rubber of the seat and the evidence did not show knowledge of its presence although control of the car had been shown [T. 86-87].

As to Count I, defense counsel argued that the evidence showed that Porter had not been searched and the officer did not know whether she had the cocaine on her at

the time [T. 88]. The court reserved ruling as to Count II [T. 90].

Counsel filed a request for an additional instruction on constructive possession [T. 92]. The court denied the requested instruction because the court considered the standard instructions were sufficient [T. 94]. Counsel also requested a lesser of simple possession as to Count I, which was given [T. 95; 116-117].

After fourteen minutes of deliberation, the jury found Mr. Gainer guilty of both offenses as charged [T. 126].

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 committed reversible error when it failed to conduct a full and adequate *Nelson* inquiry. After concluding that counsel had not rendered ineffective assistance, the court, as it is required to do, failed to advise petitioner that no substitute counsel would be appointed if he moved to have counsel discharged, and failed to advise petitioner that he had the right to represent himself. Due to his deep dissatisfaction with counsel, petitioner might have opted to discharge counsel and represent himself had he been properly advised.

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.[6] 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 exercise of challenges to jurors was done at an unreported side bar [T. 276].

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[6]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.

That proceeding has been reconstructed. During selection of the jury, and upon conclusion of voir dire of the panel, defense counsel conferred with Mr. Gainer concerning the exercise of peremptory challenges. Mr. Gainer was physically present in the courtroom and located at counsel table. Peremptory challenges were exercised during a "side bar" conference at which Mr. Gainer was not physically present. He was, throughout that time, in the courtroom, seated at the counsel table. Following the exercise of peremptory challenges, counsel returned to the counsel table and defense counsel stated that the jury was acceptable. The defendant made no comment. The defendant did not personally, or through counsel, object to this procedure. The trial court did not specifically address this procedure with Mr. Gainer nor was Mr. Gainer asked whether he desired to be present at the side bar or whether he waived his presence at the side bar. [SR. 304-305, Settled and Approved Statement of Proceedings; SR. 306, Order Settling and Approving Statement].

- 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 directly upon the 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 in *Coney* 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.

Gainer's case made no inquiry or certification whatsoever. None of the requirements established by the Court in *Coney*, set forth at p. 15, 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 portions 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 physically present at bench conferences where peremptory challenges are exercised is also a prospective rule. This is not so, and that notion is refuted by this Court's reasoning and authorities unpinning that holding in *Coney*.

This Court said Fla. R. Crim. P. 3.180(a) means what it says, and it 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 physically 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 on the record waivers of the right to be present and ratification of the actions of counsel.

(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 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.[7] The case was then decided adversely to Coney on the sole basis of

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[7] Coney was not present at the sidebar where the initial challenges were made, and the record fails to show that he

(continued...)

harmless error because only challenges for cause were made in Coney's absence. *Ibid.* Petitioner is asking this Court to apply the same law in his case that was applied *Coney*'s case. Equal protection under the law requires no less.

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

Whether or not *Coney* is a clarification of existing law or is 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 the Florida Rules 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. Gainer was present in the courtroom, as was Coney, he was not physically present at the sidebar. Inferentially, Gainer could no more hear what was happening at the bench than the jury could, and the jury was also present in the courtroom. Thus, Mr. Gainer was as effectively excluded from this critical stage of the trial

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[7](...continued)

> 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).

as was the jury. The exclusion of the jury was proper, of course; the absence of the accused was not.

(a) Florida Rule of Criminal Procedure 3.180(a)(4)

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

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

(b) Prior Case Law

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

> We recognized in *Francis v. State*, 413 So. 2d 1175, 1177 (Fla. 1982), that the defendant has the constitutional right to be present at the stages of his trial where fundamental fairness **might be** thwarted by his absence. *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed.674 (1934). *See also, Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).
>
> Florida Rule of Criminal Procedure 3.180(a)(4) recognizes the challenging of jurors as one of the essential stages of a criminal trial where a defendant's presence is mandated.
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> * * *
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> A defendant's waiver of the right to be pre-sent at essential stages of trial must be knowing, intelligent and voluntary. *Amazon v. State*, 487 So. 2d 8 (Fla.), *cert. denied*, 479 U.S. 914, 107 S. Ct. 314, 93 L. Ed. 2d 288 (1986); *Peede v. State*, 474 So. 2d 808 (Fla. 1985), *cert. denied*, 477 U.S. 909, 106 S.Ct. 3286, 91 L.Ed.2d 575 (1986).

Id.

Nothing in the record demonstrates that Petitioner knew that he had the right to be physically so that he could 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).[8]

Numerous decisions of both this Court and the U.S. Supreme Court have also

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[8]In contrast, Chandler, upon proper inquiry, was found to have knowingly, intelligently and voluntarily waived his presence during the challenging.

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").[9]

(c) Plain Language in Coney Indicates That it Is Not New Law

In *Coney*, this Court clearly relied on the plain, unequivocal language of Rule 3.180 in reaching its result.

> 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). Thus, if the rule already existed, it is NOT, and cannot be, a "new rule."

Where, as here, an appellate court's decision is based on the plain language of a rule or statute, the court does not announce a new rule. *See Murray v. State*, 803 P.2d 225, 227 (Nev. 1990). Furthermore, where, as here, a judicial decision is "merely 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).

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[9]For reasons explained *infra*, this error constitutes a fundamental structural defect in the trial process.

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*. Thus, *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 an involuntary absence from sidebar for jury selection as much as it precludes an accused from 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 involuntary 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 be accomplished only by a personal, affirmative, on-the-record waiver. *See e.g.*, *Torres-Arboledo v. State*, 524 So. 2d 403, 410-411 (Fla. 1982); *Armstrong v. State*, 579 So. 2d 734, 735 n.1 (Fla. 1991).[10]

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[10] Additionally, this Court has "strongly recommend[ed]that the trial judge personally inquire of the defendant when a waiver [of the right to be present] is required." *Ferry v. State*, 507 So.2d 1373, 1375-76 (Fla. 1987). *See also*, *Amazon v. State*, 487 So.2d 8, 11 n.1 (Fla. 1986)("experience teaches that it is the better procedure (continued...)

Courts in other jurisdictions also require 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 principle 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) <u>What If *Coney* is Considered "New Law"</u>

If it is assumed *arguendo* that *Coney* announced a "new rule," recent state and federal constitutional cases require that Petitioner be permitted to benefit from the Court's holding in *Coney*. In *Griffith v. Kentucky*, 479 U.S. 314 (1987), the Supreme Court abandoned its former retroactivity doctrine[11] and held that all new rules of criminal procedure rooted in the federal Constitution must be applied to all applicable criminal cases pending at trial or on direct appeal at the time that the new rule was

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[10](...continued)
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").

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

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

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

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

Other state appellate courts have also held that when a state's "new rule" is not *solely* based on state law, or if it *implicates* or is interwoven with the federal Constitution, 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. Of course, Rule 3.180 itself is designed to implement and protect rights

guaranteed by the constitution. 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). Earlier, 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 [solely] 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 because his case was not final and was on appeal when *Coney* was decided.

Even if *Coney* were based solely on state law (which it clearly is not), the Equal Protection and Due Process Clauses of the Florida Constitution, Art. I, Section 2 and 9, would require that this Court to apply the decision retroactively to Petitioner's appeal. *Griffith v. Kentucky*, 479 U.S. 314 (1987). This Court has adopted and applied the reasoning in *Griffith* to new state-law based rules as well as new federal-law based rules. In *Smith v. State*, 598 So. 2d 1063 (Fla. 1992), this Court agreed with "the principles of fairness and equal treatment underlying *Griffith*," and adopted the same bright line rule in *Griffith*.[12]

Then, in several subsequent cases, those principles of fairness and equal treatment seemed to be forgotten, culminating in the decision in *Wuornos v. State*, 644 So. 2d 1000 (Fla. 1994), where this Court refused to apply a "new [state] law" announced in *Castro v. State*, 597 So. 2d 259 (1992), to a pipeline case. *See Wuornos*, at 1007-1008.

However, later, in *State v. Brown*, 655 So. 2d 82 (Fla. 1995), this Court appears to have re-embraced the principles of fairness and equal treatment of *Griffith*, holding

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

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 to 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 for reversal), and relief should therefore be granted by this Court under *Coney*. Failure to do so will violate Petitioner's rights under the U.S. and Florida Constitutions.

(3) Relief Is Also 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 says 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. *Turner* and *Francis* mandate reversal independent of the decision in *Coney*.[13]

It is not known, and it is now impossible to determine, what input petitioner might have provided to counsel regarding the exercise of his peremptory challenges at the sidebar as the process proceeded.[14] 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*, e.g., *Chandler v. State*, 534 So. 2d 701, 704 (Fla. 1988). The defendant's presence could also be waived by counsel — provided that the defendant subsequently ratified or acquiesced in counsel's waiver on the record — if said waiver were made knowingly, voluntarily, and intelligently. *State v. Melendez*, 244 So. 2d 137,

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[13]This issue was specifically raised in the district court, but the decision of the district court did not address this basis for reversal, but focus solely upon whether *Coney* applied to pipeline cases.

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

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.[15] *Francis*; *Turner*; *Chandler*.

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

[15]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. 19.

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 to defense counsel as to the accused's wishes.

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 panel. This depends upon which individuals have been struck and upon which party has exercised the strikes. It is a highly fluid situation which requires constant evaluation and reevaluation about who should or should not be struck as the dynamic situation unfolds. When, as here, the accused is involuntarily 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 to satisfy the requirement that the accused be present. If the accused were present and contemporaneously aware of how the situation was developing, he or she 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 or she 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 involuntarily 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.

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,"[16] that Mr. Gainers'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 involuntary 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 Gainer 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 need for 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 conferred 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*,

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

665 F.2d 607 (5th Cir. 1982)(right to counsel in force until waived, right to self-representation does not attach until asserted). Rather, if the accused is not present when mandated, particularly when required under the rule, a waiver of the right — one which is voluntarily, freely and intelligently given after a proper advisement of the right and inquiry — must be spread upon the record. In the absence of such an affirmative 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 to preserve 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. 35.

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 or acquiescence, 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.[17] 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

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[17]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.

reliably serve its function as a vehicle for determination of guilt or innocence," and the defendant's conviction must be reversed. *Id.* On the other hand, trial error is error "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless." *Id.* at 307-308, 111 S.Ct. at 1263-64. The accuse's absence from the challenging of the jury through peremptory challenges is a structural error. *See* e.g., *Hays v. Arave*, 977 F.2d 475 (9th Cir. 1992)(*in absentia* sentencing is structural error requiring automatic reversal); *Rice v. Wood*, 44 F.3d 1396 (9th Cir. 1995)(defendant's absence at return of verdict fundamental and a structural error; but where defendant has no role to play, absence is not structural error). Being a structural defect, harmless error does not apply. *Fulminante.*

H. Analysis of Prejudice

While it is contended that the absence of the accused constitutes a structural error not subject to harmless error analysis under *Fulminante*, clearly this Court has previously 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 or could not have "influenced the process" of that critical stage of the trial. *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)); *Hegler v. Borg*, 50 F.3d 1472, 1476 (9th Cir. 1995). As already noted, 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 accused during the peremptory challenging of the jury:

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

Francis, 1176-1179.

There was error in this case. 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 or could not have "influenced the process" of that critical stage of the trial. If this Court is unable to assess the extent of prejudice sustained by Mr. Gainer'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 FAILED TO CONDUCT A FULL AND ADEQUATE *NELSON* INQUIRY

In a letter Judge Sirmons dated on or about October 13, 1994, petitioner advised the court that he was afraid of Mr. Whitton, that Whitton had refused to investigate his witnesses and had refused to see him while he was being held in custody pending trial [R. 135-136].

Mr. Whitton then moved to withdraw as counsel [R. 138-139]. At a hearing on the matter on October 20th, Whitton indicated that while he would continue to represent Mr. Gainer if the court required him to, he "would just as soon not." [T. 220].

Mr. Gainer indicated that he did not want to represent himself and that he needed an attorney [T. 223]. Gainer stated that he did not want counsel whom he could not contact or talk to regarding his witnesses [T. 224; 230]. Gainer stated he needed to give his attorney his witnesses [T. 225]. Gainer stated that he had called Whitton several times, and had asked his mother to call Whitton, but he had not given Whitton the names of any witnesses because he had not been able to get together with Whitton and to talk to Whitton about witnesses [T. 227; 230].

Whitton stated that Gainer had been given every piece of paper concerning the investigation as the result of discovery through the "rocket docket." At pretrial, Whitton spoke to Gainer and Gainer did not identify any witnesses to investigate [T. 225].

The court told Gainer that if he had witnesses to provide to counsel, he could communicate that to Whitton by mail, but found no basis to relieve Whitton as counsel [T. 230-231; 232].

By November 8, 1994, Mr. Gainer's dissatisfaction with counsel had deepened

to the extent that following jury selection that Gainer had declined to come to the courtroom from the annex. Gainer was brought by force and had been persuaded to come across from the jail to the courthouse. But, Gainer still refused to dress out and was not dressed for court in civilian attire [T. 4].

Mr. Gainer stated that he had not received the pre-trial depositions (transcripts) in his case, and *that he was not getting adequate representation.* He stated he needed a disclosure of the discovery depositions before going into trial; he wanted to read them. He stated he did not know what was going on in his case, that he had not seen the transcripts, and still had not received the FDLE lab results [T. 12-13; 22].[18] Whitton stated that Gainer had been furnished the discovery, he had been given a memorandum from FDLE identifying the reports and he had given Gainer a written synopsis of the witnesses' testimony in depositions [T. 13-14]. Whitton had not had the depositions transcribed because of the cost, and because as that was policy [T. 21].

Gainer responded he wanted the evidence disclosed to him and had asked for deposition transcripts [T. 15; 21].

The court concluded that no ineffective assistance claim had been shown [T. 18]. The court stated it was the practice of that circuit not to transcribe depositions and that it was not necessary to do so [T. 22].

Gainer then agreed to dress out in civilian clothes for the trial, but was still protesting the trial because information had not been disclosed to him by counsel [T.

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[18]Mr. Gainer had also complained about not receiving the FDLE lab results at the previous hearing. Counsel had then represented that he had not yet received them.

25].

> Under *Nelson*,[19] when the issue of competence of counsel is raised, which in this case involved a claim of bias, the trial judge is required to ask the defendant and the appointed counsel about the allegations to determine if there is reasonable cause to believe that court-appointed counsel is providing ineffective assistance. If reasonable cause appears, the court must appoint a substitute attorney; if no reasonable cause appears, the court shall then advise the defendant that the state is not required to appoint a substitute lawyer. *Hardwick v. State*, 521 So. 2d 1071, 1074-75 (Fla.), *cert. denied*, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988); *Parker v. State*, 423 So. 2d 553, 555 (Fla. 1st DCA 1982). If a defendant requests leave to discharge his or her court-appointed counsel, it is presumed that the defendant is exercising the right to self-representation; however, "the courts have long required that a request for self-representation be stated unequivocally." *Hardwick*, 521 So. 2d at 1074 (emphasis added).

Davenport v. State, 596 So. 2d 92, 93 (Fla. 1st DCA 1992).

Addressing the same subject, this Court has said:

> We reverse based on *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *Johnson v. State*, 560 So. 2d 1239 (Fla. 1st DCA 1990); and *Jackson v. State*, 572 So. 2d 1000 (Fla. 1st DCA 1990). In *Johnson*, this court held:
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> > [W]hen a defendant lets it be known that he wishes to discharge his court-appointed counsel, the trial court should inquire of the defendant as to his reason for requesting discharge. If incompetency of counsel is given as a reason, the trial court should then make further inquiry to determine whether there is reasonable cause to support the allegation. If reasonable cause appears, the court should appoint substitute counsel; if no reasonable

[19]*Nelson v. State*, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973)

> cause appears, the court should then advise the defendant that if he insists on discharging his original counsel, the State may not be required to appoint a substitute.

Id. at 1240 (citing *Nelson v. State*, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973).

* * *

> ***Even if the trial court had conducted an adequate inquiry before finding counsel to be competent, the trial court was still obligated to advise appellant that his attorney could be discharged but the state would not be required to appoint substitute counsel and that appellant had the right to represent himself.*** *Jackson v. State*, 572 So. 2d 1000 (Fla. 1st DCA 1990); *Taylor v. State*, 557 So. 2d 138, 143-44 (Fla. 1st DCA 1990). In *Faretta*, the United States Supreme Court held that by forcing defendants to accept against their will state-appointed public defenders, trial courts deprive defendants of their constitutional right to conduct their own defense. ***The trial court failed to advise appellant that his counsel could be discharged without substitute counsel and to advise him of his right to self representation.*** We are unable to view this error as harmless, for the state argues only that the court did not err; it does not argue that the error was harmless and thus has not carried its burden. *See Taylor*, 557 So. 2d at 144. Accordingly, we reverse appellant's conviction.

Perkins v. State, 585 So. 2d 390, 391-391 (Fla. 1st DCA 1991)(***bold italics*** added).

In *Hardwick v. State*, the Court stated:

> [W]e approve the procedure adopted by the Fourth District:
>
> > If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed

> counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. ***If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute.***

Nelson v. State, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973).

Hardwick v. State, 521 So. 2d 1071, 1074-1075 (Fla. 1988).

> When a defendant raises the incompetency of counsel, the court must conduct an inquiry of the defendant and his appointed counsel to determine whether the counsel has rendered effective assistance. *Hardwick [v. State]*, 521 So. 2d [1071] at 1074 [(Fla. 1988)]. Of course, the court's inquiry can be only as specific as the defendant's complaints; however, the court must attempt to clarify the defendant's complaints. *Lowe v. State*, 650 So. 2d 969 (Fla. 1994).

See Mason v. State, 20 Fla. L. Weekly D1119 (Fla. 2d DCA May 5, 1995).

The trial court heard Mr. Gainer's complaints about his attorney. His complaints raised questions of the effectiveness of the representation he was receiving. The court heard responses for appointed counsel. Without further inquiry, the court found that counsel was not rendering ineffective assistance. Having found no ineffective assistance, the court was nonetheless required to advise Mr. Gainer that his counsel could be discharged without substitute counsel and to advise him of his right to self representation. Even if the trial court conducted an adequate inquiry before finding counsel to be competent, the trial court was still obligated to advise petitioner

that his attorney could be discharged but the state would not be required to appoint substitute counsel and that petitioner had the right to represent himself. *Jackson v. State*, 572 So. 2d 1000 (Fla. 1st DCA 1990); *Taylor v. State*, 557 So. 2d 138, 143-44 (Fla. 1st DCA 1990). The court never advised Mr. Gainer of those matters, as the cases require. That was reversible error.

Had the court advised Mr. Gainer that no substitute counsel would be appointed, Mr. Gainer might have elected to have counsel discharged and to represent himself. He had that right. *Faretta*. His dissatisfaction with counsel, the absence of meaningful communications with counsel, and Gainer's lack of knowledge of his own case and what had been done in preparing the case were so deep at the very commencement of trial that he may well have elected to represent himself had the court advised him of the right. He clearly had no trust in his attorney or the attorney's representation. Gainer stated that the representation was not adequate. The court was required to make an inquiry. "Of course, the court's inquiry can be only as specific as the defendant's complaints; however, the court must attempt to clarify the defendant's complaints." *Lowe v. State*, 650 So. 2d 969 (Fla. 1994); *Mason v. State*, 20 Fla. L. Weekly D1119 (Fla. 2d DCA May 5, 1995). The court made no inquiry beyond the specific matter of the deposition transcripts that Mr. Gainer had mentioned.

There was no inquiry into, and nothing was presented by counsel, that counsel had ever discussed with Gainer what defense could be put forth in his case. They quite evidently had never discussed the depositions and the state's witnesses face to face;

counsel had only given Gainer a written synopsis of their depositions. The court made no inquiries into whether counsel had discussed the case and its preparation with him. The court made no further inquiries into whether counsel had discussed with him any witnesses he wanted (which was his earlier complaint) or whether counsel had ever talked to any of the witnesses Gainer wanted. The court only heard what counsel said he had done regarding certain items of discovery without any inquiry into what counsel did not do or what counsel should have done before the court determined that counsel's representation was not ineffective.

Given the continued assertions by Gainer that the representation was not effective and that he was still protesting going forward with the trial represented by this attorney, the scope of the court's inquiry may well have been inadequate to insure that all the reasons for Gainer's complaints of inadequate representation had been considered.

For the foregoing reasons, this court must reverse and grant petitioner a new trial.

CONCLUSION

Petitioner, REGINALD DONALD GAINER, based on all of the foregoing, respectfully urges the Court to 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,

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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