IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA, :

Petitioner/Cross Respondent, :

v. : CASE NOS. 87,788 & 87,789

MAURICE HORN, :

Respondent/Cross Petitioner. :

_____/

# INITIAL BRIEF OF RESPONDENT/CROSS PETITIONER

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CROSS PETITIONER

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IN THE SUPREME COURT OF FLORIDA,

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| MAURICE M. HORN, Petitioner, | ) | |
| v. | ) | CASE NO. 87,789 |
| STATE OF FLORIDA, Respondent. | ) | |

INITIAL BRIEF OF PETITIONER

PRELIMINARY STATEMENT

This case is before the Court on a certified question of great public importance:

> 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 ISSUANCE OF THE OPINION?

Horn v. State, 21 Fla. L.Weekly D867 (1st DCA April 12, 1996). This issue was first certified by the district court in Lett v. State, 21 Fla. L. Weekly D580 (1st DCA Mar. 5, 1996), rev. pending, Fla.Sup.Ct. No. 87,541. The case of Mr. Horn's codefendant is also before this Court on discretionary review. Lee v. State, Fla. Sup. Ct. No. 87,715.

In this brief, citations to documents in the record proper as well as the transcript of the sentencing hearing appear as

(R[page number]). Citations to the trial transcript are designated (T[page number]). References to the supplemental record appear as (S[page number]).

## STATEMENT OF THE CASE

The state charged Horn and codefendants Demetrius Holden and Brian David Lee with second degree murder, three counts of attempted second degree murder and shooting at an occupied vehicle. (R33-36)

Horn went to trial before Circuit Judge Jere Tolton. (T1) Counsel for Horn exercised peremptory challenges during a bench conference while Horn remained at counsel table. (S3) On the record, Horn did not waive his presence during exercise of peremptory challenges or ratify the challenges made by his counsel. (S15-16) At one point during the exercise of peremptory challenges, the court granted the request of Horn's counsel for a "skull session." (T141)

The trial proceeded, and reached closing arguments. During his initial closing argument, the prosecutor repeatedly told the jury, "Don't be robbed of your common sense" by the arguments of the defense lawyers. (T1192, 1193, 1195, 1212, 1219, 1244) He referred to the arguments of defense counsel, primarily counsel for Lee, as attempts to "confuse," (T1188), "innuendoes," (T1193, 1202, 1237, 1244, 1248), and "hogwash." (T1202) During his rebuttal, the prosecutor responded to the prediction by Lee's attorney that state witness Freddy Wayne McLaughlin would receive a deal on his pending first degree murder charge. (T1295, 1303) He said defense counsel is "trying to poison your mind." (T1306)

The prosecutor then discussed defense assertions concerning evidence that other, uncharged persons were present with guns during the killing. (T1304)

> These people weren't even up there and there are names everywhere. They're still doing the name game. The only names you have to worry about are the names of these folks that are on trial here. That's the one you're going to have to deal with what they did as either comparative, if you think anybody did anything else, but mainly what they did. What did they do? They don't want to talk about what they did or what they said in their statements. No.
>
> You will have the opportunity to hear that over and again. It's hard to argue lack of evidence, although again they're trying, even by bringing evidence that's not in the trial. It's real hard, the things that aren't even true, to poison your mind. That's all I can call that.

(T1305-1306) Lee's counsel interrupted to object and move for a mistrial or curative instruction, on grounds that the prosecutor had accused the defense of fabricating evidence and lying. (T1306) Counsel for Horn joined in the motion. (T1308) The prosecutor responded that his comments were invited by the insupportable assertion that the state and McLaughlin had made a deal. (T1306-1307) Counsel responded that the prosecutor's accusations of lying went beyond the subject of McLaughlin and that they belittled the defense. (T1309) The court denied the motion for mistrial and the request of both counsel for Lee and the state for a curative instruction, and suggested that the prosecutor apologize. (T1309-1310) The prosecutor resumed his

argument:

> Ladies and gentlemen, I just want to sincerely apologize to you because in responding to what Mr. Harrison said, I've talked about some things that are not in evidence in this case. But I felt it necessary to cover that because he covered it, on both of those issues. And I think the Judge will instruct you of this, you're not to consider things that haven't been said in this courtroom and haven't come from the witness stand.

(1310)

On the counts alleging second degree murder and attempted second degree murder, the court instructed the jury on the lesser included offenses of third degree murder and attempted third degree murder, based on the underlying felonies of aggravated assault, aggravated battery and shooting at an occupied vehicle. (T1374-1375)

The jury found both Lee and Horn guilty of the lesser included offenses of third degree murder and attempted third degree murder in Counts I-III, not guilty in Count IV, and guilty as charged of shooting at an occupied vehicle in Count V. (T1420-1423, R150-155) Holden, whose counsel sang a portion of his closing argument, (T1333) was acquitted on all counts. (T1423)

Counsel for Lee and Horn moved for a new trial, arguing inter alia that the prosecutorial misconduct in closing argument deprived the defendants of an impartial jury. (T156, 359-363) The judge stated that he did not have to determine whether the

comments constituted misconduct, as they were harmless, particularly in light of the prosecutor's apology. (T367) The motion was denied. (T367, R296) Counsel for both defendants objected to enhancement of the felony murder and attempted felony murder counts on grounds that the use of a deadly weapon was essential to each of the underlying felonies. (R158-175, T376-382) The prosecutor noted that the defense had not objected to instructions on the underlying felonies, at least one of which, aggravated battery, did not require proof of use of a deadly weapon. (T385-389, R176-182) The court ruled the sentence enhancements proper, adjudicated Lee and Horn guilty of the offenses, and imposed a guideline sentence of 17 years imprisonment on both defendants for the felony murder, concurrent to shorter sentences for the other offenses. (T410-413, R307-323)

On relinquishment of jurisdiction, the parties determined that Horn remained at counsel table while the parties exercised peremptory challenges at the bench, and that he did not expressly waive his presence at the bench or expressly ratify the choices made by counsel in selecting the jury. (S3-4, 15-16) Pinkerton stated that generally, he discusses the composition of the jury with his clients during the exercise of peremptory challenges. (S5-8) He could not recall any specific discussions with Horn, but said he felt certain he tried to enlist Horn's participation. (S8) Pinkerton stated:

> I don't have any recollection whether Mr. Horn at any point in time had some reservation or question about keeping or striking a particular juror. All I can tell you is the process was discussed. I feel certain that we probably did discuss individual jurors and that he had no objection to the jury that was ultimately selected.

(S21) He also stated that, as a matter of strategy, he and counsel for the codefendants exercised challenges as a group, and that all seven exercised by the defense team were charged to codefendant Brian David Lee. (S5, 16) Counsel stated that he did not explain that all peremptory challenges exercised were attributed to Lee. (S16-17)

During the hearing on relinquishment, the prosecutor and court stated that the defense lawyers returned to counsel table several times and appeared to discuss the exercise of peremptory challenges. (T13, 18) The court stated that it was obvious that the defendants were satisfied with the jury impaneled. (S22)

Jurisdiction returned to the district court, which reversed the convictions of attempted felony murder and deleted the firearm enhancement for the count of third-degree felony murder. The court rejected Horn's argument that he was entitled to a new trial based on his absence from the bench during exercise of peremptory challenges, but certified a question of great public importance on whether Coney v. State, 653 So. 2d 1009, 1013 (Fla. 1995), applies to "pipeline" cases. The Court certified

several more questions on the remedy when a defendant is convicted of the nonexistent crime of attempted felony murder. The court summarily rejected Horn's claim that prosecutorial misconduct in closing argument compelled a new trial. Horn v. State, 21 Fla. L. Weekly D867 (1st DCA April 12, 1996).

## STATEMENT OF THE FACTS

This case arose from a shooting that occurred on Martin Luther King Avenue in Crestview at approximately midnight on Friday night, December 10, 1993. The scene was a crowded area surrounding a bar named The Cozy Corner, known as Rachel's. (T549) Curtis Durm, a passenger in a truck damaged in the shooting, was killed by a bullet wound to the brain. (T276, 588) The fatal injury was a single entry wound at the bridge of the nose, with no exit wound. (T588, 598) The medical examiner testified that the wound is consistent with a bullet that was flattened after contact with another object. (T591-603) A bystander, Tyshena Durm, was wounded by a bullet in the abdomen (T267-268, 294-296)

One to two weeks before the shooting, Freddy Wayne McLaughlin was involved in a fight with one of the defendants, Brian David Lee. (T904-905) McLaughlin struck Lee on the head with a weapon resembling a police nightstick. (T904) Someone led Lee, who was bleeding, away from the scene. (T500) Olivia LaFaye Bryant said that the next day, Lee said he should have shot Freddy Wayne, and that it wasn't over. (T522) Maurice Horn, Lee's cousin, said, "I got your back," according to Bryant. (T523)

McLaughlin, facing first degree murder charges for the shooting death of an infant held by Jeffrey Brown, testified for

the state. (T302) He said that on the night of the fight, Brown shot a gun at him. (T307) McLaughlin, a former police informant, said he'd had problems with others trying to fight him. (T303, 339) On the night of the shooting, McLaughlin was searching for Brown either to fight him or resolve their disagreement, he said. (T312) McLaughlin said that although he had a 12-gauge shotgun with him, he didn't intend to shoot Brown. (T313-314) He backed his truck next to Brown's car across from Rachel's. (T314) Nicole Seals and Curtis Durm were passengers in the truck. (T313)

Earlier that night, Lee, Horn and others attended a party at the home of Marky Bess Nelson. (T455-456) Bryant testified that Horn and Keith Shanklin with there with guns. (T54) Defense witness Stephanie Daniels Smith testified that Nelson had a "rectangle gun." (T988) Freddy Larry said he took a .22 revolver from Nelson's home to Rachel's, and gave it to Horn 10-15 minutes before the shooting. (T456-460)

Bryant testified that while in the area of Rachel's, she heard Lee say he was going to get McLaughlin, "going to beat him up, anyway." Horn, Holden and Larry were in the group that then moved with Lee toward the truck. (T528) McLaughlin said that as he was seated in the truck talking to Reggie Bradshaw, Lee and Horn approached on foot. (T315) McLaughlin was trying to pull out as he heard Lee say, "You're a dead motherfucker, Freddy Wayne." (T316) Numerous witnesses then heard and saw shots, and

saw Horn and Lee holding guns. (T316, 376, 379, 475-476, 529-530, 536) Bryant identified Horn, Lee and Holden as having guns during the shooting. (T536) McLaughlin said the final shot that hit the truck was a shotgun slug, fired by Aaron McQueen. (T338) He said he also saw someone else -- not Lee or Horn -- with a shotgun. (T339) Defense witness Patrice Dixon testified that, hours after the shooting, Bryant identified other shooters as well, including Javarias Skinner. (T984) Skinner had been involved in the fight that concluded with McLaughlin striking Lee in the head. (T356-359)

Witness Celina Durm said she saw Horn shoot 5 to 10 shots, and heard 15-20 shots in all, some not from Horn. (T476) Stephanie Daniels Smith, a defense witness, testified that she saw McLaughlin point a gun out the truck window before any shooting began. (T993) Another defense witness, Deundra Frederick, saw he saw McLaughlin shooting from the truck. (T943) According to Smith, Horn fired once, then the gun jammed and would not shoot again. (T996) She said that in the direction the gun was pointed when fired, the shot could have hit only the rear tire or fender. (T995-996) His gun appeared to be a .22-caliber weapon, she said. (T1003) She also said that others had guns out, including Marky Nelson, and that shots came from every direction. (T998)

Horn and Lee gave statements to police. Horn said he fired

a Western-style, .22 revolver once at the left rear tire of the truck, didn't know how to make it fire again, and gave it back to Fred Larry. (T719) Lee said he fired five times at the truck with a .357 revolver, to scare McLaughlin. (T713)

Horn testified at trial that he fired once after seeing what looked like a gun in McLaughlin's hand on the driver's side of the truck. (T1060) He was unable to fire the gun a second time, he said. (T1071)

Edard Love, a firearms examiner, testified that an exhibit identified as being removed from Curtis Durm's brain contained fragments of both a large caliber bullet and a .22 bullet. (T838) He said the .38 could have ricocheted off a post in the passenger compartment before striking Durm, but that it was "not likely" a .22 bullet could strike the post and retain sufficient energy to penetrate a human skull. (T855-856) The medical examiner, Edmund Kielman, testified that in his decades of experience he had never been involved in a case in which two bullets entered a body at the same spot. (T640)

Love testified that the bullet removed from Tyshena Durm was a .38 or .357 caliber hollow point or soft point, fired from the same type of gun as the large caliber bullet removed from Curtis Durm. (T844) The truck contained several other bullets or jackets of bullets fired by the same .38 or .357 weapon. (T845-846) There were no identifiable small-caliber bullets or bullet

holes in the truck. (T880) Love identified several cartridge cases found in the street after the shooting as coming from a 9-millimeter weapon. (T81)

## SUMMARY OF THE ARGUMENT

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 those whose trials occurred after the date of the Coney decision. This is true whether Coney is considered "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, 413 So. 2d 1175 (Fla. 1982), 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, inasmuch as Horn's trial counsel exercised challenges in tandem with counsel for the codefendants. Thus there is error, it is harmful, and it is impossible to assess the consequences. Thus, the answer to the

certified question must be in the affirmative, and Petitioner should be granted a new trial.

II. In his closing argument, the prosecutor made a number of egregiously improper remarks characterizing the defense theories as "innuendoes," "untruths" and attempts to "poison your (the jury's) mind." The remarks grew so vituperative that they drew a motion for mistrial or curative instruction, which was denied. Although the remarks primarily attacked the argument of counsel for codefendant Lee, Horn's counsel was also a target. Moreover, because these remarks were part of a general appeal to the jurors not to be "robbed of your common sense" by the defense lawyers, and because the evidence, defense strategies and verdicts so closely identified Lee and Horn with one another, the prosecutorial misconduct prejudiced Horn equally. The remarks deprived Horn of an impartial jury, requiring reversal and remand for a new trial.

## ARGUMENT

I. PEREMPTORY CHALLENGES WERE EXERCISED DURING A BENCH CONFERENCE WHILE APPELLANT REMAINED AT COUNSEL TABLE, RESULTING IN HIS ABSENCE DURING A CRUCIAL STAGE OF TRIAL WITHOUT WAIVER OF HIS RIGHT TO BE PRESENT OR RATIFICATION OF ACTIONS TAKEN IN HIS ABSENCE, CAUSING REVERSIBLE ERROR.

The district court certified the following question of great public importance:

> 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 same question has been certified by the First DCA in a number of cases, of which the first is Lett v. State, 21 Fla. L. Weekly D580 (1st DCA Mar. 5, 1996), rev. pending, Fla.Sup.Ct. No. 87,541.

The question should be answered in the affirmative. Whether Coney is a clarification of existing law or new law, it must be applied to pipeline cases. Even were Coney not applied to this case, the statute and case law preceding Coney must be applied in the same manner as they were in Coney.

Horn remained at counsel table while the defense lawyers exercised peremptory challenges as a team. He did not expressly waive his presence, and did not expressly ratify the strikes made in his absence by his counsel and counsel for his codefendants. At one point during the exercise of peremptory challenges, the

court granted the request of appellant's counsel for a "skull session." (T141) On relinquishment of jurisdiction, Horn's trial counsel stressed that he could not recall specifically what was said between Horn and himself concerning peremptory challenges:

> I do not have any specific recollection of what I said to him or what he said to me. (S5)
>
> I don't recall any specific comments that he made, I don't recall any specific questions that I asked other than the fact that normally during jury selection I go over and sit down with a client. (S7)
>
> Now I do not specifically recall, and I would have to say that I don't think that I did, explain to Maurice Horn how we were physically and mathematically exercising the challenges. (S16)
>
> I don't have any recollection whether Mr. Horn at any point in time had some reservation or question about keeping or striking a particular juror. (S21)

What is important to this issue is not so much what appears on the record, as what does not appear. Nowhere is it reflected the petitioner was informed of his right to be present at the bench. Nowhere is it indicated the petitioner was present at the bench. Nowhere does the trial court **inquire** if the petitioner's absence from the bench is voluntary. Nowhere does the trial court **certify** that the petitioner's absence from the bench is voluntary. Nowhere does the trial court ask the petitioner to **ratify** the choice of jurors made by his counsel.

These are indications that petitioner was not present during

this important conference, thus the record demonstrates that only counsel for the state and the defense were at the bench.

The record is entirely silent regarding whether Horn understood the process of jury selection and, in particular, understood that the defense and the prosecution had the right to exercise peremptory challenges. Additionally, it is beyond dispute that lay persons typically do not understand what a "peremptory" challenge is.

The district court acknowledged that peremptory challenges were exercised at the bench, while Horn remained at counsel table. 21 Fla. L. Weekly at D868. It concluded, however, that he was not entitled to relief for his absence from the immediate site where the challenges were exercised, because his trial occurred before the decision of this Court in Coney.

The district court was mistaken. Horn's presence at the immediate site was compelled by court rule and cases preceding Coney. To the extent that Coney is seen as creating a new rule, it must be applied to Horn. Because this issue is already before the Court in a number of cases, the argument which follows is presented in somewhat compressed form.

**A. *Coney* and pre-*Coney* Law.**

The law applied in Coney is based upon both a Florida Rule of Criminal Procedure and case law, which in turn is based on both the Florida and U.S. Constitutions.

Rule 3.180(a)(4) of the Florida Rules of Criminal Procedure requires that a defendant in a criminal case be present "at the beginning of the trial during the examination, challenging, impaneling, and swearing of the jury" and this Court has ruled that this provision means exactly what it says. Coney at 1013.

A defendant is not present during the challenging of jurors if he is not at the location where the selection process is taking place. Thus, it is not enough that he be present somewhere in the courtroom. He must be able to hear the proceedings and participate in them. If he is seated at the defense table while a whispered selection conference is being conducted at the judge's bench, he cannot be said to be present and participating.

In Coney v State, 653 So.2d 1009 (Fla. 1995) this Court wrote:

> 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. Obviously, no contempo-

> raneous 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. Our ruling today clarifying this issue is prospective only.

Id.

A waiver of the right to be present must be certified by the court to be knowing, intelligent, and voluntary. The judge in Horn's case made no inquiry or certification whatsoever. None of the requirements listed in the above quotation 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 rule is clearly violated, the constitutional rights it 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 Horn 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 are the requirements that the trial judge **certify** on the record a waiver of a defendant's right to be present at the bench or a **ratification** of counsel's action (or inaction) in the defendant's absence.

However, the state and the district court 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 in Coney that Rule 3.180 means just what it says.

**2. State Estopped from Arguing Lack of Error.**

The State of Florida is estopped from arguing that Horn's absence from the bench conference where 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 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 pointed out the state's concession of error in its opinion:

> Coney was not present at the sidebar where the initial challenges were made, and the record fails to show that he waived his pre-

> sence or ratified the strikes. **The State concedes this rule violation was error**, but claims that it was harmless.

Coney, at 1013 (**bold** emphasis added). The case was then decided adversely to Coney on the basis of harmless error because only challenges for **cause** were made in his absence. Ibid.

Petitioner is asking that this Court at least apply the same analysis in his case that was afforded Coney. Equal protection under the law requires no less.

**B. *Coney* and the Principles of Law Underlying *Coney* must Be Applied to This, a "Pipeline Case."**.

Whether 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 same law upon which the decision in Coney rests must be applied to this case. To do less violates state and federal constitutional priciples.

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 Horn was present in the courtroom, as was Coney, he was not physically present at the sidebar. Inferentially, he

could no more hear what was happening at the bench than the jury could, and the jury was also present in the courtroom. Thus, Horn 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.

Rule 3.180(a)(4) 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; . . .

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.
>
> * * *
>
> A defendant's waiver of the right to be present at essential stages of trial must be knowing, intelligent and voluntary. Amazon

> v. State, 487 So. 2d 8 (Fla.), cert. denied, 479 U.S. 914, 107 S. Ct. 314, 93 L. Ed. 2d 288 (1986); Peede v. State, 474 So. 2d 808 (Fla. 1985), cert. denied, 477 U.S. 909, 106 S.Ct. 3286, 91 L.Ed.2d 575 (1986).

Id. [**Bold** added].

Nothing in the record demonstrates that Horn 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 a clear violation of Rule 3.180(c)(4).

The "clarification" of the law announced in Coney was not a "new rule" of law; no part of Coney's procedural requirements was a "clear break" with the past. 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. 1013)

Even assuming for the sake of argument that Coney announced a "new rule" that would not qualify for retroactive application

to Petitioner's direct appeal under traditional standards of retroactivity, recent state and federal constitutional cases require that Petitioner be permitted to benefit from Coney.

In Griffith v. Kentucky, 479 U.S. 314 (1987), the Supreme Court abandoned its former retroactivity doctrine 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 and state appellate courts **must** apply the Griffith retroactivity procedure 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, 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).

Clearly, Coney is based in part on the U.S. Constitution in addition to Fla. R. Crim. P. 3.180. Consider in the plain language of Coney,(and in Turner and Francis which Coney follows), the cites to the 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).

Turning again to Turner 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).
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> * * *
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> A defendant's waiver of the right to be present at **essential stages of trial** must be knowing, intelligent and voluntary. Amazon v. State, 487 So. 2d 8 (Fla.), cert. denied, 479 U.S. 914, 107 S. Ct. 314, 93 L. Ed. 2d 288 (1986); Peede v. State, 474 So. 2d 808 (Fla. 1985), cert. denied, 477 U.S. 909, 106 S.Ct. 3286, 91 L.Ed.2d 575 (1986).

Turner, 47-48, 49 [**Bold** added].

Thus, the "new rule" of procedure 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 require this Court to give Coney, retroactive application to Petitioner's direct appeal.

Even if Coney were based only on state law, which it clearly is not, the Equal Protection and Due Process provisions of the Florida Constitution would require that this Court apply the decision retroactively to Petitioner's appeal. This Court has 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)[1], this Court agreed with "the principles of fairness and equal treatment underlying Griffith," and adopted the same bright-line law as in Griffith. Then, in several subsequent cases, those priciples 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 (state) "new law" announced

[1] It is interesting to note that Smith itself seems to implicate federal law -- by agreeing with the "priciples" of Griffith.

in Castro v. State, 597 So.2d 259 (1992) to a pipeline case. See Wuornos, at 1007-8.

However, in State v. Brown, 655 So. 2d 82 (Fla. 1995) this Court appears to have embraced the principles of fairness and equal treatment again, holding that Smith "established a blanket rule of retrospective application to all nonfinal 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 (**bold** emphasis added)

The integrity of judicial review requires this Court, once and for all, to abandon its pre-Smith *ad hoc* approach to retroactivity and adopt the bright-line approach 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

that Coney was issued, he sought relief based on Coney, and relief should therefore be granted by this Court. Failure to do so will violate Petitioner's rights under the U.S. and Florida Constitutions.

**C. *Coney* or Pre-*Coney*, the Law must Be Applied to this Case**

Common sense dictates that the right to be present would be meaningless if it were not applied to the absence of a defendant at side-bar conferences during which peremptory and cause challenges are or should be exercised.

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

The problem here occurs because the defendant may have had input into the strategy by which trial counsel exercised challenges jointly with counsel for the codefendants.

Petioner, Maurice Horn, may have had contemporaneous input to make to counsel as to the exercise of his peremptory challenges -- because they are often exercised arbitrarily and ca-

priciously, 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 implies constant input from the defendant. The process is dynamic, and results in a rapidly and ever-changing face of the jury. This depends upon which individuals have been struck and which party exercised the strikes. It is highly fluid, requiring constant evaluation and reevaluation of 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 apparently consulted with Horn prior to the sidebar and again during the process, that itself is not

sufficient. If the defendant were present and contemporaneously aware of how the situation was developing, he may have expressed additional or other preferences. He may have wished to strike others on the jury who had not been previously discussed with counsel.

The accused 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.

**D. Petitioner Did Not Waive His Right.**

Nothing Maurice Horn 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; Faretta. The waiver by inaction of a Constitutional right or presuming waiver by a silent record flies in the face of opinions of the United States Supreme Court.

The challenging of the jury is a critical 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 is no 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," that Horn'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.

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 Horn 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.

**E. No Objection Need Be Made to Preserve this Issue.**

The right to be physically present at various critical stages of the proceedings and trial is one which exists without a specific assertion of the right. It, like the right to counsel,

exists and is protected by the due process clause of the federal and state constitutions -- guarantees further implemented and protected by Fla. R. Crim. P. 3.180.

No defendant must stand up and insist that he be present at trial or at any critical stage thereof. Compare, e.g., Brown v. Wainwright, 665 F. 2d 607 (5th Cir. 1982)(right to counsel in force until waived, right to self-representation does not attach until asserted). Rather, if the defendant is not present when required, an inquiry and a waiver of the right must be made on the record. This right is not waived by inference or by silence of the defendant (particularly where, as here, there is no affirmative indication that the defendant was ever advised of the existence of the right). Johnson v. Zerbst, 304 U.S. 458 (1938); Brewer v. Williams, 430 U.S. 387 (1977)(every presumption against waiver).

Since the right is not waived by silence, no contemporaneous objection is required to preserve the issue for review. To do otherwise, to require an objection to preserve a right which already exists, would be imposition of waiver by silence.

**F. 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*** under certain analysis. 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).

As was conceded by the state in Coney, it was error 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)).

**G. Analysis of Prejudice.**

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.

This Court's analysis in Francis v. State, 413 So. 2d 1176-1179, is important on the question of the prejudice flowing from the involuntary absence of the defendant during the challenging of the jury:

> Since we find that the court erred in proceeding with the jury selection process in Francis' absence, we also consider whether this error is harmless. We are not satisfied

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

Francis, 1176-1179.

There was error. There was prejudice. Thus, the Petitioner is entitled to a new trial (even if properly admitted evidence were sufficient to support the jury verdict) where 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 Horn'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 unless the state can show beyond a reasonable doubt to the contrary.

Accordingly, because the error in this case is not harmless beyond a reasonable doubt, Horn should receive a new trial in which jury selection is conducted in accordance with Coney, Turner, Francis and Rule 3.180.

II. THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR CURATIVE INSTRUCTION AND MISTRIAL WHEN THE PROSECUTOR REPEATEDLY DISPARAGED DEFENSE ARGUMENTS AS "INNUENDOES" AND ATTEMPTS "TO POISON YOUR MIND."[2]

Counsel for the three codefendants mounted a cooperative effort at trial. None of the defense lawyers, in their examinations of witnesses and arguments to the jury, made their cases at the expense of the codefendants. The evidence placed both Horn and Lee at the shooting scene with guns, while Holden's counsel presented witnesses calling into question his presence during the shooting. Accordingly, the jury acquitted Holden altogether while returning identical verdicts against Lee and Horn of guilty of lesser included offenses in Counts I-III, not guilty in Count IV and guilty as charged in Count V. This is the procedural posture in which the prosecutor made his closing arguments.

The prosecutor made a number of egregiously improper remarks in his arguments, eventually drawing a motion for mistrial or curative instruction, which was denied. Although the remarks primarily attacked the argument of Mr. Harrison on behalf of Lee, Horn's counsel was also a target. Moreover, because these remarks were part of a general appeal to the jurors not be "robbed of your common sense" by the defense lawyers, and because Lee and Horn were so closely identified with one another in the

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[2] This issue is also before the Court in the case of codefendant Lee. Fla.Sup.Ct. No. 87,715.

evidence, defense strategies and verdicts, the prosecutorial misconduct prejudiced Horn and Lee approximately equally. If anything, the comments caused greater prejudice to Horn because the evidence against him was weaker.

The following excerpts from the record are direct quotes from the prosecutor's argument:

> I anticipate these defense attorneys will be pointing you in every direction to things that just don't matter when you go to what the elements of the crime are and what the State has to prove. I anticipate Mr. Pinkerton will try to tell you that in Maurice's situation we have justifiable use of non-deadly force. Don't be robbed of your common sense. (T1212)
>
> Don't be robbed of your reasonableness. Don't be robbed of your common sense by a bunch of innuendoes and pointing fingers. (T1244)
>
> Don't be robbed of your common sense. Don't do something that is not reasonable or get your mind off in some ozone where they want you. (R1249)

These comments were made in the opening portion of the prosecutor's closing argument, after initial closing arguments by counsel for Horn and Holden. Admittedly, there was no objection made at this time. Probably as a consequence, the comments became more egregious. After the prosecutor concluded his initial closing argument by asserting that the only lawful verdict was guilty as charged, (T1250) Lee responded to some of the improprieties and predicted that there would soon be news of

a plea bargain between the prosecutor and witness Freddy Wayne McLaughlin on his pending first degree murder charge. (T1295)

The following comments were made by the prosecutor in his rebuttal immediately following argument by counsel for Lee.

> Mr. Harrison told you that he wasn't going to get too far out there in left field. He got way out there. He got outside this courtroom. He said complete untruths for lack of a better word. (T1302)
>
> So, when Mr. Harrison comes in and tells you to look at the newspapers in a few weeks and he's going to get some kind of reduced charge and all this, no. That is a complete untruth and I think you know what that means. (R1303)
>
> Again, they're making up evidence. They're taking stuff that's outside the courtroom that hasn't even been presented and they're trying to put that in your mind to poison your mind. Like I said, don't let them rob you of your common sense. (R1303)

These quotes may reasonably be interpreted as rebuttal to argument by Lee's counsel on McLaughlin's immunity and pending charges. Again, no objections were made, yet.

The comments drawing an objection by counsel for Horn and Lee were on a different subject altogether. These comments concerned persons present during the shooting and who among them had guns, a focus of argument by counsel for all three defendants. Additionally, the prosecutor made the following remarks immediately after commenting that certain people were not present and did not have guns that night. Among others, the prosecutor specifically mentioned Jeffrey Brown, significant in

that Brown said that he had a .22 the night of the fight and was present the night of the shooting. One of the state's theories was that the portion of the .22 bullet taken from Curtis Durm's body was from a gun fired by Horn. Discussing the statement of Freddy McLaughlin, in which he gave a number of names of persons possibly involved in the shooting, the prosecutor said:

> In his mind he thought they had something to do with this. So he starts where he thinks the beginning is. Well, I just got back from California, all these people hate me, maybe they had something to do with it. He thought Jeffrey Brown had something to do with it.
>
> These people weren't even up there and there are names everywhere. They're still doing the name game.

(T1305) The evidence showed that McLaughlin parked his truck next to a car identified as Jeffrey Brown's, and that Brown and McLaughlin had spoken a short distance from the site of the shooting an hour or so earlier in the evening. (T311, 314, 913) The prosecutor continued:

> It's hard to argue lack of evidence although they're trying, even by bringing evidence that's not in the trial. It's real hard, the things that aren't even true, to poison your mind. That's all I can call that. (T306).

Lee's counsel objected, stating, "Now he's accused us of fabricating evidence, lying to the jury and that's per se reversible error." Joined by counsel for Horn and Holden, he asked the trial court to give a curative instruction or declare a mistrial. (T1306-1308) The trial court denied both requests.

(T1307) In further discussions, Lee's counsel argued that the prosecutor had not limited his comments to the issue of witness Freddy McLaughlin but had also said that counsel fabricated evidence regarding other matters (e.g., who was present at the time of the shooting and who had guns). He argued that these comments directly reflected on Lee and his defense. (T1307) The trial court again denied the requests for a curative instruction and mistrial. (T1308).

At the court's suggestion, the prosecutor apologized to the jury, as follows:

> Ladies and gentlemen, I just want to sincerely apologize to you because in responding to what Mr. Harrison said, I've talked about some things that are not in evidence in this case. But I felt it necessary to cover that because he covered it, on both of those issues. (T1310).

There was no further "apology" from the prosecutor. He did not tell the jury that it was improper and unethical for him to call the defense lawyers liars. He did not tell the jury that it was improper and unethical for him to tell them that the defense lawyers were trying to poison their minds. Again, though the bulk of his remarks had been directed to the arguments of Lee's counsel, the frequent use of the pronoun "They" could only be understood as applying to counsel for Horn and Holden as well, as Lee did not testify and was represented by only one attorney. The lukewarm apology went only to the issue of comments outside

the evidence and only to the comments of counsel for Lee, when, as to Horn, the harm in the improper remarks lay elsewhere.

The caselaw plainly shows that the comments of the prosecutor were improper. The trial court should have declared a mistrial or delivered a curative instruction.

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

In Valdez v. State, 613 So.2d 916 (Fla. 4th DCA 1993) the Fourth District Court of Appeal ruled that the prosecutor improperly attacked the credibility of defense counsel by arguing to the jurors that "the defense" failed to give them an "accurate story." Valdez also cites to Briggs, supra. In Briggs this Court held that it is both improper and unethical for either the

prosecutor or defense counsel to attack the personal integrity and credibility of opposing counsel. 455 So. 2d at 521.

Many other courts in Florida have held it to be error when the prosecutor ridicules a defendant or his theory of defense or when the prosecutor indulges in personal attacks upon the accused, his defense or his counsel. Riley v. State, 560 So.2d 279 (Fla. 3rd DCA 1990); Rosso v. State, 505 So.2d 611 (Fla. 3rd DCA 1987); McGuire v. State, 411 So.2d 939 (Fla. 4th DCA 1982); Williamson v. State, 459 So.2d 1125 (Fla. 3rd DCA 1984); Jackson v. State, 421 So.2d 15 (Fla. 3rd DCA 1982); Gomez v. State, 415 So.2d 822 (Fla. 3rd DCA 1982); Bass v. State, 547 So.2d 680 (Fla. 1st DCA 1989); Murray v. State, 443 So.2d 955 (Fla. 1984). The prosecutor in this case did all of these things. In fact, much of his argument appears distilled from the caselaw just cited. In the aggregate, these remarks fundamentally tainted the defendant's right to an impartial jury.

In State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) the Florida Supreme Court held that the standard for determining if error is harmless is whether there is a reasonable possibility that the error affected the verdict. The state must show that the error is harmless. In Long v. State, 494 So.2d 213 (Fla. 1986), the court held that the sufficiency or overwhelming nature of the evidence is not the correct standard by which to analyze harmless error. The court reiterated that the burden falls on the state

to show beyond a reasonable doubt that the error did not affect the verdict.

Here, the state cannot meet that burden, for several reasons. First, its case against Horn for the killing of Curtis Durm rested largely on the infinitesimally slight prospect that a .22 from Horn's weapon struck Durm's head at the same spot as a .38 or .357 fired by someone else, presumably Lee. Several witnesses testified that Horn fired only once. There was no evidence -- aside from the .22 fragments identified from Durm's body -- of .22 bullets in the truck or at the scene. Second, nearly every lay witness who took the stand was impeached with inconsistent statements about the shooting leaving the jury unsure what to believe. As in Bass v. State, supra, this was a close case in which the prosecutor's remarks could have contributed to the verdict.

The verdicts also reflect the tenuousness of the evidence and belie any claim of harmlessness. Holden was acquitted altogether, while Horn and Lee were found not guilty on one count and guilty of only lesser included offenses on three other counts. The jury found both Lee and Horn not guilty of the attempted murder of Tyshena Durm, though the bullet taken from her body was of the same caliber as the gun Lee admitted firing. Thus, these defendants were clearly connected in the jury's minds, disparities in the evidence notwithstanding. Prejudice to

one was prejudice to both. Compare Clark v. State, 553 So. 2d 240, 242 (Fla. 3d DCA 1989)(prosecutor's speculation that one defendant intended to asphyxiate victim harmless as to other defendants).

The district court found "no merit" in this argument, but did not explain its reasons. Horn thus cannot know why the court rejected his claim, and cannot address any perceived shortcoming. In the good-faith belief that the prosecutor's argument denied him a fair trial, he requests that this Court quash the decision of the district court on this point, and remand with directions to grant Horn a new trial.

## CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Honorable Court quash the decision of the district court on the issues raised herein, and remand with directions to grant petitioner a new trial.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Giselle Lylen Rivera, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL, on this 20th day of May, 1996.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER