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FILED
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JUN 10 1996
CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

DAVID BOWICK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 87,826

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, David Bowick, was the defendant in the trial court and the appellant in the First District. He will be referred to herein as petitioner or by his last name. Respondent, State of Florida, was the prosecuting authority in the trial court and the appellee in the First District. It will be referred to herein as "State."

The record on appeal will be referred to as follows:

Volume I (pleadings, etc.) Volume II (sentencing transcript) Volume IV (supplemental pleadings) Volume V (voir dire) Volume VI (stipulation) (These five volumes are numbered consecutively 1 through 222.)	R
Volume III (trial transcript) (1 through 117)	T

STATEMENT OF THE CASE AND FACTS

Bowick has not summarized the facts relevant to the certified question. The State, therefore, will summarize these facts.

Bowick was present during examination of the jurors (R. 216, 222), but he did not participate in the sidebar conference when peremptory strikes were exercised (R. 222). The circuit court minutes reflect that a sidebar conference, lasting one minute,

was held at 10:49 a.m. on February 28, 1994. (R. 24) After the strikes were exercised, the trial court announced in open court the names of the jurors selected. (R. 220) Immediately preceding trial on March 1, 1994, the trial court asked the parties whether they "acknowledge[d] the presence of the jury selected to try this case," and they answered affirmatively. (T. 5)

SUMMARY OF ARGUMENT

Bowick was seated at defense table during a sidebar conference that lasted one minute at which peremptory strikes were announced. Bowick seeks a new trial because he was not standing beside the lawyers at the bench during this one-minute conference. As justification for a new trial, he relies on a rule of law that was announced by this Court approximately a year after completion of his jury trial. Coney, infra, on which Bowick relies, changed the law, but the change did not benefit Coney. Coney was not released from custody; he was not given a new trial; and neither his conviction nor his sentence was reduced. The new rule announced in Coney was held to be prospective only. There is nothing confusing about the prospectivity principle; it is fully understood. Based on these facts, the certified question is not one of great public importance, and it, therefore, should not be addressed by this Court.

If the certified question is addressed, it should be answered in the negative. Coney did not reap a windfall, and neither should Bowick.

Assuming, arguendo, that the certified question is addressed, the new rule announced in Coney should be clarified. The

defendant's presence at defense table when peremptory strikes are announced at the bench satisfies the constitution. If the defendant wants to stand at the bench with counsel, the burden is on him to make his preference known. If he remains silent, he waives the right, and he cannot be heard to complain for the first time on appeal.

ARGUMENT

CERTIFIED QUESTION

> DOES THE DECISION IN CONEY V. STATE, 653 SO. 2D 1009 (FLA. 1995) 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?

Whether to address certified questions purporting to be of great public importance is within this Court's sound discretion. Art. V, § 3(b)(4), Fla. Const.; State v. Burgess, 326 So. 2d 441 (Fla. 1976); Stein v. Darby, 134 So. 2d 232 (Fla. 1961). For the reasons stated below, the State respectfully asks the Court to decline to review the certified question in the case at bar.

In Jones v. State, 569 So. 2d 1234, 1237 (Fla. 1990), this Court held that the defendant's absence from sidebar conferences where peremptory strikes were announced was not error because the defendant was given the opportunity to confer with counsel at defense table prior to the conferences. Coney v. State, 653 So. 2d 1009 (Fla. 1995), decided approximately four years later, changed the law. It held that the defendant has a right to be standing at the bench with counsel, not just sitting at defense

table.[1]. Justice Overton recognized Coney's radical departure from judicial practice: "Judges have believed for nearly fifteen years that exercising challenges at the bench, outside the hearing of the jury while the defendant was at counsel table, was proper because the defendant was present in the courtroom." The number of cases litigating the Coney issue bears this out.[2]

The new rule announced in Coney was held to apply prospectively. There is nothing ambiguous about the prospectivity principle. As this Court has repeatedly held, prospective decisions do not apply to cases tried before the new

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[1]In his brief, Bowick misquotes this Court's Coney opinion. (I.B. 17) Although the first Coney decision indicated that no objection would be required, Coney v. State, 20 Fla. L. Weekly S16, 17 (Fla. January 5, 1995) ("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"), the revised opinion eliminated that language, Coney v. State, 20 Fla. L. Weekly S204 (Fla. April 27, 1995); Coney v. State, 20 Fla. L. Weekly S255 (Fla. April 27, 1995); Coney v. State, 653 So. 2d 1009, 1013 (Fla. 1995).

[2]Bowick relies on two cases in which the defendant was not even in the same room with the judge and the lawyers when the strikes were announced. See Francis v. State, 413 So. 2d 1175 (Fla. 1982) (defendant was in the bathroom part of the time while prospective jurors were questioned in the courtroom, and when the judge and counsel retired to the jury room to exercise peremptory strikes, the defendant was left in the courtroom); Turner v. State, 530 So. 2d 45, 47 (Fla. 1987) (defendant was not present in the judge's chambers when jurors were challenged).

decision was announced, regardless of whether such cases are still pending on appeal. See, e.g., Fenelon v. State, 594 So. 2d 292, 293, 295 (Fla. 1992) ("We agree with the State that giving the flight instruction, even if erroneous, was harmless beyond a reasonable doubt....," and "we approve the result below although we direct that henceforth the jury instruction on flight shall not be given"); Taylor v. State, 630 So. 2d 1038, 1042 (Fla. 1994) ("This Court intended that the holding in Fenelon be applied prospectively only, and, since Taylor was tried before our decision in Fenelon was issued, the trial court did not err given the circumstances of this case"); Wuornos v. State, 644 So. 2d 1000, 1007 n. 4 (Fla. 1994) ("We recognize that this holding [a prior decision is to have 'prospective effect only'] may seem contrary to a portion of Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992), which can be read to mean that any new rule of law announced by this Court always must be given retrospective application. However, such a reading would be inconsistent with a number of intervening cases. We read Smith to mean that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise") (cites omitted); and Domberg v. State, 661 So. 2d 285, 287 (Fla. 1995) (in Wuornos, Smith was "read to mean

that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise").

The defendant in Coney was not given the benefit of the new rule, regardless of how it is ultimately characterized. (Bowick asserts that the new rule relates solely to the requirement of a recorded waiver of the defendant's right to be present at sidebar conferences (I.B. 18), an interpretation which overlooks Jones, supra.) Coney was not released from custody; he was not granted a new trial; and neither his conviction nor his sentence was reduced. No rational reason exists for according Bowick relief not granted to Coney.

In the event this Court elects to address the certified question, the State asks that the rule announced in Coney be clarified. The law should be made clear that if a defendant wants to stand at the bench with the lawyers when peremptory strikes are announced, the burden is on him to make his request known to the judge. If he remains silent, he has waived the right, and he cannot be heard to complain for the first time on appeal about his absence from the sidebar conference.

The defendant's absence from sidebar conferences where peremptory strikes are announced does not offend the

constitution. See, e.g., U.S. v. Gayles, 1 F. 3d 735, 738 (8th Cir. 1993) (defendant was absent from courtroom when attorney announced strikes over the lunch break, but he was present when clerk gave strikes effect by reading off list of selected jurors); U.S. v. McCoy, 8 F. 3d 495, 496-497 (7th Cir. 1993) (defendant was not present at sidebar conference where "the attorneys discussed their peremptory challenges, only one of which raised any concern"); U.S. v. Bascaro, 742 F. 2d 1335, 1349-1350 (11th Cir. 1984) (defendants in courtroom entire time but lawyers left courtroom briefly to confer collectively to decide on peremptory strikes).

This Court recently applied the contemporaneous objection rule to violations of Florida Rule of Criminal Procedure 3.180. In Gibson v. State, 661 So. 2d 288, 290 (Fla. 1995), decided after Coney, the defendant argued:

> Gibson raises three claims relating to the guilt phase of the trial: (1) The trial court violated Gibson's right to be present and to the assistance of counsel by denying his counsel's request to consult with Gibson before exercising peremptory challenges. (e.s.)
>
> *** Gibson claims error in two respects. First, he argues that the trial court violated his right to be present with counsel during the challenging of jurors by conducting the challenges in a bench conference. Second, he argues that the trial court violated his right to the assistance of counsel by denying defense

> counsel's request to consult with Gibson before exercising peremptory challenges. (e.s.)

In deciding Gibson, this Court stated:

> In Steinhorts v. State, 412 So. 2d 332 (Fla. 1982), we said that, "in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." In this case, we find that Gibson's lawyer did not raise the issue that is now being asserted on appeal. If counsel wanted to consult with his client over which jurors to exclude and to admit, he did not convey this to the trial court. On the record, he asked for an afternoon recess for the general purpose of meeting with his client. Further, there is no indication in this record that Gibson was prevented or limited in any way from consulting with his counsel concerning the exercise of juror challenges. On this record, no objection to the court's procedure was ever made. In short, Gibson has demonstrated neither error nor prejudice on the record before this Court. Cf. Coney v. State, 653 So. 2d 1009, 1013 (Fla. 1995) (holding trial court's error in conducting pretrial conference where juror challenges were exercised in absence of defendant was harmless beyond reasonable doubt). (e.s.)

See, also, Shriner v. State, 452 So. 2d 929 (Fla. 1984) (defendant's absence from unspecified bench conferences not fundamental error).

The clarification of the rule sought by the State is compatible with the approach taken by the federal courts. A criminal defendant need not be warned of his right to be present under Federal Rule 43, comparable to Rule 3.180, and the right is waived unless the defendant expressly invokes it. Fed. Rules Cr.

Proc., Rule 43; United States v. Gagnon, 470 U.S. 522, 527-530 (1985) (right waived where defendants did not ask to be present during in camera discussion among judge, juror, and one of the defense lawyers).

In the case at bar, Bowick made no request to stand at the bench; nor did he object to the procedure used for challenging jurors. (R. 216, 220, 222)

Contrary to Bowick's assertion (I.B. 19), the State is not "estopped" from advancing inconsistent arguments on the law in different cases. There are three estoppel doctrines (mutual collateral, nonmutual collateral, and judicial). Judicial estoppel does not apply here because that doctrine is limited to a party's positions on the "facts." Rand G. Boyers, Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw. U. L. Rev. 1244, 1262 (1986). Mutual collateral estoppel does not apply here because that doctrine requires that the parties be the same; that is, the defendant must be the same in both proceedings. Ashe v. Swenson, 397 U.S. 436, 443 (1970). Nonmutual (different parties, as here) collateral estoppel does not extend to the government. U.S. v. Mendoza, 464 U.S. 154 (1984); Standefer v. United States, 447 U.S. 10 (1980); Nichols v. Scott, 69 F. 3d 1255, 1268-1274 (5th Cir. 1995). Finally,

pure questions of law, such as the one at issue here (what does a rule of procedure mean), arising in unrelated cases are excepted from the collateral estoppel doctrine. Mendoza, 464 U.S. at 573 n 7.

Bowick relies on State v. Pitts, 249 So. 2d 47 (Fla. 1st DCA 1971) for the proposition that the Equal Protection Clause prohibits the State from taking different positions on a legal issue. He misreads that case.

A party's "confession of error" is nothing more than the party's opinion on the law. It does not bind the Court, State v. Lozano, 616 So. 2d 73, 75 n 4 (Fla. 1st DCA 1993); L.S. v. State, 547 So. 2d 1032 (Fla. 3rd DCA 1989), for the obvious reason that only the Court has the power to say what the law means, State v. Smith, 547 So. 2d 613, 616 (Fla. 1989). It is only when the Court adopts the opinion of a party as its own that it becomes the law, and it is at this point that it must be applied equally to everyone. This is what was of concern to the Pitts court.

The Equal Protection Clause requires the government to apply the law, not the government's opinion on the law, equally to all similarly situated persons. The government's opinion on the law may be wrong, either to the defendant's detriment or his benefit. If it is to his detriment, the harm will be remedied. If it is

to his benefit, the windfall stands. Although windfalls cannot be undone, the government can prevent others from unjustly reaping the benefit of the error. Mendoza, 464 U.S. at 161-162.[3]

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[3]The contemporaneous objection rule limits the arguments that the losing party can advance on appeal. State v. Applegate, 591 P. 2d 371, 373 (Or. App. 1979) set outs the many policy reasons for this rule. The prevailing party, however, is not limited by what he argued in the lower court. This is so because of the procedural rule which requires appellate courts to affirm the decisions of lower courts if correct, even though based on faulty reasoning. Stuart v. State, 360 So. 2d 406, 408 (Fla. 1978) The primary purpose for this rule is obvious. "It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate." Securities and Exchange Com. v. Chenery Corp., 318 U.S. 80, 88 (1943).

CONCLUSION

Based on the foregoing discussion, the State respectfully requests the Honorable Court to decline to review this case or, alternatively, to answer the certified question in the negative and clarify its Coney decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Terry Carley, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401, North; 301 South Monroe Street; Tallahassee, Florida 32301, this 10th day of June, 1996.

Carolyn J. Mosley
Assistant Attorney General

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