IN THE SUPREME COURT OF FLORIDA

DAVID BOWICK, :

Petitioner, :

v. : CASE NO. 87,826

STATE OF FLORIDA, :

Respondent. :

_____/

INITIAL BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

TERRY CARLEY
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 295701
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
PAGE TWO

TABLE OF CITATIONS
PAGE THREE

CONSTITUTIONS

STATUTES

IN THE SUPREME COURT OF FLORIDA

DAVID BOWICK,

Petitioner,

v. CASE NO. 87,826

STATE OF FLORIDA,

Respondent.

_____/

INITIAL BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

The petitioner was the defendant in the trial court and the appellant in the district court and will be referred to by name or as the petitioner. The state is the respondent and was the appellee in the district court. The state will be referred to as the state or the respondent.

The record on appeal consists of six volumes. Volume I contains the information, motions, orders, and other pleadings filed in this case in the trial court. References to this volume will be to "R" followed by the appropriate page number, in parentheses. Volumes II, III, IV, and V contain the transcripts of the proceedings in the trial court. References to these volumes will be to "T" followed by the appropriate page number, in parentheses. Volume VI consists of a stipulation entered into by the state and the defense regarding jury selection. References to

this volume will be to the "Stipulation".

The proceedings in the trial court were held before Circuit Judge Clinton Foster in Panama City, Bay County, Florida.

The documents comprising the record in this appeal refer to the petitioner as David Bowicki, as well as David Bowick. After the jury retired to deliberate, the state attempted to clear up the confusion. At this time, Mr. Bowick informed the trial court that his name was actually Bowick, and not Bowicki. (T-110-111)

This case is before the Court on a certified question from the First District Court of Appeal.

STATEMENT OF THE CASE

The petitioner, David Bowick, was charged by information with the crime of purchasing cocaine. After a trial by jury, he was convicted and adjudicated guilty. The trial judge sentenced Mr. Bowick to 5 ½ years in prison. This was a belated appeal.

Petitioner appealed to the First District Court of Appeal which issued a per curiam affirmed opinion on January 29, 1996. (See Appendix A). A motion for clarification, rehearing, rehearing en banc, and/or certification was filed raising three possible questions: 1) Does Coney apply to pipeline cases; 2) must an objection be raised to preserve the Coney issue; and 3) is the state estopped from taking a position that petitioner's absence from the bench was not error? (Appendix B)

Upon rehearing another opinion was issued on April 8, 1996, granting relief in part and denying relief in part. The

following question was certified to this Court regarding the application of its decision in Coney v. State, 653 So.2d 1009 (Fla. 1995):

> 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?

(Appendix C).

A notice to invoke the discretionary review of this Court was filed on April 25, 1996 (Appendix D), and the First District Court of Appeal issued its mandate in this case on April 24, 1996. (See Appendix E).

STATEMENT OF THE FACTS

The appellant, David Bowick, was arrested for allegedly attempting to purchase a rock of crack cocaine from an undercover police officer on November 19, 1993. (R-1) He was charged by information dated January 19, 1994, with unlawfully purchasing a controlled substance, cocaine, in violation of Section 893.13, Florida Statutes. (R-6) The information was filed 62 days after Mr. Bowick's arrest and incarceration in the county jail. (R-1, 6)

The jury for Mr. Bowick's trial was selected on February 28, 1994. (R-24) The trial was held on March 1, 1994, before Circuit Judge Clinton Foster. (R-26)

Officer John Pierce, of the Panama City Police Department, was the first witness to testify for the state. He testified that he was working with the Bay County Joint Narcotics Task Force on November 19, 1993. (T-16-17) On that date, the task force was involved in a reverse sting operation in which a plain-clothes police officer wearing a body wire attempted to sell cocaine on the street. (T-17-18) The sting operation was situated in front of the Neota Motel, at 14th Court and Palo Alto in Panama City, Florida. (T-18)

Officer Pierce was in his unmarked police vehicle nearby. His job was to monitor the body wire that his fellow officer, Officer Gardner was wearing. (T-19) He told the jury that he saw Mr. Bowick walk around the corner of the Neota Motel and walk directly up to Officer Gardner. Allegedly Officer Gardner did not approach Mr. Bowick. (T-28). He heard the conversation through the wire and observed an exchange between their hands. (T-19-21)

During Officer Pierce's testimony, the state attempted to introduce the audiotape of the drug transaction. (T-23-24) The defense objected. The court overruled the objection and allowed the tape to be played for the jury. (T-24-25)

On cross-examination, Officer Pierce admitted that he was about 200 feet away from the transaction and that it was 10:50 p.m. (T-28-29) The defense attorney asked him if sale of crack cocaine was illegal in the state of Florida. Officer Pierce responded in the affirmative. The defense attorney then asked if

Officer Gardner, who had been selling crack cocaine that night, was arrested. Officer Pierce replied that he was not. (T-31) Nine or ten sting transactions were conducted that evening. (T-32) Officer Pierce conceded that all of the transactions conducted that evening would be on the tape. (T-32) On redirect examination, the defense attorney asked the police officer, "If Mr. Gardner hadn't sold that crack, there wouldn't be anyone there to buy it, would there?" The police officer's answer was yes. The following exchange occurred next,

> Q But if he hadn't of sold it, those ten people couldn't have bought it from him, could they?
> A Not from him.

(T-33-34)

The state's next witness was Officer Frank Gardner. (T-34) On the night of November 19, 1993, he was working as an undercover agent, posing as a drug dealer. (T-35) He identified Mr. Bowick as the person he sold cocaine to that night. (T-36) He testified that Mr. Bowick walked up to him and asked him if he had a rock, meaning crack cocaine. The officer pulled some rocks of cocaine from his pocket and displayed them. He claimed that Mr. Bowick picked out the rock he wanted. (T-36-37) He told the jury that, when Mr. Bowick approached him, the cocaine was in his pocket and not in his hand. (T-37)

On cross-examination, the officer was asked how one posed as a drug dealer. He said that this involved walking around or hanging out on the corner of the street. (T-39-40) He denied

approaching Mr. Bowick or having any drugs out in the open. (T-41) Officer Gardner testified that the transaction took two to three minutes. (T-42) He could not say whether Officer Pierce had taped the entire transaction. (T-42) The transcript of the tape made by Officer Pierce comprises 30 lines in the record. (T-25-26)

At the conclusion of Officer Gardner's testimony, the state called Bay County Sheriff's Deputy Faith Bell. (T-44) Deputy Bell was in an unmarked vehicle approximately 250 yards from the transaction. She was in a separate vehicle from Officer Pierce. (T-49) Her part of the operation was to run the body wire and listen to the conversation for the safety of the officer. She was also to provide back-up assistance. (T-45) She saw Mr. Bowick approach Officer Gardner. (T-46) The lighting was dim but she could see the transaction. (T-46) She believed the transaction took less than two minutes. (T-47) Although she saw the transaction occur, she was only able to see the two individuals involved. She could not see their hand movements. (T-48) She could not recall whether Officer Pierce or she made the decision of when to start the tape. (T-48)

As its last witness, the state recalled Officer Pierce to the stand. He testified that during the transaction he was in charge of making the audiotape of the transaction. (T-57) He claimed that he began the tape each time he saw someone approach Officer Gardner or begin a conversation. (T-57) The recording device would then be turned off when the transaction was com-

pleted. (T-57) The recording device was in a large suitcase in the back seat. To start the recorder the officer was required to reach around behind himself to the back seat. (T-58) The defense asked the officer during cross-examination how long the tape was. The officer responded that it was approximately a minute or a minute and one-half. (T-59) The defense attorney had the tape played again and timed its length as 52 seconds. The officer then told the jury that there was some conversation which occurred before the tape recording device was turned on. He admitted that he may have missed some of the initial conversation. (T-59-60)

The state rested. The defense moved for a directed verdict of acquittal on the basis that the evidence showed Mr. Bowick had been entrapped. The defense also made a motion to dismiss. The court said, "Motion denied", apparently referring to both motions. (T-61)

Mr. Bowick testified on his own behalf as the only defense witness. He worked 40 hours a week at Springfield Community Church cafeteria. (T-62-63) He worked as a cook but performed other responsibilities in the church. (T-63) On the day in question he got off of work about 3:00 or 3:30. He did not go directly home. He went to his employer's house to help her get ready for a garage sale. (T-63) She asked him to come to work very early the next morning. (T-64) His employer then dropped him off at the house of Josephine Harris, an older friend, where he watched the news. He went home and had dinner at his mother's

house and got ready for bed. He discovered that he could not sleep so he decided to go out and buy something to drink. (T-65-66)

As he neared the Neota Motel, Officer Gardner called out to him, "[Y]o, man, yo." (T-70, 72) The officer approached him at "a fast little trot". (T-72) He asked Mr. Bowick, "You looking, you looking". Mr. Bowick responded "Looking for what?" He thought the man was referring to a woman standing nearby. It was his belief that he was offering Mr. Bowick the services of a prostitute. Officer Gardner reached into his pocket and flashed something. He told the officer he had only $10 and was going to buy a bottle of wine. The officer told him he would give him what was in his hand for $10. Mr. Bowick testified that it was approximately $40 or $50 worth of drugs. He had not been thinking of buying drugs but the officer was offering him such a large amount for only $10 that he gave him the $10 bill. It was not his intention to buy cocaine when he went out that evening. (T-72-73, 78)

Because the area in which he lived was a high-crime area, Mr. Bowick was very nervous when the police officer approached him. As he said, "You don't just walk up to strangers over there." (T-81)

At the conclusion of Mr. Bowick's testimony the defense attorney moved for a judgment of acquittal, asking the court to consider the objective standard of entrapment. The court denied the motion. (T-83) During the jury instructions, the court read

instructions relating to the defense of entrapment. (T-102-103)

After the jury retired the state pointed out to the court that the information charged Mr. Bowick as David Bowicki, but he was also known as David Bowick. The defense attorney and Mr. Bowick informed the court that his name was Bowick. (T-110-111) The court allowed the state to amend the information to read David Bowick rather than David Bowicki. (T-111)

The jury returned with the request that they be allowed to listen to the tape in the jury room. The parties agreed that the portion of the tape relating to the transaction would be rerecorded so that the jury would not hear other portions of the tape relating to other transactions. (T-111-112) Later, the jury returned with questions regarding the defense of entrapment. The court reread the entrapment instructions to the members of the jury. (T-112)

The jury found Mr. Bowick guilty of purchasing cocaine. The court asked if the defendant wanted the jury polled. Mr. Dusseault, the defense attorney, responded in the negative. (T-115) The jury found Mr. Bowick guilty as charged of the purchase of cocaine. (R-29)

Mr. Bowick's sentencing was held on March 23, 1995. (T-166) His employer testified on his behalf. (T-168-169) He was adjudicated guilty. Judge Foster ordered him to serve five and a half years in prison. Mr. Bowick was ordered to pay court costs of $259.00, an attorney's fee of $300.00, and a fine of $1,000.00, with a surcharge of $50.00. (T-171) He was given

credit for 124 days spent in jail. (T-172) Judge Foster declared that Mr. Bowick's driver's license would be suspended for two years. (T-171) Mr. Bowick received 124 days jail credit. The court imposed a $100.00 fee "pursuant to Chapter 893". (T-172; R-34, 36-41) No restitution was ordered. (R-42)

Mr. Bowick's attorney failed to file a notice of appeal. Mr. Bowick filed a notice of appeal on his own behalf. This was dated May 5, 1994, and was filed on May 9, 1994. The district court issued an order dismissing Mr. Bowick's appeal due to lack of jurisdiction on June 9, 1994. (R-75)

On August 8, 1994, Mr. Bowick filed a motion for mitigation and reduction of sentence in the circuit court in Bay County. In its order denying the motion for mitigation and reduction of sentence, the trial court stated that Mr. Bowick's sentence became final 30 days after the sentencing on March 23, 1994. His motion to mitigate and reduce the sentence was filed on August 4, 1994. The court noted that this was more than 60 days from the time the sentence was originally imposed. The court found that it was without jurisdiction. The order notified Mr. Bowick that he had 30 days in which to appeal the order. (R-86-87)

Mr. Bowick then filed a motion for post-conviction relief in the lower court on September 5, 1994. (R-88-104) To it he attached a memorandum of law in which he alleged, among other grounds, that trial counsel failed to file a timely notice of appeal upon his request. (R-105-112)

The motion for post-conviction relief was heard by Judge

Foster on October 19, 1994. (R-113) The court was mainly concerned with Mr. Bowick's charge of ineffective assistance of counsel for failure to file a notice of appeal. (R-115) The trial counsel, Brian Dusseault, informed the court that he and Mr. Bowick discussed the possibility of an appeal prior to the trial. Mr. Dusseault did not remember talking with him after the trial regarding this matter but stated that it was possible they had discussed it. (R-116) Mr. Bowick told the court he had discussed the appeal with Mr. Dusseault after the trial. (T-117)

The court found that Mr. Bowick had received ineffective assistance of counsel in that his attorney had failed to file the notice of appeal. The court granted Mr. Bowick permission to file a belated appeal. Judge Foster appointed the office of the public defender to represent Mr. Bowick on his appeal. (R-121) Trial counsel filed a notice of appeal on Mr. Bowick's behalf on October 26, 1994. (R-125)

Petitioner appealed to the First District Court of Appeal which issued a per curiam affirmed opinion on January 29, 1996. (See Appendix A). A motion for clarification, rehearing, rehearing en banc, and/or certification was filed raising three possible questions: 1) Does Coney apply to pipeline cases; 2) must an objection be raised to preserve the Coney issue; and 3) is the state estopped from taking a position that petitioner's absence from the bench was not error? (Appendix B)

Upon rehearing another opinion was issued on April 8, 1996, granting relief in part and denying relief in part. The follow-

ing question was certified to this Court regarding the application of its decision in Coney v. State, 653 So.2d 1009 (Fla. 1995):

> 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?

(Appendix C).

A notice to invoke the discretionary review of this Court was filed on April 25, 1996(Appendix D), and the First District Court of Appeal issued its mandate in this case on April 24, 1996. (See Appendix E).

The record contains numerous documents filed in the lower court by Mr. Bowick on his own behalf. They will not be discussed here as they are not pertinent to the issue raised in this appeal.

SUMMARY OF THE ARGUMENT

The issue which is before this Court is 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 a new trial.

The reasoning of Coney is applicable here. At the very least, the law which preceded Coney, and upon which Coney was decided, mandates that Petitioner be granted the same relief.

The state conceded error in Coney, but the error was held harmless. Here, the state is estopped from arguing that what occurred here is not error.

Error has occurred, and it is not harmless, whether peremptory challenges were made or not. The challenges may not have been enough or the ones Petitioner wanted.

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 is YES, and Petitioner should be granted a new trial.

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?

Yes. Whether Coney[1] is a clarification of existing law or new law, it must be applied to pipeline cases.[2] Even if Coney is not applied to this case, the rules, case law, and Constitutional law preceding Coney must be applied in the same manner as in Coney.

A. Facts of the Case.

ISSUE I

REVERSIBLE ERROR OCCURRED IN THAT APPELLANT WAS NOT PRESENT DURING THE SELECTION OF HIS JURY.

The transcript of jury selection shows that the jury was selected during an unrecorded discussion. (T-220) No recess was declared so it is clear that the jury panel was present in the courtroom and the attorneys were at the bench with the judge. (T-220). The defense attorney and the assistant state attorney

---

[1] Coney v. State, 653 So. 2d 1009 (Fla. 1995).

[2] 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 (Alfredco) Lett v. State, Case No. 87,541, and was addressed at oral argument in Boyett v. State, Case No. 81,971.

entered into a Stipulation that Petitioner was not present when peremptory challenges were exercised and the jury selected. (See Stipulation, Volume VI)

Further, the record shows that Petitioner did not waive his right to be present. The court did not inquire whether the decisions made by his attorney were acceptable to him.

Mr. Bowick did not personally, or through counsel, object to this procedure for selecting the jury. The trial court did not specifically address this procedure with him or ask whether he desired to be present at the bench conference or waived his presence at the bench. It is clear from the transcribed record that Mr. Bowick never stated that he was waiving his right to be present during the challenging of the jury or that his counsel stated that he had waived his presence. There is no record, further, that Mr. Bowick expressly ratified or approved any of the decisions made by his attorney. The trial court made no inquiries whatsoever of Mr. Bowick regarding his knowledge of his right to be present during the challenging of jurors, regarding a waiver of his presence at that time, or regarding his approval of peremptory strikes made by defense counsel. Mr. Bowick was silent throughout the process.

The Petitioner was not present during this important conference. The record demonstrates that only counsel for the state and the defense were at the bench.

The record is entirely silent regarding whether Petitioner understood the process of jury selection and, in particular, un-

derstood 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.

B. 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, impanelling, 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 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. 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 Mr. Bowick'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.

B1. Only A Portion of the Language of Coney Appears to Be "Prospective," and That 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 portion of Coney is the requirement 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 First District Court of Appeal apparently believe that the defendant's right to be present at bench conferences where peremptory challenges are exercised is also a prospective rule. This is not so, and is refuted by this Court's reasoning in Coney.

This Court wrote that Fla. R. Crim. P. 3.180 (a) meant what it says and has always said: a defendant has the right to be present at the immediate location where juror challenges are being made. See, Francis v. State, 413 So.2d 1175 (Fla. 1982). The state conceded error in Coney because the defendant was not present at a bench conference where juror challenges were made

and the record was silent as to waiver or ratification. Coney, at 1013. SURELY, THE STATE WOULD NOT CONCEDE ERROR BASED ON A RULE YET TO BE ANNOUNCED!

Thus, the RIGHT to be present at the bench during the actual selection process pre-existed Coney, and the only "prospective" portion of the opinion was the requirement placed on trial courts that they inquire whether the defendant wishes to be present or waives the right and, in the event of a waiver, certify that the waiver is knowing and voluntary and the defendant ratifies the decisions made by his attorney ON THE RECORD.

B2. State Estopped from Arguing Lack of Error.

The State of Florida is estopped from arguing that Petitioner'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 presence or ratified the strikes. The State concedes this rule violation was error, but claims that it was harmless.

Coney, at 1013. The case was then decided adversely to Coney on the basis of harmless error because only challenges for cause[3] were made in his absence. Ibid.

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

C. 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 principles.

C1. Coney as a Clarification of Existing Law.

Both a Florida Rule of Criminal Procedure and the due process clauses of the state and federal Constitutions provide that a criminal defendant has the right to be present during any "critical" or "essential" stage of trial. See Fla. R. Crim. P. 3.180; Faretta v. California, 422 U.S. 806, 819 n.5, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Francis v. State, 413 So.2d 1175, 1177 (Fla. 1982).

Although Mr. Bowick was present in the courtroom, as was Coney, he was not physically present at the sidebar. Inferentially, Bowick could no more hear what was happening at the bench

[3] Elsewhere in this brief, Petitioner addresses whether Coney applies even without peremptory challenges having been exercised.

than the jury which was also present in the courtroom. Thus, Bowick 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.

C1-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; . . .

C1-b. Case law.

In Turner v. State, 530 So. 2d 45, 47-49 (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).

(Emphasis added)

Nothing in the record demonstrates that Petitioner knew that he had the right to be physically present and to meaningfully participate in this critical function during his trial. Petitioner's involuntary absence thwarted the fundamental fairness of the proceedings. It was a clear violation of Rule 3.180(a)(4), Fla. R. Crim. P.

More recently this Court revisited the same issue in Coney v. State, 653 So. 2d 1009 (Fla. 1995). The Court said:

> 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.(Emphasis added)

This Court has repeatedly recognized that jury selection -- at least that portion of voir dire when counsel exercise their peremptory challenges -- is a "critical" stage of the trial, at which time a criminal defendant's fundamental right to be present has fully attached. See e.g., Francis, 413 So.2d at 1177-78; Chandler v. State, 534 So.2d 701, 704 (Fla. 1988).

Numerous decisions of both this Court and the U.S. Supreme Court have 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*, Sect. 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 defen-dant'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").

C1-c. Plain Language in Coney Indicates That it Is Not New Law.

In Coney, this Court indicated that it relied on the plain language of Rule 3.180 to reach its result. Thus, if the rule already existed, it is NOT a "new rule."

> We conclude that the rule means just what it says: The defendant has a

> right to be physically present at the immediate site where pretrial juror challenges are exercised.

Id. at 1013. (Emphasis added)

Where an appellate court's decision is based on the plain language of a statute, the court does not announce a new rule. See Murray v. State, 803 P.2d 225, 227 (Nev. 1990). Furthermore, where 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). The same is true here. The rule was in effect prior to Coney.

This Court's decision in Coney was based on Fla. R. Crim. P. 3.180, Francis, and Turner. It was not "new law," but simply explained that the Rule meant what it said. But what is "new law?"

C1-d. "New" Rule or Law Defined.

The right to be present at all critical stages of trial includes the right to be present at a sidebar conference for jury selection as much as it does being totally absent from the courtroom during jury selection.

> To determine what counts as a new rule,... courts [must] ask whether the rule [that a defendant] seeks can be meaningfully distinguished from that established by [prior] prece-dent.... If a proffered factual dis-tinction between the case under con-sideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not mean-ingful, 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 Blackmum & 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 the 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) which continued to refer to a new rule as a "clear break" with prior precedent.

C1-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 requirement was a "clear break" with the past. Johnson; Griffith. Florida courts had previously applied the right to be present in the context of bench conferences at which jury selection occurred. See Jones v. State, 569 So.2d 1234, 1237 (Fla. 1990); Smith v. State, 476 So. 2d 748 (Fla. 3rd DCA 1985); cf. Lane v. State, 459 So. 2d 1145, 1146 (Fla. 3rd DCA 1984) (defendant present in court room, but excluded from proceedings where peremptories were exercised in hallway "due to the small

size of the courtroom"). In Coney itself, the state conceded that Coney's right to be present was violated by his absence from the bench conference. (Id. at 1013)

C1-f. "On-the-record" Requirement Announced in Coney Is Not New Law. Waiver by Silence Is Not Allowed Where Fundamental Rights Are Involved.

In Florida, this Court has repeatedly held that a defendant's waiver of the small class of "fundamental" rights can only be accomplished by a personal, 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).

Additionally, this Court has "strongly recommend[ed] that the trial judge personally inquire of the defendant when a waiver [of the right to be present] is required." Ferry v. State, 507 So.2d 1373, 1375-76 (Fla. 1987); See also Amazon v. State, 487 So.2d 8, 11 n.1 (Fla. 1986) ("experience teaches that it is the better procedure for the trial court to make an inquiry of the defendant and to have such waiver [of the right to be present] appear [on the] record"); Mack v. State, 537 So.2d 109, 110 (Fla. 1989) (Grimes, J., concurring)("It is impractical and unnecessary to require an on-the-record waiver by the defendant to anything but those rights which go to the very heart of the adversary process, such as the right ... to be present at a critical stage in the proceeding.")

Courts in other jurisdictions have also required on-the-record waivers. 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 done in compliance with the constitutional axiom that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that [courts] do not presume acquiescence in the loss of fundamental rights." Carnley v. Cochran, 369 U.S. 506, 514, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962) (citing Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938)).

C2. Coney as New Law.

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[4] 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

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

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).

Other state appellate courts have also held that when a state court "new rule" is not solely based on state law, or if it implicates the federal Constitution, the rule must be applied to all cases pending on direct appeal at the time the new rule is announced. See People v. Mitchell, 606 N.E.2d 1381, 1383-1384, (N.Y. 1992); People v. Murtishaw, 773 P.2d 172, 178-179 (Cal. 1989) (federal retroactivity doctrine applies where new rule of criminal procedure announced by state court is not based solely on state law).

Clearly, Coney is based in part on the U.S. Constitution in

addition to Fla. R. Crim. P. 3.180. Consider in the plain language of Coney, and in Turner and Francis which Coney follows, the references 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 man-dated. [citing Francis, at 1177]

Coney, 653 So. 2d at 1013. (Emphasis added)

In 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).
>
> * * *
>
> 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, 47-49. (Emphasis added)

Furthermore, the procedural requirement of an on-the-record, personal waiver 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 "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 Fifth and Fourteenth Amendments of the United States Constitution require this Court to give Coney, retroactive application to Petitioner's direct appeal.

Even if Coney was based only on state law, which it clearly is not, the provisions of the Florida Constitution would require that this Court apply the decision retroactively to Petitioner's appeal. Article I, Sections 2, 9, and 21, Florida Constitution. 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)[5], this Court agreed with "the principles of fairness and equal treatment underlying Griffith," and adopted the same bright-line law as in

---

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

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

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.

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.

C3. Relief Is Mandated by the Law in Existence Before Coney.

Even in the absence of the application of the "on-the-record" language in Coney, Turner and Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982), require reversal. "[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." Coney, citing Francis.

Thus, the rule meant what it says prior to Coney. 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.

It is not known, and it is impossible to now determine, what input Mr. Bowick might have provided to counsel regarding the exercise of peremptory challenges at the sidebar as the process proceeded. However, Bowick's absence was clearly error given the strict construction required of Rule 3.180(a)(4).

Prior to Coney, a defendant could personally waive his right

to be present prior to leaving the courtroom, such waiver being accomplished through personal questioning by the trial Court. See Chandler v. State, 534 So.2d 701, 704 (Fla. 1988). Defendant's presence could also be waived by counsel -- provided that the defendant subsequently ratified or acquiesced in the counsel's waiver on the record -- if said waiver were made knowingly, voluntarily, and intelligently. State v. Melendez, 244 So.2d 137, 139 (Fla. 1971). Furthermore, a defendant could effectively waive his right to be present through 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 or ratified any waiver by counsel. He also did not engage in any misconduct which could have been considered a 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.[6]

D. Coney or Pre-Coney, the Law must Be Applied to this Case Irrespective of Whether Peremptory Challenges Were Made.

Common sense dictates that the right to be present at jury selection would be meaningless if it was 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, peremp-

[6] Again, the state is estopped from arguing that his absence was not error. Infra

tory 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, but also where counsel fails to exercise peremptory challenges.

Petitioner may have had contemporaneous input to make to counsel as to the exercise of his peremptory challenges -- because they are often exercised arbitrarily and capriciously, for real or imagined partiality, often on sudden impressions and unaccountable prejudices based only on bare looks or gestures. Francis, 413 So. 2d at 1176. Thus, the very concept of peremptory challenges implies constant input from the defendant.

The process of the exercise of peremptory challenges by both sides is a dynamic process, and results in a rapidly and ever-changing face of the jury. This depends upon which individuals have been struck and which party 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 to not strike an objectionable juror, leaving that person on the jury, rather than to exercise the final challenge which would result in the seating of 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 where counsel consults with the defendant prior to the sidebar, and perhaps even again during the process, that itself is not sufficient. If the defendant was present and contemporaneously aware of how the situation was developing, he might have expressed additional or other preferences. He might 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 prefer. Again, peremptory challenges are often made on 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 intention-

ally sacrifice a playing piece (exercise a strike) simply to force a move which is advantageous to him or disadvantageous to the opponent. A defendant's input regarding this cannot be made until the situation actively develops 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 when it can be made contemporaneously with developments during the on-going challenging process.

E. Petitioner Did Not Waive His Right.

Nothing Mr. Bowick 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 discussed 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. In addressing a similar waiver, that of speedy trial, the 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." [Cite omitted]. Courts should "indulge every reasonable presumption against waiver," [Cite omitted] and they should not presume acquiescence in the loss of fundamental rights." [Cite omitted]. In Carnley v. Cochran, 369 US 506, 8 L Ed 2d 70, 82 S Ct 884 (1962), we held:
>
> > 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.
>
> The Court has ruled similarly with respect to waiver of other rights designed to protect the accused. [Cites 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 stage of trial. Francis. Petitioner's right to be physically present so 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", [7]that Mr. Bowick's absence at this critical stage 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 Mr. Bowick knew he had the right to be present, so that he knew he might be required to object to the procedure employed or to his absence.

F. 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

---

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

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. This is particularly true 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 to allow waiver by silence.

G. The Burden Is on the State to Prove the Error Harmless.

Petitioner's absence from the bench when, as here, he could have influenced the process, may be considered harmful *per se*. 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 plain and simple error for the Petitioner not to be present at the bench. 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)).

H. Analysis of Prejudice.

As discussed 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 to the question of the prejudice flowing from the involuntary absence of a 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 harm-less. 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 chal-lenges were exercised. Accordingly, we conclude that his involuntary absence without waiver by consent or subsequent ratification was reversi-ble error and that Francis is entit-led to a new trial.

Francis, 1176-1179.

There was error and there was prejudice. Thus, the Petitioner is entitled to a new trial, regardless of whether properly admitted evidence was sufficient to support the jury verdict, because the Court cannot say beyond a reasonable doubt that this error did not affect the fairness of the trial. Since this Court is unable to assess the extent of prejudice sustained by Mr. Bowick'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, this Court must reverse Petitioner's conviction and sentence and remand for a new trial.

CONCLUSION

The certified question posed by the 1st District Court of Appeal must be answered in the affirmative. The logic used in Coney must be applied to "pipeline cases" such as this one.

Based on the law and facts above, Petitioner, David Bowick, respectfully requests this Court to reverse his conviction and sentence, remand for a new trial, and grant all other relief which this Court deems just and equitable.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief on the Merits has been furnished by delivery to Carolyn Mosley, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, Florida; and a copy as been mailed to Petitioner, on this 21st day of May, 1996.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

Terry Carley

TERRY CARLEY
Assistant Public Defender
Florida Bar No. 295701
Leon County Courthouse
Suite 401
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

DAVID BOWICK,

Petitioner,

v.

CASE NO. 87,826

STATE OF FLORIDA,

Respondent.

_____/

A P P E N D I X

TO

PETITIONER'S BRIEF ON THE MERITS

IN THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT, STATE OF FLORIDA

DAVID BOWICKI,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 94-3666

Opinion filed January 29, 1996.

An appeal from the Circuit Court for Bay County.
Clinton E. Foster, Judge.

Nancy A. Daniels, Public Defender; Terry Carley, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Carolyn J. Mosley, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED.

MINER, WEBSTER and MICKLE, JJ., CONCUR.

JAN 29 1996

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

DAVID BOWICK,

Appellant,

v. CASE NO. 94-3666

STATE OF FLORIDA,

Appellee.

_____/

MOTION FOR CLARIFICATION, REHEARING, REHEARING EN BANC, AND/OR CERTIFICATION

APPELLANT, David Bowick, through his undersigned counsel, hereby respectfully requests this Court to clarify its decision, to rehear its decision under Fla. R. App. P. 9.330 and / or 9.331, and/or to certify a question presented herein to the Supreme Court of Florida under Fla. R. App. P. 9.030 (a) (2) (A) (v and vi), and in support of these motions states as follows:

I.

This Court's per curiam opinion of January 29, 1996, affirms appellant's judgment and sentence for purchase of cocaine. Although the Court did not write an opinion in Mr. Bowick's case, it would appear that the Court denied him a new trial under Coney v. State, 653 So. 2d 1009 (Fla. 1995), since that fact that Mr. Bowick was not present at the bench when his jury was selected was raised as the only dispositive issue in this appeal. In its recent opinion in Alfredco Lett v. State, Case Number 94-4211, dated January 23, 1996, this Court indicated that Coney holds that the defendant's right to be physically present at the immediate site where pretrial juror challenges are exercised is limited to "prospective application". The Court went on to write, "Thus, the Coney ruling does not apply to cases, such as the instant case, that were in the 'pipeline' at the time Coney was decided." (Lett opinion, page 2). Although it appears that this Court relied upon this interpretation of Coney in denying Mr. Bowick a new trial, this is not stated in the opinion. For this reason, it would be helpful to all of the parties for the Court to

clarify its decision and the basis therefor by issuing a written opinion. Mr. Bowick respectfully requests that the Court do so. Caselaw shows that a motion for rehearing can be filed after the issuance of a per curiam affirmed decision, without opinion. Gilmore v. State, 602 So. 2d 578 (Fla. 1st DCA 1992); Sinkfield v. State, 592 So. 2d 322 (Fla. 1st DCA 1992); Green v. State, 539 So. 2d 484 (Fla. 1st DCA 1988).

II.

This Court appears to have overlooked and or misapprehended the reasoning, holding, and applicability of Coney under the Constitutions of the United States and Florida, and cases of the Florida Supreme Court which hold that despite the "prospective" language, such holdings as this must be applied to "pipeline" cases. This case is such a pipeline case. Mr. Bowick's trial was held on March 1, 1994. The notice of appeal was filed on October 26, 1994.

First, the state should be estopped from arguing that Mr. Bowick'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 of Florida conceded error. Id. at 1013. The state cannot assert otherwise in this case without offending Mr. Bowick's right to equal protection of the laws. 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). The Florida Supreme Court in Coney noted 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 presence or ratified the strikes. The State concedes that this rule violation was error, but claims that it was harmless.

Coney, at 1013. 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. Mr. Bowick is asking this Court to apply the same analysis that the Supreme Court used in deciding Coney to his case in which peremptories were exercised.

Second, a dispute exists as to what portion of the Coney decision is prospective. Mr. Bowick's position is that the entire Coney decision should apply to him since his case was on

appeal at the time Coney was decided. Art. I, Secs. 9 and 16 Fla. Constitution; Amends. V and XIV, U.S. Constitution; Smith v. State, 598 So.2d 1063 (Fla. 1992). The only prospective part of Coney is the requirement 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 in the defendant's absence. However, the state and this Court perceive that defendant's right to be present at bench conferences where peremptory challenges are exercised is also a prospective rule. This is not so, and it is refuted by the Supreme Court's reasoning in Coney.

On whether the defendant had the right to be at a bench conference where peremptory challenges were made, the Florida Supreme Court said Fla. R. Crim. P. 3.180 (a) meant what it says, and has always said, that a defendant has the right to be present at the immediate location where juror challenges are made. See, Francis v. State, 413 So.2d 1175 (Fla. 1982). The state conceded error in Coney because the defendant was not present at a bench conference where juror challenges were made and the record was silent as to waiver or ratification. Coney, 653 So.2d at 1013. Surely, the state did not concede error based on a rule yet to be announced.

The decision in Coney was controlled by precedent existing before Coney came to court. Mr. Bowick is entitled to a new trial on the same law applied in Coney without regard to the prospective certification requirement announced in the Coney decision. In other cases where the Supreme Court has established new procedural rules to be applied prospectively, the error in the case was evaluated in accordance with the pre-existing law. E.g., Valentine v. State, 616 so.2d 971 (Fla. 1993); State v. Johans, 613 So.2d 1319 (Fla. 1993); Elam v. State, 636 So.2d 1312 (Fla. 1994); Koon v. Dugger, 619 So. 2d 246 (Fla. 1993); Jackson v. Dugger, 633 So.2d 1051 (Fla. 1993); Huff v. State, 622 So.2d 982 (Fla. 1993). Similarly, Mr. Bowick is simply asking this Court to apply the law which was in existence before the Coney decision.

The prospective rule established in Coney concerning certification on the record of a waiver or ratification of counsel's actions was not applied in Coney. This court need not apply that rule here in order to reverse Mr. Bowick's conviction.

III.

Appellant further moves this Court for rehearing en banc in this matter as this case is of exceptional importance and that such consideration is necessary to maintain uniformity in the Court's decisions. Fla. R. App. P. 9.331 (c)(1). This case involves the application of the laws of the Supreme Court of Florida to the various Districts, specifically the interpretation of the meaning of the word "prospective" as used in Coney.

Equally important, however, is the necessity of uniformity in this Court's decisions. Many cases pending before this Court include issues concerning the application of Coney either as a pipeline case, or post Coney decision. Other similar cases rely on the law prior to the Coney decision.. Those cases immediately known to undersigned counsel are:

Case name	DCA Case Number	Notes
Bowicki v. State,	94-3666	PCA 1-29-96
Wm. Roger Brown v. State,	94-4331	Post Coney
Theodoris Bryant v. State,	94-3691	Pipeline
Jeff Butler III. V. State,	95-1146	Post Coney
Frank Greeson v. State,	95-4069	Pipeline - PCA'd 12-7-95, Rehearing denied 1-11-96.
Horn v. State,	95-58	Pipeline
Alfredco Lett v. State	94-4211	Pipeline
Martinez v. State,	94-2951	Pipeline
Rickie Mathis v. State,	94-2464	
Rickie Mathis v. State,	94-2465	
Carlos Mejia v. State,	95-1182	Post Coney I
Mary Page v. State,	95-454	
Raul Rafael v. State,	94-3887	Pipeline
Lisa Vann v. State,	95-1227	Post Coney

This Court is undoubtably aware that the circuit courts, acting as appellate courts to the county courts are also faced with this issue. Consider that undersigned counsel is aware of the fol-lowing cases in the 2nd Judicial Circuit which raise the issue in question:

Tommy Roebuck v. State,	Circuit Case 94-5220	Pipeline
Johnnie Wilson v. State,	Circuit Case 95-5894	Pipeline

Furthermore, this same issue is before the Florida Supreme Court in the case of Matthew Dale Boyett v. State, Case No. 81,971. Undersigned counsel gratefully acknowledges that she borrowed the majority of the argument above, from Mr. Boyett's reply brief filed February 2, 1996.

The above cases were found with only a cursory inquiry by undersigned counsel. Yet, with even this many cases raising the issue of the application of Coney, pipeline, or pre-Coney law, it is readily apparent that in order to maintain uniformity in the courts's decisions, rehearing en banc is appropriate and necessary. Thus, Mr. Bowick requests a rehearing en banc under Fla. R. App. P. 9.331 because he believes that the panel decision is of exceptional importance. In so requesting, undersigned makes the following representation:

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

/s/ Terry Carley
Terry Carley
Assistant Public Defender

IV.

Alternatively, because appellant also believes there is a lack of uniformity in the Court's decisions as shown by the Per Curium Affirmance in at least three cases already, appearing to be in direct conflict with the law as espoused in State v. Pitts, 249 So.2d 47, 48-50 (Fla. 1st DCA 1971) and Smith v. State, 598 So.2d 1063 (Fla. 1992), he requests rehearing en banc as to the

application of Coney and pre-Coney law to pre-Coney and "pipeline" cases. In so requesting, undersigned counsel makes the following representation:

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of this court and that a consideration by the full court is necessary to maintain uniformity of decision in this court: 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), and Smith v. State, 598 So.2d 1063 (Fla. 1992) (ruling to be applied retrospectively to every case pending on direct review or not yet final).

/s/ Terry Carley
Terry Carley
Assistant Public Defender

V.

In conjunction with the above, or in the alternative, Mr. Bowick moves this Court to certify the following questions to the Supreme Court for clarification as questions of great importance. Since the Supreme Court has before it the issue in Boyett v. State, Case No. 81,971, as noted above, it seems most appropriate that it applies its reasoning to all other similarly situated cases.

Much of the argument concerning this issue involves two particular parts of the Supreme Court's holding in Coney. First is the question of "prospective" application of the holding in Coney (at 1013) which the state and this Court have taken to imply from the date of the Supreme Court's decision forward. This, however, is in direct conflict with Smith v. State, 598 So.2d 1063 (Fla. 1992), where the Florida Supreme Court, being "troubled by the inconsistency or lack of clarity in various decisions of [the Supreme Court, itself] and others concerning the application of the prospectivity rule." held:

> [A]ny decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final. Art. I, sect's 9, 16 Fla. Const. [Footnote omitted] To benefit

> from the change in law, the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review. [Citations omitted]

Id. at 1066.

The second question involving the application of Coney revolves around whether the appellant must object at the trial level to preserve the issue. The state has argued that it is necessary and this Court has not taken a position on the question as yet. However, the Supreme Court noted that to benefit from a **change** in law, the defendant must have timely objected at trial, but Coney is **not** a change in law. The Court was explicit that it was simply explaining that Fla. R. Crim. P. 3.180 "means just what it says," Id. at 1013, and that it based its reasoning in Coney on a case that was over ten years old -- Francis v. State, 413 So.2d 1175 (Fla, 1982).

Thus, two questions are raised:

> 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?
>
> AND
>
> MUST AN OBJECTION HAVE BEEN RAISED AT TRIAL TO PRESERVE THE ISSUE OF THE DEFENDANT'S RIGHT TO BE PHYSICALLY PRESENT AT THE IMMEDIATE SITE WHERE PRETRIAL JUROR CHALLENGES ARE EXERCISED?

Furthermore, given the state's concession of error in Coney, at 1013, the following certified question appears to be appropriate and necessary:

> IS THE STATE OF FLORIDA ESTOPPED FROM TAKING A POSITION CONTRARY TO ITS CONTENTION IN CONEY V. STATE, 635 So.2d 1009, 1013 (Fla. 1995), THAT THE DEFENDANT'S ABSENCE FROM THE IMMEDIATE SITE WHERE PEREMPTORY CHALLENGES ARE EXERCISED VIOLATES FLA.R.CRIM.P. 3.180?

WHEREFORE, appellant, David Bowick, respectfully requests this Court, for the reasons stated above, to grant this motion and clarify its per curiam affirmed decision, rehear this

appeal, rehear it en banc, and/or certify to the Florida Supreme Court the questions raised herein as questions of great public importance.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Carolyn Mosley, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Mr. David Bowick, on this 13th day of February, 1996.

Respectfully submitted,

TERRY CARLEY
ASSISTANT PUBLIC DEFENDER
ATTORNEY FOR APPELLANT
FLORIDA BAR NO. 295701

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

IN THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT, STATE OF FLORIDA

DAVID BOWICK,

Appellant,

CASE NO. 94-3666

v.

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed April 8, 1996.

An appeal from the Circuit Court for Bay County.
Clinton E. Foster, Judge.

Nancy A. Daniels, Public Defender; Terry Carley, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Carolyn J. Mosley, Assistant Attorney General, Tallahassee, for Appellee.

ON MOTION FOR REHEARING

PER CURIAM.

This direct criminal appeal was affirmed without opinion. Appellant has now filed a motion for clarification, rehearing, rehearing en banc and/or certification. He asserts that he is entitled to a new trial because, though present in the courtroom during jury selection,

he was not present at the bench when peremptory challenges were exercised, and there is no evidence that he waived his right to be present. We affirm. Lett v. State, Case No. 94-4211 (Fla. 1st DCA Mar. 5, 1996) (on rehearing). However, we grant the request for certification, and certify to the supreme court the same question certified on rehearing in Lett:

> 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?

In all other respects, appellant's motion is denied. Appellant's judgment and sentence are affirmed.

AFFIRMED.

MINER, WEBSTER and MICKLE, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

DAVID BOWICK,

Appellant/Petitioner,

v. CASE NO. 94-3666

STATE OF FLORIDA,

Appellee/Respondent.

_____/

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that DAVID BOWICK, Petitioner, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered April 8, 1996. This decision passes upon a question certified to be of great public importance, and/or it expressly and directly conflicts with the decision of another District Court of Appeal or of the Supreme Court on the same question of law.

Respectfully Submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

TERRY CARLEY
Fla. Bar No. 295701
Assistant Public Defender
Leon County Courthouse
301 S. Monroe, Suite 401
Tallahassee, FL 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, this 25th day of April, 1996.

TERRY CARLEY