IN THE SUPREME COURT OF
FLORIDA

DINO HOWARD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 87,856

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
BUREAU CHIEF - CRIMINAL APPEALS
FLORIDA BAR NO. 0325791

WILLIAM J. BAKSTRAN
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0443832

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

TABLE OF CITATIONS

(Continued)

TABLE OF CITATIONS

(Continued)

TABLE OF CITATIONS

(Continued)

CASES — PAGE(S)

TABLE OF CITATIONS

(Continued)

IN THE SUPREME COURT OF FLORIDA

DINO HOWARD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 87,856

PRELIMINARY STATEMENT

Petitioner, DINO HOWARD, defendant/appellant below, will be referred to herein as "the Petitioner." Respondent, the State of Florida, prosecuting authority/appellee below, will be referred to herein as "the State." References to the record on appeal will be by the use of the letter "R" followed by the appropriate page number(s) in parentheses. References to the transcript of proceedings will be by the use of the letter "T" followed by the appropriate page number(s) in parentheses. References to the Petitioner's initial brief will be by the use of the letters "IB" followed by the appropriate page number(s) in parentheses. References to the district court's opinion below, which is attached hereto as an appendix, will be by the use of the letter "A" followed by the appropriate page number(s) in parentheses.

STATEMENT OF THE CASE

The State accepts the Petitioner's statement of the case, which is an appeal of the judgment and sentence of the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, the Honorable R. Hudson Oliff, Circuit Judge, presiding in Case No. 94-2072 CF. Specifically, the Petitioner is seeking discretionary review of the certified question of the district court of appeal. Also, the Petitioner is seeking review of the trial court's denial of his motion for continuance as well as the trial court's refusal to give a requested jury instruction, even though the district court affirmed on these issues without written opinion.

STATEMENT OF THE FACTS

The Appellant's statement of the facts is essentially accurate and supported by the record.

SUMMARY OF ARGUMENT

ISSUE I:

The question certified by the district court has already been answered and does not rise to the level of a question of great public importance. Thus, discretionary review should be denied. The Court should also decline review because the Petitioner is not a member of the pipeline class who could benefit from an affirmative answer to the certified question, as he did not raise the issue at trial.

Moreover, if this Court determines it should answer the certified question, the State urges it to answer it in the negative. The question should be answered in the negative because the issue has been decided, because this Court has the authority to make its decisions prospective, and because modifications of rules of procedure are appropriately prospective only. Furthermore, because the record demonstrates that the trial court allowed defense counsel to confer with the Petitioner during the sidebar conference and also demonstrates that the Petitioner not only acquiesced in the peremptory strikes, but also ratified the final jury, there was no reversible error resulting from the defense counsel's exercising peremptory strikes at sidebar while the Petitioner was seated only five or six feet away.

ISSUE II:

Because the trial court's ruling denying the Petitioner's motion for continuance to locate potential defense witnesses was not an abuse of discretion, it should be affirmed. Moreover, it was not the State's fault the Petitioner was having difficulty locating potential witnesses. Nor was it the State's fault the Petitioner had waited several months to follow up on investigatory leads.

ISSUE III:

The trial court did not abuse its discretion in refusing to give the Petitioner's requested jury instruction regarding accomplice testimony because such an instruction was inconsistent with the Petitioner's theory of defense and there was absolutely no evidence adduced at trial which would support the giving of an instruction on accomplice testimony.

ARGUMENT

ISSUE I

Certified Question

DOES THE DECISION IN CONEY APPLY TO "PIPELINE CASES," I.E., 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?

Jurisdiction

Because the First District Court of Appeal has certified the foregoing question, this Court has discretionary jurisdiction in this appeal. Art. V, § 3(b)(4), Fla. Const.

Exercise of Jurisdiction

While this Court has jurisdiction to answer the certified question, it also has the discretion to decline to do so. State v. Burgess, 326 So. 2d 441, (Fla. 1976). In order to avoid a waste of judicial time and energy, the State urges this Court to exercise its discretion and decline to review this case. Coffin v. State, 374 So. 2d 504, 508 (Fla. 1979).

The certified question is the same as that certified in Lett v. State, 21 Fla. L. Weekly D580 (Fla. 1st DCA March 5, 1996). As in Lett, the certified question improperly asks this Court to conduct

a rehearing of its decision in Coney v. State, 653 So. 2d 1009 (Fla. 1995). In Coney, this Court construed Florida Rule of Criminal Procedure 3.180(a)(4) to mean that a defendant has the right to be physically present at the immediate site where pretrial juror challenges are exercised. However, this Court added that its ruling in Coney was prospective only. Id. at 1013. Again, as in Lett, the district court acknowledged that it understood the meaning of the language in Coney, i.e., that "prospective only" means the decision does not apply to cases tried prior to its issuance. Nevertheless, the district court certified the question. (A 2). The basis of the district court's decision to certify appears to be the same as in Lett, i.e., its concern over a misperceived difficulty in reconciling Coney with this Court's decision in Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992), wherein this Court held that any decision it makes 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. The district court's perception that an issue remains to be resolved is erroneous. Subsequent to Smith, this Court decided Wuornos v. State, 644 So. 2d 1000 (Fla. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1705, 131 L. Ed. 2d

566 (1995), wherein it explained that Smith should be 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." Id. at 1008 n.4. See, also, Domberg v. State, 661 So. 2d 285, 287 (Fla. 1995). Thus, the issue of how Smith is to be read has already been decided. Since the issue presented by the certified question has been put to rest by recent decisions of this Court, it cannot be said that the certified question is one of any public importance. Consequently, to avoid a waste of judicial time and energy, this Court should decline to exercise its jurisdiction to answer the already decided question presented by this case.

Another reason this Court should decline to exercise jurisdiction here is that the issue was never preserved for appellate review. As this Court said in Smith, "[t]o 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." Smith, 598 So. 2d at 1066.[1] Thus, issues relating to a

---

[1] The State notes that an objection is required to preserve Coney issues for appellate review. This point is the only reasonable inference to be drawn from the fact that it was only in the original version of Coney that the following appeared:

> Obviously, no contemporaneous objection by

defendant's presence during jury voir dire (as with other jury voir dire issues) must be preserved in the trial court by contemporaneous objection. Gibson v. State, 661 So. 2d 288 (Fla. 1995). The Gibson case presented this Court on appeal with the following issue:

> 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 assistance of counsel by denying defense counsel's request to consult with Gibson before exercising peremptory challenges.

This Court specifically held that:

> In Steinhorst 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 of the general purpose of

---

> 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.

Coney v. State, 20 Fla. L. Weekly S16, S17 (Fla. January 5, 1995). However, this sentence was deleted in the Court's revised opinion published on April 27, 1995, at S255-S258, which constitutes the final official version of the opinion. See, Coney v. State, 653 So. 2d 1009, 1013 (Fla. 1995).

> 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).

Gibson at 290-91.

Thus, Gibson's attempt to raise for the first time on appeal a Coney issue was rejected because it was not properly preserved. This rule of law operates independently of Coney and will apply even to cases where the trial takes place after Coney was issued.

In this case, as in Gibson, the Petitioner did not object at the trial level. Thus, the issue is not preserved. In contrast to Gibson, the record in this case shows that the trial court specifically noted, "the defendant is seated within five or six feet from side-bar so he can confer with the defense attorney during the course of the jury selection process." (T 117)(emphasis supplied). Also, after making two peremptory strikes, defense counsel conferred with the Petitioner and then advised the trial court, "We'll take them." (T 120)(emphasis supplied).[2] Thus, the

---

[2]Defense counsel's use of the first-person plural pronoun "we'll" clearly incorporates the client,especially in light of the fact that during the sidebar conference, defense counsel had twice conferred with the Petitioner (T 120, 121). This conclusion is supported by the following exchange which occurred in

State submits that rather than having raised an objection, the Petitioner affirmatively waived any objection he might have had regarding the exercise of peremptory challenges.

This Court should discourage the promiscuous certification of irrelevant questions by declining to exercise its discretionary jurisdiction and by instructing the district courts that unpreserved claims cannot be the basis for "an issue of great public importance." Misapplication of the designation "this is an issue of great public importance" when the issue certified could not provide the defendant with relief is all too common. In fact, this "Coney" issue has been repeatedly certified by the lower tribunal in cases which do not contain any objection to the trial court procedure. See, Gainer v. State, No. 87,720; Branch v. State, No. 87,717; Bell v. State, No. 87,716; Lett v. State, No.

---

open court:

> THE COURT: Miss Starrett, in behalf of the State, Mr. Buzzell, in behalf of the defense, do you accept as the jury: Whitacre, Jones, L, Brown, P, Sampson, Mames, Rohrbaugh, as the jury, and the first alternate Miller, and the second alternate Mathis?
>
> MS. STARRETT: The State so accepts.
>
> MR. BUZZELL: We accept, Your Honor.

(T 122) (emphasis supplied).

87,541; Lee v. State, No. 87,715; Horn v. State, No. 87,789. Continuation of this practice should be discouraged.

Merits

This Court, if it exercises discretionary review, should answer the certified question in the negative.

This Court specifically answered the question of how its decisions are to be applied in, e.g., Wuornos v. State, 644 So. 2d 1000 (Fla. 1994), where this Court addressed the proper reading of Smith and held that Smith means 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 Court noted that it had repeatedly held that it had the authority to make new rules prospective and cited a series of cases in which it had dictated that the new rule was to be prospective only.

The Petitioner makes a two-fold argument to support his position. First, he argues that Coney did not announce a new rule of law but rather simply clarified the existing law consisting of: Rule 3.180(a)(4); Turner v. State, 530 So. 2d 45 (Fla. 1987), cert. denied, 489 U.S. 1040, 109 S. Ct. 1175, 103 L. Ed. 2d 237 (1989); and Francis v. State, 413 So. 2d 1175 (Fla. 1982), cert. denied, 474 U.S. 1094, 106 S. Ct. 870, 88 L. Ed. 2d 908 (1986). (IB 22).

The Petitioner does not explain the point of this part of his argument nor does he show how it leads to his conclusion that the judgments and sentences entered below should be vacated and the case remanded for new trial.[3] Presumably, the Petitioner means to imply that this Court should find reversible error based upon the rule, Turner and Francis, as "clarified" by Coney. The State respectfully disagrees.

Rule 3.180(a)(4) requires that the defendant in a criminal prosecution to be present "at the beginning of the trial during examination, challenging, impaneling, and swearing of the jury[.]" In Francis, prospective jurors were examined in the courtroom in the defendant's presence, but peremptory strikes were exercised either in the courtroom, while the defendant was in the bathroom, or in the jury room while the defendant was in the courtroom. No waiver or ratification appeared on the record. At a post-trial evidentiary hearing, the defendant testified that he had wanted to

---

[3] Clearly, his point is wrong *ab initio*. The obvious reason this Court made its ruling in Coney "prospective only"was that its interpretation of Florida Rule of Criminal Procedure 3.180(a)(4) constituted a radical departure from the judicial norm. As stated by Justice Overton in his separate opinion, "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." Coney, 653 So. 2d at 1016 (Overton, J., concurring in result only).

be present and did not consent to his absence. A new trial was granted because this Court was "unable to assess the extent of prejudice, if any, Francis sustained by not being present to consult with his counsel during the time his peremptory challenges were exercised." Francis, 413 So. 2d at 1179. In Turner, the defendant was not present in the judge's chambers when juror challenges were exercised. Turner, 530 So. 2d at 47. He neither waived his presence there nor subsequently ratified the strikes. This was error, but it was harmless based on facts developed at an evidentiary hearing:

> Clearly, Turner had an opportunity to participate in choosing which jurors would be stricken from the panel. He could have offered no further assistance during counsel's actual exercise of the peremptories. Nor could he assist counsel in the presentation of the legal arguments supporting the requested challenges for cause. Turner's involuntary absence did not thwart the fundamental fairness of the proceedings, and, therefore, was harmless.

Turner, 530 So. 2d at 49-50.

In Coney, the defendant was not present at a bench conference when jurors were challenged for cause based on their views about the death penalty. The Florida Supreme Court held that Coney had a right to be present at the sidebar conference. Construing Rule 3.180(a)(4), the Court stated:

> We conclude that the rule means what it says: The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised. See Francis. Where this is impractical, such as where a bench conference is required, the defendant can waive this right and exercise constructive presence through counsel. In such a case, the court must certify through proper inquiry that the waiver is knowing, intelligent, and voluntary. Alternatively, the defendant can ratify strikes made outside his presence by acquiescing in the strikes after they are made. See State v. Melendez, 244 So.2d 137 (Fla. 1971). Again the court must certify the defendant's approval of the strikes through proper inquiry. Our ruling today clarifying this issue is prospective only.

Coney, 653 So. 2d at 1013 (emphasis supplied).

The State notes that in the above-referenced case of Melendez, the defendant was outside the courthouse during jury selection. After a jury was impaneled, "[t]he defendant then appeared, and after careful questioning by the trial judge as to his willingness and understanding, ratified the selection of the jury, which then was sworn." Melendez, 244 So. 2d at 138. The question before the Melendez court was whether a defendant in a non-capital felony case has the power to ratify the selection of his jury (which had occurred in his absence because he had not been notified as to the time his trial would be held). Id. Because Melendez was represented by counsel at jury selection and the jury was sworn only after Melendez consented to it, the court answered the

question affirmatively by stating that under such circumstances, "the judge does not abuse his discretion if he elects to proceed with the trial." Id. at 140.

In contrast to the situation in Melendez, the record in Coney failed to show that Coney had waived his presence or ratified the strikes. Nevertheless, this Court found the error in Coney to be harmless because the excusals only involved a legal issue (the juror's views on the death penalty) regarding which Coney would have had no basis for input. Coney, 653 So. 2d at 1013. In other words, this Court declined to construe a defendant's right to be present (at all proceedings before the court when the jury is present) to include "bench conferences in which counsel and the court discuss purely legal issues." Coney, 653 So. 2d at 1013 n.5.

In saying that its decision "is prospective only," the Florida Supreme Court intended Coney not to apply to pipeline cases. See, 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).

As the State noted in its discussion as to whether jurisdiction should be exercised, the obvious reason this Court made its ruling "prospective only" was that this interpretation of the rule constituted a radical departure from the judicial norm. As stated by Justice Overton in his separate opinion, "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 became the defendant was present in the courtroom." Coney, 653 So. 2d at 1016 (Overton, J., concurring in result only).

In the instant case, the Petitioner was tried in October 1994 (T 30), nearly three months before this Court's opinion in Coney was rendered on January 5, 1995, and six months before the revised opinion issued on April 27, 1995. Thus the requirement, established in Coney, that the trial court certify that a defendant ratify the peremptory strikes his attorney made at sidebar does not apply to the instant appeal. Although the Petitioner was not physically present at the immediate site where the peremptory challenges were made, the trial court specifically noted "the defendant is seated within five or six feet from sidebar so he can confer with the defense attorney during the course of the jury selection process." (T 117)(emphasis supplied). Thus, the State submits, the spirit of Francis was satisfied in that the Petitioner was present and available for consultation "during the time his peremptory challenges were exercised." Francis, 413 So. 2d at 1179. The record also shows that after making the two peremptory strikes, defense counsel conferred with the Petitioner and then advised the trial court, "We'll take them." (T 120) (emphasis supplied). Later, at the conclusion of the sidebar conference, during which defense counsel had twice conferred with the Petitioner (T 120, 121), the following exchange occurred in open court:

THE COURT: Miss Starrett, in behalf of the State, Mr. Buzzell, in behalf of the defense, do you accept as the jury: Whitacre, Jones, L, Brown, P, Sampson, Mames, Rohrbaugh, as the jury, and the first alternate Miller, and the second alternate Mathis?

MS. STARRETT: The State so accepts.

MR. BUZZELL: We accept, Your Honor.

(T 122)(emphasis supplied).[4]

The State respectfully submits that given the foregoing circumstances, the trial court acted properly in having the attorneys make their jury challenges at sidebar.

The second part of Petitioner's argument is his claim that "[e]ven if Coney announced a new rule of law, it nevertheless is applicable to 'pipeline cases' under traditional standards of retroactivity[.]" (IB 23). As authority for his position, he cites Smith; State v. Brown, 655 So. 2d 82 (Fla. 1995); and Griffith v. Kentucky, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). The Petitioner's reliance on Smith is misplaced because, as the State argued supra, Smith should be read to mean that new points of law established by this Court shall be deemed retrospective with respect to pipeline cases unless this Court says

---

[4]Once again, the State notes that this use of the first-person, plural pronoun by the defense counsel certainly is evidence that the Petitioner ratified his peremptory strikes.

otherwise. Wuornos, 644 So. 2d at 1008 n.4. See, also, Domberg, 661 So. 2d at 287. Clearly by saying "prospective only," this Court was saying "otherwise" in Coney. Likewise, the Petitioner's reliance on Brown is to no avail because it fails to address the significant limitation that Wuornos places on Smith.

Petitioner's reliance on Griffith appears to be based on a fundamental misunderstanding of the nature and scope of this Court's authority. Unlike the United States Supreme Court, this Court has the authority to promulgate procedural rules and modify them when necessary. For obvious reasons, changes to procedural rules are almost always prospective. Tucker v. State, 357 So. 2d 719 (Fla. 1978). Thus, there will be many occasions for this Court's rulings to be prospective only. Adopting a rule akin to the United States Supreme Court rule in Griffith would be inappropriate given this Court's rulemaking authority and would unduly restrict the Court's ability to modify the rules.

This approach is also appropriate given the subject of this litigation. Like the decision in R.J.A. v. Foster, 603 So. 2d 1167 (Fla. 1992), where this Court found the procedural rules superseded the statutory juvenile speedy trial provision, Rule 3.180 superseded the provisions of § 914.01, Fla. Statutes. See, Thomas

v. State, 65 So. 2d 866 , 868 (Fla. 1953). Thus, the rule is a procedural mechanism to implement a substantive right.

It must also be recognized that the rights provided in the rule and the rights mandated by the constitution are not synonymous. In Shriner v. State, 452 So. 2d 929 (Fla. 1984), this Court held that it was not fundamental error when a defendant was absent from bench conferences because he was present in the courtroom. Likewise, in Jones v. State, 569 So. 2d 1234 (Fla. 1990), this Court found no error when Jones was not at the sidebar during selection of the jury even though the record did not reflect an affirmative waiver.

Thus, the Coney interpretation of the term "present" is not constitutionally mandated but a modification of a rule of procedure setting out the manner in which the constitutional right should be implemented. See R.J.A.

Reading the rule in this fashion is in accord with federal practice. The Unites States law regarding this issue was summarized in United States v. McCoy, 8 F. 3d 495 (7th Cir. 1993), as follows:

> A defendant's right to be present at trial derives from several sources. First, the defendant has a sixth amendment right to confront witnesses or evidence against him. See United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct 1482, 1484, 84 L.Ed.2d 486 (1985)(per curiam); Verdin v. O'Leary, 972 F.2d 1467, 1481 (7th Cir. 1992); United States v. Shukitis, 877

F.2d 1322, 1329 (7th Cir. 1989). That right is not implicated here, because no witness or evidence against McCoy was presented at any of the conference. See Verdin, 972 F.2d at 1481-82.

The defendant also has a due process right to be present "'whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.'" Gagnon, 470 U.S. at 526, 105 S.Ct. at 1484 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330, 332, 78 L.Ed.2d 674 (1934)). But "'the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.'" Id. (quoting Snyder, 291 U.S. at 107-08, 54 S.Ct. at 333); see also Verdin, 972 F.2d at 1481-82; United States v. Moore, 936 F.2d 1508, 1523 (7th Cir.), cert. denied, ___ U.S. ___, 112 S.Ct. 607, 116 L.Ed.2d 630 (1991); Shukitis, 877 F.2d at 1329-30. That determination is made in light of the record as a whole. Gagnon, 470 U.S. at 526-27, 105 S.Ct. at 1484.

In Gagnon, the Supreme Court found that defendants' due process rights were not violated when they were excluded from an in camera conference between the judge, defense counsel and a juror regarding the juror's possible bias. The Court based its holding on the fact that the defendants "could have done nothing had they been at the conference, nor would they have gained anything by attending." Id. at 527, 105 S.Ct. at 1485. In Shukitis, we similarly held that a defendant's due process rights were not implicated when he was excluded from an in camera conference that addressed a separation of witnesses order. We reasoned that the absence did not affect the court's ability to decide the issue or otherwise diminish Shukitis' ability to defend against the charges, and that Shukitis' interests were adequately protected by his counsel's presence at the conference. 877 F.2d at 1330. See also Moore, 936 F.2d at 1523.

As in Gagnon and Shukitis, McCoy's absence from the conferences did not detract from his defense or in any other way affect the fundamental fairness of his trial. Indeed, McCoy seems to have conceded this point, having offered no argument to the contrary. Like Shukitis, McCoy's interests were sufficiently protected by his counsel's presence at the conferences. McCoy therefore had no due process right to attend.

Finally, Fed.R.Crim.P. 43 entitles defendants to be present "at every stage of the trial including the impanelling of he jury. . . ." This right is broader than the constitutional right (Shukitis, 877 F.2d at 1330), but is waived if the defendant does not assert it. Reversing the Ninth Circuit in Gagnon, the Supreme Court explained:

> We disagree with the Court of Appeals that failure to object is irrelevant to whether a defendant had voluntarily absented himself under Rule 43 from an in camera conference of which he is aware. The district court need not get an express "on the record" waiver from the defendant for every trial conference which a defendant may have a right to attend. . . . A defendant knowing of such a discussion must assert whatever right he may have under Rule 43 to be present.

470 U.S. at 528, 105 S.Ct at 1485; cf. Taylor v. United States, 414 U.S. 17, 18-20, 94 S.Ct. 194, 195-96, 38 L.Ed.2d 174 (1973)(per curiam). A defendant may not assert a Rule 43 right for the first time on appeal. Gagnon, 470 U.S. at 529, 105 S.Ct. at 1485; Shukitis, 877 F.2d at 1330. Because McCoy did not invoke Rule 43 either during trial or in a post-trial motion, he has waived any right under that rule.

McCoy, 8 F. 3d at 496-97 (Footnotes omitted).

Because of the availability of consultation between a lawyer and his client (when the client is present for trial), there is no due

process violation when the client is not physically present at the bench during a sidebar for peremptory challenges. See, McCoy; United States v. Gayles, 1 F. 3d 735 (8th Cir. 1993); United States v. Moore, 936 F. 2d 1508, 1523 (7th Cir. 1991); United States v. Bascaro, 742 F. 2d 1335 (11th Cir. 1984). Therefore, the only legitimate conclusion is that the Coney decision was not one of constitutional magnitude.

In Gagnon, the Supreme Court indicated that the right of the defendant to be present under Rule 43 of the Federal Rules of Criminal Procedure (similar to our rule) is broader than the constitutionality based right to be present. In Gagnon, the Court held that such claims must be preserved at trial and that waiver of the benefits of the Rule 43 right to be present may be inferred by a defendant's failure to assert the right at trial. Thus, the United States Supreme Court recognizes that the Rule 43 right must be asserted at trial by the defendant; our rule should follow the federal rule.

Finally, to express the problem and analysis in a slightly different form, the State notes that the district court and the Petitioner fail to distinguish between the Coney decision and the prospective rule announced in that decision. While the Coney decision is applicable retroactively, its terms are prospectively

applied. In other words by its terms, Coney plainly announces that the new procedural rule established therein is only applicable to trials which occur after the announcement of the new rule. By its terms, it does not provide relief to any appellant/petitioner whose trial occurred before the Coney decision became final. Not only is it uncontroverted that the issue was not preserved below, it is also uncontroverted that the trial occurred before the issuance of Coney. The district court is simply misapprehending the plain language of Coney in perceiving a conflict with Smith. None exists.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR BY DENYING THE PETITIONER'S MOTION FOR CONTINUANCE (Restated).

Whether the Court Should Exercise Jurisdiction

Even if this Court exercises its discretionary review of the certified question, it should not address the additional issues raised by Petitioner. The district court below did not address the additional issues, i.e., it per curiam affirmed and such decisions do not give rise to jurisdiction -- conflict jurisdiction or otherwise. See Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980); Art. V, § 3, Fla. Const. (1968). The State urges this Court to exercise its discretion and decline to review those issues. Coffin v. State, 374 So. 2d 504, 508 (Fla. 1979); State v. Burgess, 326 So. 2d 441 (Fla. 1976).

Merits

If this Court decides to go behind the per curiam affirmance, it should affirm the trial court. The Petitioner argues that the trial court abused its discretion and violated his rights to due process of law and effective assistance of counsel by denying his request for "a continuance for the purpose of locating and speaking

with potential defense witnesses." (IB 24). According to the Petitioner, he had only recently learned of these witnesses and had wanted more time to see if they had information to support his theory of defense, namely, that he was not the one who killed the victim. (T 5-7, 8-9; IB 24-25). Because the Petitioner has failed to show a palpable abuse of discretion clearly in the record, the trial court's ruling should not be disturbed.

In support of his argument, the Petitioner cites Griffin v. State, 598 So. 2d 254 (Fla. 1st DCA 1992), and Brown v. State, 426 So. 2d 76 (Fla. 1st DCA 1983). In Griffin, the defendant was on trial for selling cocaine to an undercover Naval Security Police Officer in Pensacola. On the day before trial, this officer (who by then was stationed out of state) testified in deposition that he was alone at the time of the drug transaction. However, upon learning, later that day, that another undercover Naval Officer had witnessed the transaction, Griffin moved for a continuance based on the revelation of a new witness the evening before trial. The trial court denied the motion but granted the defense a short recess to attempt to contact this new witness who was then stationed in Orlando. The defense counsel was able to contact her by telephone and learned that she believed she would remember the suspect if she saw him in person. Nevertheless, the trial court

denied the renewed defense motion to allow this new witness to view the defendant and testify at trial. Because identification was the key issue[5] in the case, this Court reversed the trial court's ruling and remanded the case for new trial. Explaining its decision, the district court stated:

> The state's late disclosure of eyewitness Underwood effectively precluded the defendant from compelling the appearance of this witness at trial and denied appellant time to adequately investigate and prepare a defense, thereby violating appellant's due process rights. Witness Underwood was the only person other than Blagrove who actually saw the transaction. Her testimony was relevant and material to the defense of misidentification.

Griffin, 598 So. 2d at 256. In Brown, the defense learned only a few days before trial that the testimony of the State's main witness (who could identify Brown as the one who uttered a forged instrument) had been obtained as a result of police use of hypnosis. Finding the trial court's denial of Brown's motion for a continuance (to depose the hypnotist and to obtain an expert on hypnosis to testify in Brown's favor) to be "a palpable abuse of discretion[,]" the district court reversed and remanded for further

---

[5] It appears the first Naval officer had only seen the suspect's face briefly and had mainly identified Griffin based on his clothing at the time of his arrest at a place where several other people were wearing similar clothing. Griffin v. State, 598 So. 2d 254, 256 (Fla. 1st DCA 1992).

proceedings on the charges of uttering and grand theft. Brown, 426 So. 2d at 94. In analyzing the law and circumstances of the case, the Brown court said:

> A number of cases detail circumstances rising to the level of a palpable abuse of discretion. [*Citations omitted*] The common thread running through each of these cases is that defense counsel must be afforded an adequate opportunity to investigate and prepare any applicable defenses. This right is inherent in the right to counsel. [*Citations omitted*] Further, it is founded on constitutional principles of due process and cast in the light of notions of a right to a fair trial. [*Citations omitted*]
>
> In the case at bar, trial was held on Tuesday morning. Defense counsel did not learn of the hypnosis session until mid-day the Friday before trial. Counsel was not even furnished the opportunity to depose the police hypnotist until Monday, the day before trial. Surely, due process demands that counsel be afforded a fairer means by which to prepare his defense to this critical evidence. . . .

Brown, 426 So. 2d at 80-81.

As the foregoing illustrates, denial of a motion for continuance is within the trial court's discretion "and will not be overturned absent a palpable abuse of discretion." Lusk v. State, 446 So. 2d 1038, 1040 (Fla.), cert. denied, 469 U.S. 873, 105 S. Ct. 229, 83 L. Ed. 2d 158 (1984). Unless an abuse of discretion appears clearly and affirmatively on the record, the trial judge's decision denying a motion for continuance should not be disturbed. Id. at 1041; See, also, Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert.

denied, 457 U.S. 1111, 102 S. Ct. 2916, 73 L. Ed. 2d 1322 (1982); and Magill v. State, 386 So. 2d 1188 (Fla. 1980), cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983).

Unlike those in Brown and Griffin, the circumstances in the instant case in no way could be described as rising to the level of a palpable abuse of discretion. In both Brown and Griffin, there was considerable fault attributable to the State for the eleventh hour discovery of new witnesses or questionable means of obtaining testimony relevant to the identification of the defendant as the perpetrator of the charged offense. In the instant case, it was not the fault of the State, but the elusiveness of the would-be defense witnesses, such as Latheria Adams, that kept the defense from completing its discovery. As the trial court remarked, the case had been pending since March and "[w]e haven't been able to find her in the last five or six months. ... She's not here in Jacksonville. ... You don't know where she is. ... There's no prospect that you will be able to locate her." (T 15-16). Moreover, unlike the issue in Brown and Griffin, the identity of the perpetrator of the crime in the instant case was not an issue. There was no question that Chuck Eaton knew the Petitioner -- they had been living together for months in the same house where the Petitioner "was dating" Eaton's mother! (T 166, 215, 263).

Likewise, David Johnson, the other eyewitness who testified that he saw the Petitioner shoot the victim, had no difficulty identifying the Petitioner -- he had met him when he spent the night at Chuck's house and he had been riding in the car the Petitioner was driving in the hours leading up to the shooting. (T 196, 198-200, 204).

Besides Latheria Adams, the other elusive witness for which the Petitioner was seeking more time to locate was a prostitute named Lynn Powell, who, according to a confidential informant had witnessed the shooting and had "described the shooter as a Mexican-looking male (not a black male)." (R 93). In his motion for continuance, the Petitioner was actually asking the trial court "to compel the identity of said confidential informant." (R 94). At the motion hearing held on October 14, 1994, only three days before trial (T 5, 34), the defense counsel elaborated on his motion:

> MR. BUZZELL [defense counsel]: Your Honor, what Officer Cream testified to at deposition, and what is reflected in the homicide supplement report, prepared by Detective Stevenson, is that a confidential informant came to him, and gave the information that a prostitute by the name of Susan -- he didn't know her last name, but he gave a physical description of her.
>
> He said that she told the confidential informant about a conversation she had with this Lynn Powell, in which Lynn Powell claimed to have been an eyewitness to the shooting, and described the shooter as being a Mexican looking male. We would like to interview the confidential informant so we could have a better hold

on trying to locate Lynn Powell, to verify whether any of this is true.

We have checked arrest records, court records and our records, to determine if we could locate somebody by the name of Lynn Powell. There is just simply not anybody with that name. That person may have been arrested before, under another name.

THE COURT: How long have you known about what this Officer Cream said about Lynn Powell?

MR. BUZZELL: We took the deposition of Officer Cream back in May, Your Honor.

THE COURT: And you're just now asking for the name of the confidential informant, to see if you can follow up on it?

MR. BUZZELL: That was my mistake, as I indicated to you yesterday. That's why I asked you to pass it until today, for a hearing on that motion.

Your Honor, I think for the Court's information, it would be important to note that all we had, in relation to this person Lynn Powell, is the name. We don't even have the race, birth date, social security number, or any of the other kinds of information that we usually get in describing a person, that enbles us to locate addresses and locate the person. That's put us at a disadvantage in trying to locate her.

MS. STARRETT [prosecutor]: Judge, it's also important to note that the confidential informant did not say that Lynn Powell gave him, or her, this information. Susan, whose last name he didn't know, gave him this information. We're talking about double to triple hearsay. There is no indication that the confidential informant even knows Lynn Powell, himself. This was relayed to him by a Susan.

MR. BUZZELL: That is correct, Judge. I don't contest that.

(T 17-19).

Clearly, given the circumstances of this case, the trial court acted reasonably in denying the Petitioner's motion for continuance. The defense counsel's delay in doing follow-up investigation to locate Latheria Adams and Lynn Powell was not attributable to the State. It was questionable whether the information Lynn Powell might have had would have even been admissible. See Sections 90.802, 90.805, Fla. Stat. (1993). Moreover, the absence of Adams probably inured to the benefit of the Petitioner in that the prosecutor had also been trying to locate her because she considered Adams to be "a good State witness." (T 12). Therefore, since the trial court's ruling was reasonable, it should be affirmed.

ISSUE III

WHETHER THE TRAIL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO GIVE THE PETITIONER'S REQUESTED JURY INSTRUCTION (Restated).

Jurisdiction

This Court should decline to review Issue III for the same reasons as in Issue II. The district court below affirmed without comment.

Merits

If this Court decides to go behind the per curiam affirmance, it should affirm the trial court. The Petitioner contends that the trial court committed reversible error by refusing to give his requested instruction on accomplice testimony. The basis of this contention is that Chuck Eaton testified he took over the driving when the Petitioner became "unsteady and 'paranoid.' (T 174, 186)." (IB 28).[6] On this basis, the Petitioner theorizes that "Eaton could arguably be considered an accessory after the fact[]"

---

[6] Actually, Eaton testified that he drove the car when the Petitioner "started getting paranoid" (T 174) or "was in shock" or "freaking out." (T 186). It was David Johnson who said the Petitioner "wasn't driving too straight so he asked Chuck to drive." (T 205).

in that he aided the Petitioner in "putting distance between himself and the scene of his alleged crime." (IB 29). Because his requested instruction was inconsistent with his theory of defense, the Petitioner's argument on this issue must fail.

In criminal cases, the trial court is responsible for insuring that the jury is fully and correctly instructed as to the applicable law. Foster v. State, 603 So. 2d 1312, 1315 (Fla. 1st DCA 1992), rev. denied, 613 So. 2d 4 (Fla. 1993). It is well established that a defendant is entitled to have jury instructions on rules of law applicable to his theory of defense if there is any evidence to support the instructions. Lewis v. State, 591 So. 2d 1046, 1047 (Fla. 1st DCA 1991). With only a few exceptions, such as included offenses (where the lower court has no discretion), the abuse of discretion standard applies to a trial court's ruling on whether or not a particular jury instruction should be given. Marr v. State, 470 So. 2d 703 (Fla. 1st DCA 1985)(holding lower court's refusal to give requested instruction an abuse of discretion)[7]; United States v. Morales, 978 F. 2d 650 (11th Cir. 1992)(holding

[7]Upon rehearing en banc, the majority decided that the trial court had not abused its discretion in denying the requested instruction. Marr v. State, 470 So. 2d 703, 712 (Fla. 1st DCA)(Ervin, C.J., dissenting), rev. dismissed, State v. Marr, 475 So. 2d 696 (Fla. 1985).

court does not abuse discretion by failing to give erroneous instruction). Discretion is abused only where no reasonable person could agree with the lower court's ruling. Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980).

In the instant case, the following discussion transpired regarding the Petitioner's requested instruction:

> THE COURT: . . . What is your requested instruction on accomplice? We don't -- neither your client, your client disclaimed any responsibility or he wasn't there, he didn't do it, and he didn't say that the defendant was an accomplice, the -- excuse me, what was the young boy's name?
>
> MS. STARRETT: Charles Eaton.
>
> THE COURT: Eaton, there was no testimony that Eaton participated in anyway other than the fact that he was simply a passenger in the car and he observed the defendant shoot the victim in the case. And the fact that some time later in some miles way across down on Blanding Boulevard in that vicinity he took over and started driving he said because the defendant went to pieces or began to, I've forgotten how he described his behavior.
>
> MR. BUZZELL: Freaked out, I think.
>
> THE COURT: There was nothing to base an accomplice instruction upon, so I'll not give that. Do you have any other requested instruction by state or defense?
>
> MS. STARRETT: None from the state, Your Honor.
>
> MR. BUZZELL: None from the defense, Your Honor.
>
> THE COURT: Okay.

Do both of you agree on the verdict forms with that one change?

MR. BUZZELL: Yes, sir.

(T 312-13).

The trial court was absolutely correct in its analysis of the pertinent testimony. The Petitioner had indeed denied responsibility for the murder. (T 276). He offered no testimony to tie Chuck Eaton, his so-called accomplice, to the victim. In fact, he claimed he did not even know where Eaton was on the night the victim was murdered (T 274), or if Eaton had previously known her. (T 276). Furthermore, the record demonstrates: that the Petitioner was driving while Eaton sat in the front passenger seat (T 168, 200); that the Petitioner exited the car with the gun (T 172, 203), and, while Eaton remained in the car talking with his friend David Johnson, the Petitioner shot the victim (T 204); that it was the Petitioner who drove the car away from the murder scene (T 174, 204); that when Eaton started driving, they had "got way to the other side of town [which] was pretty far from McDuff going toward Orange Park" (T 186); that when Eaton took over the driving, he "drove to [the] Krystal restaurant." (T 205).

During his closing argument to the jury, the defense counsel suggested: that Chuck Eaton testified against his client because

he wanted to get off "scot-free" (T 336);[8] that Melody Poole testified against him in order to help her son, Chuck, because "blood is thicker than water" (T 341); and that Johnson also testified against the Petitioner because he and Chuck were "still friends." (T 341). Thus, the Petitioner's theory of defense was that he did not kill the victim, but was being framed by a conspiracy designed to get a little hoodlum off "scot-free." Not only was there absolutely no evidence to support giving the Petitioner's requested instruction on accomplice testimony, but such an instruction was not even logically consistent with the Petitioner's theory of defense. Consequently, the trial court acted reasonably when it refused to give the requested instruction. Therefore, this Court should affirm on this issue.

---

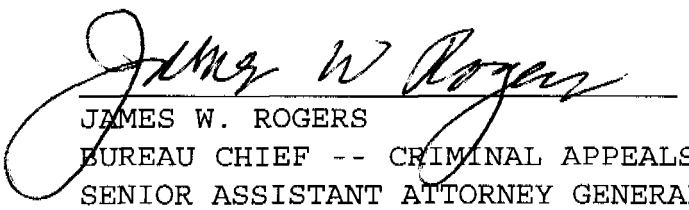
[8] This comment from the defense counsel failed to clarify the fact that Eaton was not charged with any crime in the instant case.

CONCLUSION

Based on the foregoing, this Honorable Court should decline to exercise discretionary jurisdiction in this case. In the alternative, the certified question should be answered in the negative and the decision below should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



JAMES W. ROGERS
BUREAU CHIEF -- CRIMINAL APPEALS
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0325791

WILLIAM J. BAKSTRAN
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0443832

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT
[AGO# 96-111059TCR]

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 Mr. Carl S. McGinnes, Assistant Public Defender, 301 South Monroe Street, Leon County Courthouse, Tallahassee, Florida 32301, this 25th day of June, 1996.

William J Bakstran

William J Bakstran
Assistant Attorney General