IN THE SUPREME COURT OF FLORIDA

DINO HOWARD, :

Petitioner, :

v. : CASE NO. 87,856

STATE OF FLORIDA, :

Respondent. :

_____/

MERIT BRIEF OF PETITIONER

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MERIT BRIEF OF PETITIONER

I. PRELIMINARY STATEMENT

Dino Howard was the defendant in the trial court and the appellant before the District Court of Appeal, First District of Florida. He will be referred to in this brief as "petitioner," "defendant," or by his proper name.

The record on appeal consists of six volumes. Volume I, which consists of the court record, will be referred to by the symbol "R" followed by the appropriate page number in parentheses. Volumes II, III, IV, V, and VI, containing transcripts, will be referred to by the symbol "T" followed by the appropriate page number in parentheses.

Attached as an appendix to this brief is a copy of the decision issued by the District Court of Appeal, First District, in petitioner's case. ***Howard v. State***, 21 F.L.W. D832c (Fla. 1st DCA April 1, 1996). Reference to the appendix will be by use of

the symbol "A" followed by the appropriate page number in parentheses.

II. STATEMENT OF THE CASE

Dino Howard was arrested in Jacksonville on February 16, 1994, and charged by information with second degree murder and attempted armed kidnaping (R-8, 78). Mr. Howard filed a Notice Of Discovery (R-13), to which the state responded (R-15). Petitioner filed an unlimited waiver of speedy trial (R-25).

Unable to locate witnesses listed by the state, petitioner repeatedly requested more definite addresses (R-17, 42, 48-51, 53, 59, 75, 85). The trial court granted the motions (R-55-58). The state gave more definite addresses for some witnesses (R-52).

After several state witnesses did not appear for scheduled defense depositions, Mr. Howard requested and the trial court granted orders to show cause (R-26-28, 31, 37-38, 40, 61-74). Seeking time to speak with those state witnesses who had been unavailable, petitioner requested and was granted two unopposed continuances (R-20-22, 33-35). The state was also granted an unopposed continuance (R-29).

On October 14, Mr. Howard requested a continuance for the purpose of locating and interviewing prospective defense witnesses thought to have exculpatory information (R-88-91, 92-98). After a hearing, the trial court denied the motion, stating the grounds were legally insufficient (T-24-25). The court left it open to Mr. Howard to file an amended motion if circumstances changed (T-24-25). Mr. Howard renewed the request prior to trial on October 17, filing a second amended motion which added new information (R-102). The court denied the motion, again stating the motion was legally insufficient (T-35).

The jury ultimately found Mr. Howard guilty of third degree murder with a firearm, and attempted kidnaping with a firearm (R-99-101, T-337).

On December 7, the court adjudicated Mr. Howard guilty of both counts and sentenced him, on Count I, to 15 years in prison with a three-year mandatory minimum mandatory and credit for time served (R-112, 115, 117, T-399). On Count II, the court sentenced petitioner to 22 years in prison, with credit, to be served concurrently with Count I (R-116-117, 399). Both sentences were to run consecutively to any federal sentence already being served (T-399).

Notice of taking an appeal to the District Court of Appeal, First District of Florida, was timely filed (R-132).

On appeal, the district court affirmed the judgments and sentences, but remanded the case on issues relating to restitution. The following question was certified to this Court as involving a question of great public importance:

> 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?

(A-2).

Notice to invoke discretionary jurisdiction was timely filed April 30, 1996 (A-4-5).

III. STATEMENT OF THE FACTS

In the early morning hours of October 5, 1993, Judy Blevins, who had recently used cocaine, was walking Market Street in Jacksonville when she was shot and killed by a man holding a .38 firearm 18 or more inches from her right ear lobe (T-142-145, 234-239, 234-246). At the time of the shooting, Ernest Rollins, an admitted drunk and four-time convicted felon, was walking along Market Street and saw a car containing three passengers stop near Judy Blevins (T-149-151, 155-158). Rollins heard some words from either the car or a nearby house, heard a shot, and saw Blevins fall (T-153-154, 161).

Blevins' death was reported in the newspaper the next day (T-175, 205, 216, 249).

Chuck Eaton, age 15, was arrested and jailed on November 8, 1993; he faced charges of two counts of attempted first degree murder, two counts of armed robbery, kidnaping, car jacking, aggravated assault, burglary of a dwelling, and attempted burglary (T-164, 166, 189-190). Eaton's mother, Melody Poole, an admitted crack cocaine user, had been briefly involved with petitioner, Mr. Howard (T-166, 185, 221). Poole had also been friends with Judy Blevins (T-219).

Sitting in jail, knowing he was facing a long prison term, Eaton called his friend, David Johnson, who agreed to help him (T-188, 206-210). Then, two months after the shooting, in the hope of reducing or eliminating the chance of receiving any prison time, Eaton contacted the police and told them he saw petitioner Howard shoot Judy Blevins (T-189, 249-250, 253).

Eaton entered into a written agreement with the state (T-191). In exchange for Eaton's pleading guilty to some of his charges and cooperating with the state in the prosecution of Mr. Howard, the state would drop one count each of armed robbery and attempted murder and make a sentencing recommendation based on his cooperation in petitioner's case (T-192). As Eaton understood it, he had to tell the jury what the state wanted to hear (T-193). Eaton faced a maximum of 22 years incarceration, but hoped for much less (T-177, 188).

Based on Eaton's information, petitioner was arrested and charged with the murder of Judy Blevins (T-255-256).

Motion To Continue

Several days prior to trial, petitioner requested a continuance and a hearing was held (R-92, T-5). Mr. Howard alleged that:

(1) Long sought witness Michael Adams was deposed by defense counsel two days prior to the hearing (T-5). Adams indicated that his sister, Letheria Adams, an eye witness to the shooting, had information that someone else, not petitioner, killed Judy Blevins, even though she did not identify anyone as the shooter when she originally spoke with the police (T-5, 13). Letheria Adams, who repeatedly failed to appear for defense depositions, was said to be living at a specified address in Green Cove Springs, Florida, and Mr. Howard sought time to locate and interview her (R-15, 92-93, T-5-7). At the hearing, defense counsel noted an order to show cause had been issued, but the order was not able to be served, and that he recently learned Ms.

Adams moved from the address in Green Cove Springs, but may be in Jacksonville (T-6, 10);

(2) A confidential informant told police that a prostitute named Susan said a prostitute named Lynne Powell witnessed the shooting and described the shooter as a Mexican male, not a black male. Powell was known to work a specified area, but had not yet been located. Mr. Howard sought additional time to locate Lynne Powell (R-94, T-16-17);

(3) Ronald Chapman, who the defense had long attempted to locate, was very recently found to be incarcerated in the Collier County Jail in Naples, Florida (T-19-20). When interviewed, Mr. Chapman stated that Judy Blevins told him shortly before her death that two guys, not Mr. Howard, had been threatening to kill her (R-94, T-20-23). Mr. Chapman also stated a man named John King had further information about these threats (R-94-95). The defense sought further time to locate and interview Mr. King;

(4) A man named Richard Montgomery had heard and possibly observed the shooting, but failed to appear for depositions despite an order to show cause (R-94-95). The defense sought further time to locate him; and,

(5) The trial court had granted five motions for better addresses of witnesses who had not yet been located or interviewed by either the state or the defense (R-95).

At the hearing, the trial court concluded the motion was legally insufficient and denied it, saying Letheria Adams had been unavailable for several months and the information from Lynne Powell was double hearsay (T-21-22, 25). The court,

however, left open the opportunity to file an amended motion if circumstances changed (T-24-25).

Prior to jury selection, Mr. Howard filed a second amended motion, adding that:

(1) Ronald Chapman told an investigator that:

(a) Judy Blevins told Chapman her life was in danger because she and Butch had robbed a drug dealer, named something like "McClendon," after she lured the dealer into a room;

(b) Three days before her death, Judy Blevins told Chapman she had to see Butch to straighten things out;

(c) Judy Blevins left several messages for Chapman to come get her because she felt she was going to be killed, and;

(d) John King knew further details of the threats to Judy Blevins (R-104-105); and,

(2) Mr. Howard had located John King at the Baker County Correctional Institution, defense counsel was not permitted to interview him over the weekend, but an investigator would try to see him that day (R-105, T-35).

Just prior to trial, the trial court denied the motion, stating again that it was legally insufficient (T-35). Defense counsel's investigator did eventually speak to Mr. King, who could not provide any helpful information (T-277).

Jury Selection

Petitioner was present in the courtroom during voir dire of the prospective jurors (T-39). Immediately following voir dire, the trial court summoned the attorneys to side bar for the purpose of exercising challenges (T-116). The jury panel was still

present in the courtroom (T-116). At sidebar, the trial court remarked: "Let the record show 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). At sidebar, outside Mr. Howard's presence, defense counsel exercised causal challenges (T-117-119).

Still at sidebar, outside petitioner's presence, defense counsel exercised two peremptory challenges (T-119). When asked for any further challenges, defense counsel left sidebar to confer with Mr. Howard (T-120). When defense counsel returned, he stated, "We'll take them" (T-120). After the initial six jurors were selected, the court instructed defense counsel to confer with petitioner on the selection of two alternate jurors (T-121). When defense counsel returned to sidebar, he accepted the first possible alternate, struck the second, and accepted the third, and indicated that was acceptable to Mr. Howard (T-121-122).

Trial

At trial, Ernest Rollins testified he had been convicted of four felonies and ten crimes involving dishonesty (T-149-150). He state he liked to drink beer, malt liquor, and liquor until he is drunk and "drink[s] frequently so [he] don't count..." how much it takes for him to get drunk (T-154-157). He admitted he was drunk the night before trial, drank the entire day and evening of October 4/5, and in fact was intoxicated at the time of the shooting (T-154-158).

Rollins testified he was walking drunk along Market Street in the dark, early morning hours of October 5, 1993 (T-149-150,

158). He saw a young white female, who he did not know, walking ahead of him (T-151-153). Rollins saw a car, which he described as "burgundy and white," drive up behind him (T-151-153). He admitted later that he may have told the police officer it was a white car, but could not remember back that far (T-161-162).

Rollins further testified there appeared to be three people in the vehicle -- a black driver, a person in the front passenger seat who "was light skinned,...might have been white,...might have been red [a light skinned black person]," and a person in the back seat (T-152, 162). However, Rollins admittedly did not get a positive look at any of the passengers and could not say for sure if the front seat passenger was white or black (T-152, 162). He did not tell the police officer that he saw the individuals in the car (T-161).

The car passed Rollins, pulled across the center line of the road, and drove up to the young woman (T-151, 153). Rollins testified he heard someone say something like "where the guy that was with her that took whatever they took from him" (T-153). However, he could not say if the voice came from the car or from people on the porch of a nearby house (T-153-154, 159-160). Rollins testified he then heard a shot and saw the woman fall, at which time he turned around and walked away (T-154). He could not say where the shot came from (T-163). Rollins returned to the area when the police arrived (T-154).

Chuck Eaton, a 15-year-old middle school drop-out, was now awaiting sentencing on charges of burglary, car jacking, kidnaping, armed robbery, and attempted murder, and was now facing a

maximum of 22 years incarceration (T-176-177). He testified that on October 3, a few weeks before he was arrested and jailed, his friend, David Johnson, spend the night at Eaton's house (T-167, 189). He acknowledged testifying at deposition that Johnson did not come over to Eaton's house until shortly after dark on October 4, but said that he "made a mistake" (T-181-182, 189). Eaton testified that at 7:00 p.m. on October 4, petitioner drove the two boys to a teen club in Eaton's white and burgundy 1992 Cougar (T-166-167). Eaton testified that he and Johnson drank liquor and beer and smoked marijuana (T-168, 180-181).

After leaving the club, Mr. Howard, Eaton, and Johnson rode around town (T-183). Eaton sat in the front passenger seat and Johnson in the back (T-168). They stopped at the house of Eaton's girlfriend and Mr. Howard pointed out places he lived as a child (T-183). Eaton testified petitioner showed him and Johnson a silver .38 revolver while in the car (T-171-172, 184).

Around 2:00 or 3:00 a.m., Mr. Howard, Eaton, and Johnson drove into the Springfield area of Jacksonville (T-167). While traveling down Market Street, Eaton saw a young white woman with blond hair and a black man on the sidewalk (T-169-170). The car crossed the center line and approached the woman (T-169). According to Eaton, Mr. Howard got out of the car with the revolver behind his back (T-172). The woman bent down and put her hand up, saying, "no" (T-172). Mr. Howard told the woman to get in the car and that he was not going to hurt her (T-172, 185). Eaton testified that when the woman would not get in the car, Mr. Howard,

standing one foot away from the woman, shot her in the back right part of her head (T-173). The woman fell to the ground (T-173).

According to Eaton, petitioner got back in the car and drove away (T-174). He turned to the right and took the expressway toward the west side of town (T-174). Eaton testified Mr. Howard "mentioned something about she had robbed him or set him up" and later "started getting paranoid so [Eaton] drove" (T-174). Eaton could not recall whether they went to a restaurant or stopped at his girlfriend's house after the shooting (T-187). Eaton testified they returned to his house and he and Johnson slept in the car in the driveway (T-187).

Eaton read about Blevins' death in the newspaper the next day (T-175), but did not call the police (T-189).

Eaton was arrested on November 8 and later charged with attempted burglary, burglary, car jacking, aggravated assault, kidnaping, two counts of armed robbery, and two counts of attempted first degree murder (T-188-190). Eaton knew he was in "trouble" after being arrested and faced a lot of time (T-188). He did not want to spend any time in jail (T-188). He decided he "better talk to law enforcement authorities to get some time taken off" the prison sentence he was facing (T-189). While sitting in jail, Eaton spoke with his mother about his "trouble" and called Johnson to request his help (T-188).

After working out a deal for Eaton's testimony, the state dropped an armed robbery and an attempted murder charge (T-190-191). The deal, which was in writing and agreed to in open court, provided that Eaton would "testify truthfully in [Mr. Howard's

case], state will make a recommendation based on cooperation of [Eaton:" (T-191-192). Eaton understood that to mean he had to "tell [the state] what they want to hear" or he might get the maximum sentence of 22 years (T-193). He believed his "only shot at getting anything less than 22 years is coming in here and saying [Mr. Howard] did it," but testified he was not told what to say and did not tell Johnson what he was going to say (T-193-194).

David Johnson affirmed that he and Eaton were good friends (T-197). He stated that between July and November of 1993, they got together four or five times a week and Johnson stayed week-ends at Eaton's house (T-198). Johnson met petitioner for the first time the morning of October 4 (T-199).

Contrary to Eaton's testimony, Johnson testified that he, Eaton, and petitioner left for the teen club at approximately 1:00 or 2:00 a.m., not 7:00 p.m., on October 5, 1993 (T-166-167, 200). Contrary to Eaton's testimony, Johnson denied that he or Eaton drank alcohol or smoked marijuana (T-168, 180-181, 208). After leaving the teen club, the three rode around town (T-201). At Eaton's prompting, according to Johnson, Mr. Howard showed Eaton and Johnson a .38 revolver that he kept in a black case (T-202-203). Contrary to Eaton's testimony, Johnson stated the gun was black, not silver (T-171-172, 184, 209).

At some point, according to Johnson, Mr. Howard jumped out of the car, saying, "that's the girl who set him up" (T-201). Johnson testified Mr. Howard pointed the gun and told the woman to get in the car (T-202-204). When she would not get in the car

and held "her hand up toward the gun blocking it," Mr. Howard shot her (T-203-204). Contrary to Eaton's testimony, Johnson testified petitioner was "a couple of feet" away from the woman when he shot her (T-173, 204).

Contrary to Eaton's testimony, Johnson stated that Mr. Howard drove straight, not right, when he left the scene (T-174, 205). Eaton drove when they got to the highway, because Mr. Howard "wasn't driving too straight" (T-205). Johnson testified they went to a restaurant and petitioner's motel room, then returned to Eaton's house (T-205). Contrary to Eaton's testimony, Johnson testified that neither he nor Eaton slept in the car in the driveway (T-187, 209). Johnson read about the shooting in the next day's newspaper, but did not tell anyone his story until after Eaton called him requesting help, and the police traveled to his home in Alabama to question him (T-205-208).

Melody Poole, Eaton's mother, Mr. Howard's former live-in girlfriend, and eight-time convicted felon, testified that at the time of the shooting she was regularly using crack cocaine and drinking quite a bit (T-214-215, 221). She admitted that she had trouble recalling events, details of events, and time of events during that period, but declared that she remember those events about which she was testifying (T-221, 224). Poole testified petitioner used her 1992 white and burgundy Cougar on the night of October 4/5, 1993 (T-217-218), and that she had in the past seen Mr. Howard with "a couple of small calibers and a .38" revolver (T-218). She stated that on some occasions Mr. Howard

indicated to her that Judy Blevins had stolen money from him (T-214-216).

After she read about Blevins' death in the October 6 newspaper, according to Poole, Mr. Howard told her, "I shot that girl" (T-216-217). She thought he was joking and did not believe him (T-217). Later, she testified, petitioner told her "that he had shot Judy and that he was sorry that he had my son with him" (T-217). However, Poole did not speak to the police until two or three months after the shooting, after her son had been jailed and they discussed what he was facing (T-222-223). She talked to the police a week after her son (T-223). She admitted that she does not want her son to go to prison (T-223).

The state rested (T-258). Defense counsel made a motion for judgment of acquittal on Count I, arguing that state did not prove a prima facie case of second degree murder (T-258-259). As to Count II, defense counsel argued the state did not prove a prima facie case of attempted kidnaping because there was only "a scintilla of evidence" to support the charge (T-259). The trial court denied the motion (T-259-260).

Mr. Howard took the stand on his own behalf and admitted being convicted of three felonies (T-262). He stated he did own a .38 revolver on October 5, 1993, which he kept in a case, but it was later stolen (T-274). He acknowledged driving Poole's white and burgundy Cougar, but could not recall whether he drove it the night Judy Blevins was shot (T-273). He testified he first heard of Judy Blevin's death when reading a newspaper one or two days afterward (T-264). At that time Poole told petitioner that she

knew Blevins (T-264). Mr. Howard did not know or recognize her (T-264, 270-271). He and Poole spoke of it again when Blevins' death was reported on the news that night (T-265). Two or three days later, he and Poole had a longer conversation about Blevins' death (T-265, 268).

On proffer, after an objection by the state, petitioner explained that Poole told him a prostitute named Katrina told her she was on her way to her mother's apartment in Springfield when saw a man named Butch shoot Judy (T-267). Katrina said Butch shot Blevins because she was brushing him off for another guy and he did not like it (T-267). Defense counsel argued the statement was not being offered to prove the truth of the matter asserted, but rather was offered to show Poole had some source of knowledge of the killing other than Mr. Howard or the news media (T-268). Defense counsel stated he would have no objection to a limiting instruction, were the statement admitted (T-269). The trial court refused to admit Mr. Howard's testimony, saying, "I can't think of a single theory under which it is admissible" (T-269).

In the presence of the jury, Mr. Howard testified he spoke about Blevins' death with Poole two or three times immediately after it was reported in the media (T-270). He never told her that he did it (T-270). He never spoke with Eaton or Johnson about Blevins' death (T-270).

The defense rested (T-278). In rebuttal, the state called Detective Stevenson who testified that after his arrest Mr. Howard stated he knew Judy Blevins to be a prostitute in the Springfield area and that a man named Butch had killed her

because she was seeing another man (T-288-289). Stevenson admitted a man known to be acquainted with Blevins was known as Butch (T-289).

The state rested (T-291). Defense counsel renewed the motion for judgment of acquittal, and it was denied (T-292).

During the charge conference, defense counsel requested an instruction on accomplice testimony, arguing Eaton qualified as an accomplice (T-296). The trial court denied the request (T-296, 312-313). Defense counsel objected t the refusal following the reading of the instructions (T-369).

The jury found petitioner guilty of third degree murder, a lesser offense, and attempted kidnaping (R-99-101, T-377).

IV. SUMMARY OF ARGUMENT

Issue I. This is the issue involving the question certified to this Court by the district court. Petitioner was not present at the bench where peremptory challenges were exercised. His case is one of the so-called "pipeline cases," falling between the time of Coney's trial, yet before the decision was rendered in ***Coney v. State***, 653 So.2d 1009 (Fla. 1995).

Equal protection under the law, as well as decisions of this and other courts, demands that petitioner be granted the same relief as was granted Mr. Coney. This is true whether ***Coney*** is considered "new law" or not. At the very least, the law which preceded ***Coney***, and upon which ***Coney*** was decided, mandates that petitioner be granted the same relief.

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

Error has occurred, and it is not harmless. The certified question must be answered in the affirmative, and the petitioner must be given a new trial.

Issue II. The trial court abused its discretion and committed reversible error in denying Mr. Howard's motion for continuance in which he sought additional time to locate and interview witnesses thought to have exculpatory information. Two long sought, recently located witnesses, testified at deposition that other individuals had witnessed the shooting and indicated that someone other than petitioner killed the victim. The exact nature of the information was unknown and it was not certain he could

locate these witnesses. However, the denial of a short period of time in which to attempt to locate these potentially vital witnesses was unreasonable and an abuse of discretion, considering the magnitude of the charges against and possible sentence faced by Mr. However, the arguable tenuous nature of the case which relied on the testimony of witnesses with questionable credibility, the fact that Mr. Howard had previously filed an unlimited waiver of speedy trial, and the fact that both the state and defense had previously been granted unopposed continuances. The trial court's denial of the motion for continuance violated Mr. Howard's rights to due process of law and to the effective assistance of counsel. ***Griffin v. State***, 598 So.2d 254, 256 (Fla. 1st DCA 1992); ***Brown v. State***, 426 So.2d 76, 80 (Fla. 1st DCA 1983), *disapproved on other grounds*, ***Bundy v. State***, 471 So.2d 9, 17 (Fla. 1985). This Court should reverse and remand for a new trial.

Issue III. The trial court erred reversibly in denying defense counsel's request for Florida Standard Jury Instruction 2.04(b), which instructs the jury to use great caution in relying on the testimony of a witness who claims to have helped the defendant commit a crime. An instruction on accomplice testimony is warranted where there is evidence that the witness "took part in the commission of the crime by aiding it, or by encouraging its commission." ***Newton v. State***, 178 So.2d 341, 345 (Fla. 2d DCA 1965). According to Eaton's testimony, he clearly took over the driving knowing Mr. Howard had committed a serious felony and knowing Mr. Howard was still "paranoid" and attempting to put

distance between himself and the scene of the alleged crime. Eaton had no intention of leaving petitioner's presence or contacting the police about the alleged crime, and in fact did not contact the police until he himself wished to avoid a long prison sentence. By taking over driving, Eaton aided Mr. Howard in avoiding arrest for the offense Eaton claimed he observed. Eaton qualified as an accomplice for the purpose of giving Standard Jury Instruction 2.04(b).

Mr. Howard was entitled to the instruction because there was evidence tending to support his theory that Eaton had great motive for fabricating his testimony implicating Mr. Howard and that he did not kill Judy Blevins. ***Bryant v. State***, 412 So.2d 347, 350 (Fla. 1982)(a defendant is entitled to an instruction on his theory of defense if there is any evidence tending to support that defense). Eaton admittedly implicated petitioner in hope of avoiding any prison sentence for the crimes of attempted robbery, and two counts of attempted first degree murder, for which he was originally charged.

While Issues II and III, *infra*, are outside of the scope of the certified question, this Court has discretion to rule on them and petitioner urges the Court to do so. ***Trushin v. State***, 425 So.2d 1126 (Fla. 1983).

V. ARGUMENT

ISSUE I

THE DECISION OF THE COURT IN ***CONEY V. STATE***, 653 SO.2D 1009 (FLA. 1995) DOES 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.

Although the district court affirmed petitioner's conviction, it certified to this Court the same issue it had previously certified in ***Lett v. State***, 21 F.L.W. D580 (Fla. 1st DCA March 5, 1996), namely:

> 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?

Petitioner contends the Court should answer the issue in the affirmative.

The same issue is presently before the Court in ***Lett v. State***, Case No. 87,541. The Court's decision in ***Lett*** will control its decision on this issue in the instant case.

The jury selection in petitioner's case, during which he was not physically present at the side-bar where counsel exercised peremptory challenges, was conducted October 17, 1994 (T-34). In ***Coney***, this Court ruled that, unless waived, the defendant is entitled to be physically present at the site where challenges are exercised.

The district court did not rule in the instant case that petitioner was, in fact, physically present. Rather, the district

court, citing to its prior decision in ***Lett***, ruled that petitioner could not benefit from ***Coney*** because his trial occurred prior to April 27, 1995, when ***Coney*** was decided on rehearing (A-1-3).

Petitioner contends that he is entitled to benefit from ***Coney***. Petitioner contends ***Coney*** should apply to "pipeline cases" for the following reasons:

(1) a fair reading of ***Coney*** leads to the conclusion that the only facets of the decision that are prospective are the requirements that the judge certify on the record a waiver of the defendant's right to be present, or a ratification of counsel's action (or inaction) in the defendant's presence;

(2) the state is estopped from arguing that what occurred in this case was not error, since under the same controlling facts it conceded error in ***Coney***. *See* ***State v. Pitts***, 249 So.2d 47, 48-50 (Fla. 1st DCA 1971)(equal protection violated where state takes differing legal positions in cases having the same material facts);

(3) ***Coney*** did not announce a new rule of law but rather simply clarified the existing law, the existing law consisting of Florida Rule of Criminal Procedure 3.180(a)(4); ***Francis v. State***, 413 So.2d 1175 (Fla. 1982); and, ***Turner v. State***, 530 So.2d 45 (Fla. 1987);

(4) the Court has recognized that jury selection is a "critical" stage of the trial at which time a defendant's fundamental right to be present fully attaches, ***Francis*** and ***Chandler v. State***, 534 So.2d 701, 704 (Fla. 1988);

(5) ***Coney*** itself indicated it relied on the plain language of Rule 3.180 to reach its result. If the rule already existed, it cannot as a matter of logic be considered a "new" rule of law;

(6) ***Coney*** did not announce a "new" rule of law under the definition of that term set forth in ***Wright v. West***, 505 U.S. 277, 112 S.Ct. 2482, 2497, 120 L.Ed.2d 225 (1992)(O'Connor, J., concurring, joined by Blackmun and Stevens, JJ.) and ***Teague v. Lane***, 489 U.S. 288, 301, 109 S.Ct 1060, 103 L.Ed.2d 334 (1989);

(7) "On-the-record" requirements such as those announced in ***Coney*** are not new law, *see* ***Ferry v. State***, 507 So.2d 1373, 1375-76 (Fla. 1987) and ***Amazon v. State***, 487 So.2d 8, 11 n.1 (Fla. 1986);

(8) Even if ***Coney*** announced a new rule of law, it nevertheless is applicable to "pipeline cases" under traditional standards of retroactivity, ***Griffith v. Kentucky***, 479 U.S. 314 (1987); ***Smith v. State***, 598 So.2d 1063 (Fla. 1992); and, ***State v. Brown***, 655 So.2d 82 (Fla. 1995);

(9) Petitioner did not waive his right to be present at sidebar, as a waiver cannot be inferred from either silence or a failure to object, *see* ***State v. Melendez***, 244 So.2d 137 (Fla. 1971).

Based upon the foregoing, petitioner requests the Court to vacate the judgments and sentences appealed from, quash the decision of the district court, and remand the cause to the trial court with directions to conduct a new trial.

ISSUE II

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR CONTINUANCE TO INVESTIGATE RECENTLY DISCOVERED INFORMATION AND GATHER AND INTERVIEW WITNESSES POTENTIALLY CRUCIAL TO HIS DEFENSE.

Before trial petitioner requested a continuance for the purpose of locating and speaking with potential defense witnesses (R-88-91, 92-98). Petitioner noted some witnesses listed by the state, including Richard Montgomery, had not yet been located by either the state or the defense (R-94-95). Most importantly, however, Mr. Howard noted two witnesses listed by the state, Michael Adams and Ronald Chapman, had very recently been located after a long search (R-92-94, 104-105, T-5, 19-20, 35). When deposed, both mentioned that other persons, Letheria Adams and John King (who was later located and found not helpful), had information that someone other than petitioner killed Judy Blevins (R-92-94; T-5-7, 19-23, 277). Additionally, it was noted in a police report that a confidential informant was told Lynne Powell witnessed the shooting and indicated that Mr. Howard was not the man who killed Judy Blevins (R-94, T-16-17). Petitioner sought time to locate these witnesses and determine whether they had information which would be helpful to his defense of misidentification.

The trial court's denial of the motion for continuance violated petitioner's rights to due process of law and to the effective assistance of counsel. Florida Rule of Criminal Procedure 3.190(g)(2) provides that a trial court may grant a continuance on "good cause shown." Denial of a continuance

resulting in inadequate time to prepare a defense violates due process of law under the both the state and federal constitutions. *See* ***Griffin v. State***, 598 So.2d 254, 256 (Fla. 1st DCA 1992). It also implicates the right to effective assistance of counsel under both constitutions. ***Brown v. State***, 426 So.2d 76, 80 (Fla. 1st DCA 1983), *disapproved on other grounds,* ***Bundy v. State***, 371 So.2d 9, 17 (Fla. 1985). A trial court's ruling on a continuance issue is assessed under the abuse of discretion standard, ***Brown***.

The trial court abused its discretion here. Throughout the time the case was in the trial court, the defense had been actively investigating and seeking witnesses (R-17, 42, 48, 51, 53, 59, 75, 85). Many of these witnesses were elusive or unreachable (R-26-28, 31, 37-38, 40, 61-74). Shortly before trial, two of these witnesses were located and interviewed and pointed the defense toward what was thought to be exculpatory information. Defense counsel needed to investigate this information further in order to effectively defend Mr. Howard.

Mr. Howard's defense was that he did not shoot Judy Blevins. Two of the potential witnesses were thought to have information that someone else, not petitioner, shot Judy Blevins. Additional time would have allowed Mr. Howard to seek, hopefully locate, interview, and subpoena these witnesses on his behalf. If these witnesses possessed the information they were believed to have, their testimony would have been crucial to Mr. Howard's defense and may well have tipped the scales in favor of reasonable doubt.

The refusal to allow even a short period of time for this further investigation was especially harmful because the state's case rested on the testimony of an identification witness with questionable credibility. Earnest Rollins was the state's only neutral witness, but he admittedly was frequently intoxicated and in fact testified he was intoxicated at the time of the shooting -- the time in which be observed the matters about which he testified. Rollins' capacity to accurately recall the events he claimed to observe was therefore quite arguably suspect.

Chuck Eaton admitted that he was facing a long prison sentence, that he contacted police with the hope that he could avoid prison, and that he was "cooperating" in exchange for the dropping of several charges and in hope of receiving a good recommendation from the state at sentencing (R-188-194). Eaton testified that he understood "cooperate" to mean that he had to tell the jury what the state wanted it to hear (T-193). Melody Poole was Eaton's mother and an admitted crack cocaine user (T-214-215, 221). She admittedly did not contact police with her story until after her son was arrested, was facing a long prison sentence, and had spoken to her about going to the police (T-222-223). Her motive for testifying and her capacity to accurately recall events was therefore also at issue. Likewise, the credibility of David Johnson, Eaton's good friend, was in question because he only reluctantly told the police their story after a jailed Eaton requested his help (T-205-208).

Mr. Howard does not dispute that the exact nature of the information had by the witnesses he sought was unknown and that

it was not certain he could locate these witnesses. However, considering the magnitude of the charges against and possible sentence faced by Mr. Howard, the arguably tenuous nature of the state's case, the fact that petitioner had previously filed an unlimited waiver of speedy trial (R-25), and the fact that both the state and the defense had previously been granted unopposed continuances, (R-20, 29, 35), the denial of a short period of additional time in which to attempt to locate these potentially vital witnesses was unreasonable and an abuse of discretion. This Court should reverse and remand for a new trial.

ISSUE III

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON ACCOMPLICE TESTIMONY BECAUSE THE STATE'S MAIN WITNESS RELATED FACTS TENDING TO SHOW HE AIDED APPELLANT IN ELUDING CAPTURE FOR THE ALLEGED CRIME.

At trial, Chuck Eaton testified against Mr. Howard, stating that he was present when Mr. Howard attempted to kidnap and shot Judy Blevins and then drove away (T-173-174). Eaton testified that, not long after the shooting, he took over the driving because Mr. Howard was unsteady and "paranoid" (T-174, 186). Eaton continued to drive Mr. Howard, himself, and his friend around Jacksonville (T-174). He did not leave Mr. Howard's presence; he did not contact police (T-189). He utterly failed to contact the police until he himself was in trouble and thought he could help himself by implicating petitioner in the shooting of Blevins (T-189). At the charge conference, defense counsel requested Standard Jury Instruction 2.04(b), which provides in part:

> You should use great caution in relying on the testimony of a witness who claims to have helped the defendant commit a crime. This is particularly true where there is no other evidence tending to agree with what the witness says about the defendant.

(T-296). The trial court denied the request (T-296).

The trial court erred in denying an instruction on accomplice testimony because Eaton's testimony tended to show that Eaton aided Mr. Howard after he allegedly committed a serious felony. The usual test for whether a witness is an accomplice of the accused is "whether or not he could be prosecuted and punished for the crime with which the accused is charged" ***Newton***

v. State, 178 So.2d 341, 354 (Fla. 2d DCA 1965). An instruction on accomplice testimony is warranted where there is evidence that the witness "took part in the commission of the crime by way of aiding or by way of encouraging its commission." ***Id***.

According to Eaton's testimony, while he may not have participated in the actual alleged killing, he aided Mr. Howard in fleeing the scene of the alleged crime. Eaton could arguably be considered an accessory after the fact. An accessory after the fact is someone who

> maintains or assists the principal..., or give offender any other aid, knowing that he had committed a felony..., with intent that he shall avoid or escape detection, arrest, trial or punishment....

Section 777.03, Florida Statutes (1993). While a simple failure to report a crime does not make one an accessory after the fact, "any aid given to a known felon or misdemeanant with intent to hinder his or her being apprehended, tried, or punished will qualify" ***Staten v. State***, 519 So.2d 622, 626 n.2 (Fla. 1988).

According to Eaton's testimony, he clearly took over the driving knowing Mr. Howard had committed a serious felony. He assisted him knowing Mr. Howard was still on the process of putting distance between himself and the scene of his alleged crime. Eaton know that Mr. Howard did was want to be apprehended for the alleged crime. When Eaton took over the driving, Eaton had no intention of leaving Mr. Howard's presence or contacting the police about the alleged offense. And in fact, Eaton never contacted the police about the alleged crime, not, that is, until he himself was facing many years in prison and wished to cut a deal.

When he took over the driving, Eaton aided Mr. Howard in avoiding arrest for the serious felony Eaton said he observed.

Additionally, Mr. Howard was entitled to the instruction because there was evidence tending to support his theory that Eaton had great motive for fabricating his testimony implicating Mr. Howard and that he did not kill Judy Blevins. A defendant is entitled to an instruction on his theory of defense if there is any evidence tending to support the defense. ***Bryant v. State***, 412 So.2d 347, 350 (Fla. 1982). While the requested instruction is not technically a "defense," it does affect petitioner's defense in that it instructs the jury to cautiously examine the testimony and credibility of an accusatory witness like Eaton. There was ample evidence of a motive for Eaton to testify untruthfully -- Eaton admitted he hoped to avoid any prison sentence. Likewise, there was evidence tending to show that Poole and Johnson each had a motive for joining Eaton in the fabrication -- each wanted to assist Eaton in avoiding a prison sentence. It was not necessary to Mr. Howard prove Eaton, Poole, and Johnson were lying; it is enough that some evidence was presented to support that theory.

The police admittedly arrested petitioner only after hearing Eaton's story and Eaton's testimony was key to the state's case. Therefore, Eaton's credibility was at issue. Standard Jury Instruction 2.04(b) addresses the credibility of an accusing witness. Mr. Howard was prejudiced by the trial court's refusal to give an instruction on accomplice testimony.

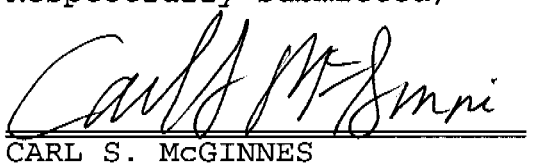
VI. CONCLUSION

Based upon the arguments made herein, petitioner contends reversible error has been demonstrated. Should the Court agree with any or all of the three issues presented herein, it must quash the district court's opinion and remand the cause to the trial court with directions to conduct a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Merit Brief of Petitioner has been furnished by delivery to William J. Bakstran, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to petitioner, Mr. Dino Howard, on this 31st day of May, 1996.

Respectfully submitted,



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IN THE SUPREME COURT OF FLORIDA

DINO HOWARD, :

Petitioner, :

v. : CASE NO. 87,856

STATE OF FLORIDA, :

Respondent. :

_____/

A P P E N D I X

TO

MERIT BRIEF OF PETITIONER

PD

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

DINO HOWARD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

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

CASE NO.: 94-4290

Opinion filed April 1, 1996.

An appeal from the Circuit Court for Duval County.
R. Hudson Olliff, Judge.

Nancy A. Daniels, Public Defender; Christine M. Ryall, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; William J. Bakstran, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Dino Howard appeals his conviction and sentences for third degree murder and attempted armed kidnapping, arguing among other things that reversal is required under Coney v. State, 653 So. 2d 1009 (Fla. 1995), because the record does not reflect that Howard was present at side-bar conferences at which challenges to the

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jury venire were exercised. We affirm all issues on appeal, except for the ordered restitution, and certify a question of great public importance relating to the application of Coney to "pipeline" cases. We reverse the order of restitution and remand for further proceedings and for the entry of a corrected judgment.

For reasons that are fully spelled out in this court's opinion in Lett v. State, 21 Fla. Law Weekly D580 (Fla. 1st DCA March 5, 1996), Coney does not require a new trial here because the court in Coney excluded its application to cases, such as the instant case, which were "in the pipeline" at the time Coney was decided. As in Lett, we also certify the following question:

> 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?

In addition to imposing a prison term, the written sentence directs that Howard pay restitution. However, the sentencing court did not announce at the time of sentencing that appellant would be required to pay restitution. Further, no factual basis has been established in the record for the amount of restitution ordered and no stipulation appears in the record as to the amount, contrary to the suggestion by the lower court in its written order. The state concedes, and we agree, that the order of restitution must be reversed, and the

cause is remanded for a proceedings consistent with this opinion. Dubois v. State, 650 So. 2d 228 (Fla. 1st DCA 1995). While on remand, the lower court is instructed to enter a corrected judgment deleting the reference to section "787.01", a non-existent statute, and adding the correct statutory reference. Further, while on remand, appellant is to be specifically advised of the amount of public defender fees sought to be assessed and of his statutory right to challenge that amount. Bull v. State, 548 So. 2d 1103 (Fla. 1989).

AFFIRMED in part, REVERSED in part and REMANDED.

BOOTH, WOLF AND VAN NORTWICK, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

DINO HOWARD,	:	
Appellant/Petitioner,	:	
v.	:	CASE NO. 94-4290
STATE OF FLORIDA,	:	
Appellee/Respondent.	:	
	:	

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that DINO HOWARD, Petitioner, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered **April 1, 1996.** This decision passes upon a question certified to be of great public importance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to William J. Bakstran, Assistant Attorney General, Department of Legal Affairs, Criminal Appeals Division, The Capital, Plaza Level, Tallahassee, FL, 32301, on this 30th day of April, 1996.

Carl McGinnes

CARL S. McGINNES