ORIGINAL

IN THE SUPREME COURT OF FLORIDA

RICKIE RENORIED MATHIS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 88,517

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Rickie Renoried Mathis, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Petitioner or his proper name.

The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of the trial court's proceedings; "IB" will designate the Initial Brief of Petitioner. Each symbol will be followed by the appropriate page number in parentheses.

In preparing this brief, the undersigned has adopted, with few alterations, the argument with regard to issue two presented in the State's brief in Bowick v. State, No. 87,826 (Fla.), which concerns the same certified question at issue in this case. The identical issue is also currently pending before this Court in, among others, the following cases:

Bruce H. Bell v. State, No. 87,716
Eric Scott Branch v. State, No. 87,717
Reginald Donald Gainer v. State, No. 87,720
Maurice M. Horn v. State, No. 87,789
Dino Howard v. State, No. 87,856

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts the Petitioner's statement of the case and facts as being generally accurate when considered in light of the following additions and exceptions.

At the conclusion of the hearing on the motion in limine, the trial court ruled as follows:

> I think the question of whether its impermissibly suggestive is a question of fact. And after hearing the evidence today, I don't find that the showing of the photograph of the defendant and his girlfriend . . . under the circumstances was unnecessarily suggestive.
>
> I believe that in the investigation, if . . . Lieutenant Haire said, 'We suspect this person,' but he made no mention of any investigation that he had done or anything at all. He just showed the picture, and the victim said that she thought that was the person.
>
> Certainly because of her prior familiarity with the defendant having come to do business in the store, buying lottery tickets and other things, the defendant having called her by name, that would have increased the ability of the victim to be able to identify him without any suggestion at all. And I don't believe that there was any suggestion whatsoever. Other than there was just simply the presentation of the photograph, so I would deny your motion. (MI 69-70).

The First District Court of Appeals, on June 27, 1996, entered its opinion in the instant case holding as follows:

> In his direct appeal, appellant raises three issues: (1) whether the trial court erred when it permitted evidence of an impermissibly suggestive pretrial photographic identification; (2) whether his absence from the bench during the exercise of jury challenges constitutes reversible error; and (3) whether he is entitled to have his sentence as an habitual violent felony offender set aside, and to be resentenced pursuant to the guidelines, because the state attorney's decision to request habitual offender treatment was racially motivated. We affirm.
>
> Appellant's first issue is based on the assertion that a pretrial photographic identification was impermissibly suggestive and, accordingly should not have been permitted in evidence. Our review of the record satisfies us that it was not error to permit evidence regarding the pretrial photographic identification. Under the totality of the circumstances, the procedure did not give rise to a substantial likelihood of irreparable misidentification. State v. Cromartie, 419 So. 2d 757 (Fla. 1st DCA), review dismissed, 422 So. 2d 842 (Fla. 1982).
>
> By his second issue, appellant asserts that he is entitled to anew trial because, although present in the courtroom during jury selection, he was not physically present at bench conferences during which jury challenges were exercised. Appellant's trial took place before release of the opinion in Coney v. State, 653 So. 2d 1009 (Fla.), cert. denied, ___ U.S. ___, 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995). Accordingly, we conclude that Coney is inapplicable. Lett v. State, 668 So. 2d 1094 (Fla. 1st DCA 1996). Pursuant to the rule which preceded that announced in Coney, appellant's rights were not violated. Francis v. State, 413 So. 2d 1175 (Fla. 1982). However, as in Lett, we certify the following to be a question of great public importance:

DOES THE DECISION IN Coney v. State, 653 So. 2d 1009 (Fla.), cert. denied, ___U.S.___, 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995), APPLY TO "PIPELINE CASES," THAT IS, THOSE OF SIMILARLY SITUATED DEFENDANTS WHOSE CASE WERE PENDING ON DIRECT APPEAL OR OTHERWISE NOT YET FINAL WHEN THE WHEN THE OPINION WAS RELEASED?

Finally, we affirm appellant's habitual violent felony offender sentence on the authority of Jones v. State, Case No. 94-1737 (Fla. 1st DCA June 13, 1996). (A. A).

SUMMARY OF ARGUMENT

ISSUE I.

The presentation of a single photo array of the Petitioner in this case was necessary. The procedure utlized could not result in a substantial likelihood of irreparable misidentification for numerous reasons, including the fact that the victim recognized the Petitioner who was a frequent customer of the store. All of the identifications in this case are supported by sixteen (16) independent indicia of reliability. Therefore, the trial court did not err in admitting evidence relating to identification of the Petitioner.

ISSUE II.

Because the principle of prospective application is well understood, and because this Court clearly stated in Coney v. State, infra, that its holding there was to applied only prospectively, this Court should decline to exercise its discretionary jurisdiction to address the certified question in this case concerning the application of Coney to so-called "pipeline" cases. Should this Court exercise its discretion to address the certified question, the Court should answer the certified question in the negative and clarify Coney by expressly

holding that a defendant must object in the trial court to his or her absence from sidebar conferences at which the parties' attorneys announce their jury challenges, and that a defendant may not raise the Coney issue for the first time on appeal.

ARGUMENT

ISSUE I

WHETHER THE PETITIONER MAY OBTAIN REVERSAL ON PETITION FOR DISCRETIONARY REVIEW ON AN ISSUE UNRELATED TO THE QUESTION CERTIFIED BY THE FIRST DISTRICT COURT WHICH CHALLENGES A TRIAL COURT RULING ON A MOTION IN LIMINE ADDRESSED TO AN EYEWITNESS IDENTIFICATION? (Restated)

The Petitioner again challenges the trial court's ruling on a motion in limine admitting evidence relating to the eyewitness' pretrial identification of Petitioner as the person who robbed her at gunpoint.

The Petitioner, in raising this issue, does not mention the fact that it is not encompassed in the question certified by the lower court as one of great public importance. As the opinion below reflects, the court did not consider the issue to be worthy of great mention.

While the Respondent acknowledges that this Court has the discretionary authority to consider this issue, it should decline to do so. State v. Burgess, 326 So. 2d 441 (Fla. 1976); Stein v. Darby, 134 So. 2d 232 (Fla. 1961); Coffin v. State, 374 So. 2d 504 (Fla. 1979). The Respondent respectfully urges this Court to exercise its discretion and refuse to consider the issue given

the increasingly frequent tendency of defendants to seek review of issues which have been found to be without merit by the lower court by 'tacking them onto' questions certified by a district court. This tendency, which adversely impacts upon the workload of this Court and the State of Florida, should be curbed.

The Petitioner argues that the trial court erred in admitting testimony regarding to his pretrial identification by the victim because the identification, initially based upon one photo of him presented to the victim, was unnecessarily suggestive giving rise to a substantial likelihood of irreparable misidentification. He additionally, asserts that a subsequent photo lineup in which he was again identified was suggestive because of the position and quality of the photo, as well as, the fact that it was the result of the first allegedly tainted identification. The Petitioner thus concludes that the trial court erred in admitting evidence of the identification.

As argued below, the Petitioner's claim is without merit because, first, the presentation of a single photo of him was necessary. Secondly, the procedure utilized could not result in a substantial likelihood of irreparable misidentification because, among other factors, the victim immediately recognized the Petitioner as a regular customer when he first entered the

store, immediately prior to the robbery. Moreover, all of the identifications were supported by indicia of reliability which included the victim's independent identification of the Petitioner's getaway car and weapon.

The decision to admit evidence is within the sound discretion of the trial court and that discretion will not be reversed on appeal absent a showing of its clear abuse. Jent v. State, 408 So. 2d 1029 (Fla. 1981); Jenkins v. State, 557 So. 2d 1017, 1020 (Fla. 1st DCA 1989). Discretion is abused when a trial court's decision is "arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980).

The determination of whether evidence should be suppressed requires a consideration of "1) whether the police employed an unnecessarily suggestive procedure and if so, 2) considering all of the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification." misidentification. Grant v. State, 390 So. 2d 341 (Fla. 1980), cert. denied, 451 U.S. 913, 101 S. Ct. 1987, 68 L. Ed. 2d 303 (1981); Crossley v. State, 580 So. 2d 801, 802 (Fla. 1st DCA 1991), reversed on other grounds, 596 So. 2d 447 (Fla. 1992).

With respect to the first consideration, the showing of one photograph is not per se unnecessarily suggestive; instead, it is merely one factor to be viewed within the surrounding circumstances. See Herrera v. Collins, 904 F. 2d 944 (5th Cir. 1990) (affirming trial court's decision that the showing of a single photo to an officer while the officer was hospitalized was not unnecessary). One factor which weighs heavily in favor of employing a single photo identification is when armed and dangerous offenders are still at large and the eye witness remains in danger. Id. at 947, n. 2. Where it is determined that the police procedure employed is necessary, the analysis is complete and the identification testimony is deemed properly admitted. Grant v. State, 390 So. 2d 341, 344 (Fla. 1980) (holding "we need address only the first step in the above analysis, for we do not believe that the police employed unnecessarily suggestive procedures in obtaining [witness'] out-of-court identifications.")

In dealing with the second factor, whether under all of the circumstances the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification, "the central question [becomes] whether under the totality of the circumstances the identification was reliable even though the

confrontation procedure was suggestive." Neil v. Biggers, 409 U.S. 188, 199, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401 (1972). In Neil, the United States Supreme Court identified factors relating to reliability, including the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Thus, the determination of whether the trial court abused its discretion in finding the evidence admissible turns on a consideration of these factors.

When the above referenced factors are applied to the instant case, it is apparent the trial court's ruling admitting the identification was imminently correct. The record clearly shows that an unnecessarily suggestive procedure was not employed to obtain the victim's identification. The first photograph presented to the victim for her identification was the only one which the police could have used. The Sheriff's Department had no other photos of the Petitioner. (MI 37, 53-54). While Leon County did have other photos of the Petitioner, these were approximately ten years old. (MI 53-54). Moreover, the source of the photo used in this case, the Petitioner's girlfriend,

Marie Baldwin, did not have any photos of the Petitioner alone. (T. 80-81). In addition, when Investigator Tommy Haire spoke to the Petitioner over the phone from Baldwin's house, the Petitioner agreed to go to the house. (MI 35-36; T. 80). However, Investigator Haire waited for two hours for the defendant to arrive prior to leaving. (MI 35-36; T. 80). Because the Petitioner did not appear at the house as promised, the Investigator was prevented from taking the Petitioner's photo with his Polaroid camera, thus leaving him with only the photo provided by Baldwin of her with the Petitioner. (MI 35-36; T. 80-81, 94-95). It is ironic that the Petitioner complains that the photo utilized was improperly suggestive because it was the Petitioner's own actions which prevented the police from obtaining a proper photo for use in a photo lineup. His argument ignores the fact that the police were working under extremely tight time constraints due to the fact that an armed and dangerous robber, who was particularly a threat to the victim, whose getaway vehicle had been identified, remained at large. As Investigator Haire testified, "[t]he normal police procedure, if possible, is to use a lineup. In this case it was not possible to do that." (T. 94). Accordingly, the police did not employ an unnecessarily suggestive procedure when presenting the victim

with the only photo they had of the Petitioner in order to a possible identification. The trial court therefore properly found that the procedure was not unnecessarily suggestive (MI 69-70) and, consequently, properly admitted the identification testimony. Because it is clear that the police did not employ an unnecessarily suggestive procedure, the analysis is complete and the trial court's decision must be affirmed.

Even if the Court were to determine that the procedure used by the police was unnecessarily suggestive, the trial court's ruling must nevertheless be affirmed since it is apparent the victim's identification of the Petitioner was reliable based upon the existence of at least sixteen (16) separate factors. **First**, the victim had a good opportunity to view the Petitioner during the course of the robbery. (T. 35, 62). The record establishes that the robbery occurred in broad daylight under good lighting conditions. (MI 10-11). The crime took place over the course of several minutes and, at one point in time, the Petitioner and the victim were face to face while only a few feet apart. (MI 7-8; T. 32-35). Thus, the victim had a good opportunity to view the Petitioner during the robbery. **Second**, the victim immediately recognized the Petitioner when he first entered the store because his face was "familiar" due to the fact that he was a "frequent"

(twice a week) customer of the store where he often purchased lottery tickets. (MI 8-9, 18, 23-24, 57; T. 50, 67). At trial, the Petitioner's mother corroborated the victim's testimony in this regard by testifying that the Petitioner was a regular customer at the store where he bought gas, lottery tickets, juice, and other items. (T. 121-122, 127). The victim immediately recognized the Petitioner's familiar face. (MI 69-70). **Third,** the intensity of the situation would have naturally resulted in the victim remembering the Petitioner's face. (MI 7-8, 69-70). **Fourth**, the victim's attention would have been further heightened when the Petitioner called her by her first name despite the fact that she was not wearing a name tag on the job. (MI 8, 69-70). **Fifth**, the victim correctly stated several specifics concerning the Petitioner's appearance, including his large shoulders, large chest, familiar face, lack of facial hair, and muscularity. (MI 7-8, 17-18, 20-22, 27). **Sixth**, the victim picked the Petitioner out of a second photo lineup utilizing a new and accurate photo taken at the time of the Petitioner's arrest. **Seventh**, both photo identifications were close in time to the robbery. The victim identified the Petitioner from the single photo within one day of the robbery; the second identification based upon the photo line-up was about one and a

half weeks later. (MI 41). Both identifications were thus close in time to the robbery. **Eighth**, the victim spontaneously and independently identified Petitioner, without any police action or involvement, when the Petitioner entered the same store accompanied by his mother and brother a few days after the robbery prior to his arrest. (MI 19-20, 40). **Ninth**, the victim made an in court identification of the Petitioner at trial. (T. 35). **Tenth**, the consistency of the victim's identifications which number four is in itself indicia of reliability. (MI 16-20; T. 35). **Eleventh**, the record undisputedly shows that the police never made any suggestions to the victim when she identified the Petitioner during any of the four confrontations. (MI 16, 18, 19-20, 25, 41-42, 69-70; T. 47, 49, 86-87). **Twelfth**, the victim's identifications were positive, even when confronted with a picture of Petitioner with a beard and moustache; the Petitioner was clean shaven at the time of the robbery. (MI 18, 20-21, 26, 39, 41-42; T. 46, 48, 87, 96). At the first confrontation the victim stated that the man in the photo had a beard and that the robber did not, but that it looked a lot like him. (MI 16, 25, 39). Moreover, the record shows that when confronted with the photo lineup, the victim "immediately" picked Petitioner's photo and she had "no doubts" about doing so because

she knew "That [wa]s him." (T. 49, 87, 96). At trial, the victim affirmed that she had "no doubts" and "no hesitation" about her identification of the Petitioner. (T. 48). The record therefore reflects that the victim positively identified the Petitioner at all stages of the case, without hesitation, regardless of whether he had a beard or was clean shaven. **Thirteenth**, the victim initially identified the getaway car prior to the time the Petitioner was even a suspect and the Petitioner had access to the car which belonged to his mother.[1] (R. 1; MI 14-15, 29-31; T. 43-44, 66). **Fourteenth**, the victim identified the gun used by Petitioner as a silver .25 caliber semi-automatic

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[1] At trial, the Petitioner attempted to show, through testimony of his mother, that he did not have access to the car identified by the victim as the getaway car. (T. 119). However, the record clearly showed the Petitioner had access to "his mother's car." The record also shows that: 1) the victim identified the car within one hour of the crime based upon specific points of identification, as a two-tone brown Chevrolet Impala with a dented front passenger fender and a bent-up license plate (MI 15, 29-31; T. 40-44, 74-75); 2) the Petitioner told his girlfriend that he was going to his mother's house at the relevant time (T. 104); 3) Petitioner kept a license plate registered in his name in the glove compartment of the car (T. 77-78); 4) Petitioner's father told the police Petitioner took the car during the relevant time period, although nine months later, at trial, the Petitioner's mother testified that her husband was incompetent (MI 34; T. 117-118); 5) Investigator Haire showed a photo of the car to a confidential informant who identified it as the Petitioner's car (MI 33). The record thus established the Petitioner had access to the car in question.

pistol, the same model which she owned herself. (MI 9). The State established the Petitioner owned the same type of silver gun. (MI 37). **Fifteenth**, Petitioner's girlfriend testified that on the morning in question Petitioner left their trailer at 6:30-7:00 a.m., saying that he was going to his mother's house. She also testified that he returned later that morning before leaving again and that his gun was not in the trailer. The robbery occurred at 7:55 a.m. (MI 37; T. 103-104, 108). **Finally**, the victim established her credibility in making accurate identifications by not making a positive identification of the Petitioner's partner when she could not do so. (MI 21, 38-39).

Accordingly, when the identifications are examined in light of the above circumstances, it is clear that the victim's identification of the Petitioner was highly reliable, regardless of any possible suggestiveness of the original single photo presentation. The trial court did not abuse its discretion in admitting the identification evidence.

The Petitioner argues that the victim's identification of him was not reliable since she told the police immediately after the robbery that the robber was approximately 5'8" tall and around 160 pounds. (MI 21-22). The victim's underestimation of the Petitioner's size is not, however, dispositive of the instant

case for several reasons. The victim specifically testified that she relied upon the Petitioner's face as the determining factor in her identification of him as the robber. (MI 9, 18, 20; T. 49, 63). This was based on the fact that the Petitioner's face was "familiar" because he was a "frequent" customer, as well as, the fact that the victim was face to face with him while only a few feet away at the beginning of the robber. (MI 7-8, 10-11, 18, 23-24, 57). Furthermore, Petitioner was bent over during most of the robbery, so no one could seen him behind the counter, making it difficult to accurately determine his height. (T. 32-33, 38). The victim, moreover, articulated other specifics concerning the robber's description including the fact that he was a big man generally, had big shoulders, a big chest, was very muscular, had no facial hair, and had a familiar face; she also provided a general clothing description. See supra. Also relevant to this inaccuracy is the size of the victim who was only 5' tall. (T. 43). From her perspective, a person 5'8" tall weighing 185 pounds would be very big. Finally, the inability to give an accurate estimate in measurements of inches and pounds is not unique to this victim. The record shows that the police records relating to the Petitioner list him as 6'1" tall, even though he stated he was 6'5" tall. (R. 1; T. 98). Thus, an

estimated height and weight of 5'8" tall and 185 pounds form a 5' tall woman is not such an egregious error that would vitiate the entire identification as set forth above. The trial court did not abuse its discretion in admitting testimony relating to the Petitioner's identification.

The Petitioner relies on Way v. State, 502 So. 2d 1321 (Fla. 1st DCA 1987), for the proposition that the use of a single photo array was unnecessarily suggestive and gave rise to a substantial likelihood of irreparable misidentification. Way, however, is not dispositive of the case. In Way, the defendant's conviction for burglary rested upon his identification by a bartender, based upon a single photo array. The Way Court determined that the identification was inadmissible since the single photo presentation was unnecessarily suggestive. The Court, however, did not explain that conclusion beyond stating that a single photo array was "one of the most suggestive methods of identification possible and is impermissibly suggestive under most circumstances. 502 So. 2d at 1323. That court also determined that the identification was not reliable finding the bartender's identification was "vague and indefinite" as

> [h]e did not remember the date the check was cashed or what the person who cashed it was wearing, nor could he remember whether the person had a beard or a broken

> tooth which Way had at the time ... He thought that he had told [the [police] that the person who cashed the check 'resembled' or 'reminded him of' Willie Coleman or Willie Coleman's younger brother. Id.

Based upon the above factors, the court found that the "highly suggestive procedure of presenting [the bartender] with a single photograph of Way did create a substantial likelihood of misidentification." Id. The Way Court further explained that events subsequent to the trial confirmed the correctness of its result, including the fact that the real offender's fingerprints were found at the scene, the real offender confessed, the real offender was identified by his partner in the burglary, and the bartender recanted his identification of Way by affidavit. Id. at 1323-1324. Thus, the court concluded that "[u]nder these facts and circumstances, both of the requirements of the two-pronged test have been conclusively met." Id. at 1324.

The record in this case fails to contain any factors which would undermine the reliability of the identifications. In contrast to Way, for example, the police in this case had only one photo of Petitioner and that photo was inherently useless for a typical photo array. Significantly, the Petitioner prevented the police from obtaining an appropriate Polaroid picture which could be used in a photo lineup. Additionally, the Petitioner

here was wanted for armed robbery of a victim who was the only witness to the crime. The police therefore had to act quickly because and armed and dangerous felon was loose, and the victim remained in potentially great danger. Additionally, in the instant case, sixteen separate indicia of reliability supported the victim's identification.

The Petitioner also challenges the second photo identification as unnecessarily suggestive on its own and also asserts that it was tainted due to the first identification. The argument is without merit on either count. At trial the Petitioner did not attack the second photo array based upon suggestiveness due to its presentation or construction. (MI 66-69). The failure to present this claim deprives this Court with the ability to review either the development of facts as to the issue, or the trial court's ruling on the claim. See Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985); Troedel v. State, 462 So. 2d 392, 396 (Fla. 1984). The argument is therefore not before this Court for its consideration. Even if this Court could consider the claim, it is apparent that the second photo array was not unnecessarily suggestive because there were no verbal suggestions by the investigator, all of the photos show black males in the same age group, some of whom appear bald or nearly bald, none have

significant facial hair, and some appear muscular. See Reese v. Fulcomer, 946 F. 2d 247, 260-262 (3d Cir. 1991); United States v. Maldonado-Rivera, 922 F. 2d 934, 973-976 (2d Cir. 1990); also see State exhibit two. The second photo array was not unnecessarily suggestive on its own.

Additionally, contrary to the Petitioner's claim, since the first identification was not unnecessarily suggestive, it could not have tainted any subsequent identifications. All of the victims identifications after the first merely affirm the positive nature of the Petitioner's identity as the robber. The reliability analysis, moreover, applies to the victim's identification of the Petitioner; thus, the central issue of identification and reliability is overwhelmingly satisfied.

Finally, the in-court identification of the Petitioner was also properly admitted in that it was not tainted by the first identification and it is amply supported by numerous independent indicia of reliability. Willacy v. State, 640 So. 2d 1079 (Fla. 1994); Lewis v. State, 572 So. 2d 908 (Fla. 1990). The Petitioner's reliance upon Judd v. State, 402 So. 2d 1279 (Fla. 4th DCA 1981) for the assertion that the in-court identification of Petitioner was a "sham" (IB. 18), is misplaced. In Judd, the

court held that after considering the applicable principles of law,

> and after careful consideration of all the facts in the instant case, we believe that the pre-trial photographic array was impermissibly suggestive in its singular depiction of Judd as the only person who was both bare-chested and had braided hair. Furthermore, the suggestiveness of the show-up was not vitiated by some other circumstance which would have reduced the 'substantial likelihood of misidentification.' Mr. Shapin's observations of his assailant were short-lived and made in a moment of fear and uncertainty. The tavern was dimly lit. Shapin had been working for some twelve hours and had consumed at least two beers earlier in the afternoon. His description of his assailant was very general and though there is an implication that the robbers were the same individuals who had visited the tavern previously, Shapin was never able to state this fact with certainty. Finally, the prosecution made no attempt to have Mr. Shapin make an in-court identification, the clear implication being that he could not do so. 402 So. 2d at 1281.

Judd therefore is inapplicable to this case where the victim made a positive and unequivocal identification of the Petitioner in-court, the victim made three other identifications of the Petitioner outside of court, and the identifications were not riddled with the frailties inherent in Judd.

The trial court's ruling admitting identification evidence must be affirmed.

ISSUE II

DOES THE DECISION IN CONEY V. STATE, 653 So. 2d 1009 (Fla.), cert. denied, ____ U.S. ____, 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995), APPLY TO "PIPELINE CASES," THAT IS, THOSE OF SIMILARLY SITUATED DEFENDANTS WHOSE CASES WERE PENDING ON DIRECT APPEAL OR OTHERWISE NOT YET FINAL WHEN THE OPINION WAS RELEASED? (Restated from Petitioner's Brief)

This Court has discretion to decide whether to address questions certified by the district courts to be of great public importance. Art. V, § 3(b)(3), Fla. Const.; State v. Burgess, 326 So. 2d 441 (Fla. 1976); Stein v. Darby, 134 So. 2d 232 (Fla. 1961). For the following reasons, the State respectfully asks this Court to decline to review the certified question in the case at bar.

In Jones v. State, 569 So. 2d 1234, 1237 (Fla. 1990), this Court held that the defendant's absence from sidebar conferences where peremptory strikes were announced was not error because the defendant was given the opportunity to confer with counsel at defense table prior to the conferences. Coney v. State, 653 So. 2d 1009 (Fla. 1995), which the Court decided some four years later, changed the law. It held that the defendant has a right under Fla. R. Crim. P. 3.180 to stand at the bench with counsel,

and not merely sit at defense table, when peremptory challenges are announced. Indeed, Justice Overton expressly recognized Coney's departure from previous, well-established judicial practice:

> Judges have believed for nearly fifteen years that exercising challenges at the bench, outside the hearing of the jury while the defendant was at counsel table, was proper because the defendant was present in the courtroom.

Id. at 1016 (Overton, J., concurring in result only). Further, the fact that Coney constituted a change in the law, and a departure from the previous practice, is apparent from the sheer number of cases litigating the Coney issue.[2]

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[2]Petitioner nevertheless claims that Coney did **not** constitute a change in the law, but that it instead "clarified" this Court's previous decisions on the issue by requiring trial courts to "inquire and certify waivers and ratification of the actions of counsel on the record." Petitioner's initial brief at 12. Petitioner asserts that defendants always had the right to be present at the bench during jury selection, and that the only part of the Coney decision that is "new" and "prospective" is the aforementioned waiver certification requirement. Petitioner's initial brief at 12. However, in the two cases on which petitioner relies, the defendant was not even present **in the same room** with the judge and the lawyers when counsel announced their strikes. See Francis v. State, 413 So. 2d 1175 (Fla. 1982) (defendant was in the bathroom part of the time while prospective jurors were questioned in the courtroom, and when the judge and counsel retired to the jury room to exercise peremptory strikes, the defendant was left in the courtroom); and Turner v. State, 530 So. 2d 45, 47 (Fla. 1987) (defendant was not present in the judge's chambers when jurors were challenged). Francis and

This Court held that the new rule it announced in Coney was "prospective only." Coney, 653 So. 2d at 1013. There is nothing ambiguous about this language, or about the prospectivity principle in general. As this Court has repeatedly held, prospective decisions do not apply to cases tried before the new decision was announced, regardless of whether such cases are still pending on appeal. See, e.g., Fenelon v. State, 594 So. 2d 292, 293 and 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) (citations omitted) ("We recognize that this holding [that a prior decision is to have 'prospective effect only'] may seem contrary to a portion of

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Turner therefore do **not** stand for the proposition that a defendant has a "right" to be present at the bench when the parties exercise their peremptory challenges, as petitioner suggests.

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."); and Domberg v. State, 661 So. 2d 285, 287 (Fla. 1995) (in Wuornos, Smith was "read to mean that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise"). Thus, this Court's statement in Coney that the decision in that case is to be applied only prospectively means, simply and clearly, that the decision is to be applied only to those cases tried after the decision in Coney was issued.

Petitioner now claims that even though he was tried and convicted **before** this Court issued its Coney decision, this Court should apply Coney to his case and grant him a new trial because he was not present at the bench when counsel announced their peremptory challenges. To support this claim, petitioner asserts that equal protection demands that Petitioner be granted the same relief as was granted Coney. However, the critical fact

petitioner overlooks is that the defendant in Coney was **not** given the benefit of the new rule the Court announced in that case. The simple truth is that Coney was not released from custody, he was not granted a new trial, and neither his conviction nor his sentence was reduced as a result of his absence from the sidebar conference when the parties exercised their peremptory challenges. Thus, because the new rule announced in Coney was not even applied to Coney, there clearly is no rational basis for applying that new rule to petitioner, thereby affording him greater relief than Coney himself received. In any event, because this Court's direction in Coney that the decision there is to be applied prospectively is unambiguous, there is no need for this Court to accept jurisdiction to answer the certified question in this case concerning that prospective application.

Should this Court exercise its discretion to address the certified question, the State asks that the Court answer the question in the negative and clarify the rule it announced in Coney. The law should be made clear that if a defendant wishes to stand at the bench with the lawyers when they announce their peremptory strikes, the burden is on the defendant to make his or her request known to the judge. A defendant who remains silent waives the right to be present at bench conferences, and cannot

be heard to complain for the first time on appeal about his or her absence from the sidebar conference.

This Court recently applied the contemporaneous objection rule to violations of Fla. R. Crim. P. 3.180. In Gibson v. State, 661 So. 2d 288 (Fla. 1995), decided after Coney, the defendant argued that the trial court violated his right to be present with counsel during a bench conference when the parties conducted their jury challenges, and that it further violated his right to the assistance of counsel when the court denied defense counsel's request to consult with the defendant before exercising peremptory challenges. However, this Court rejected Gibson's argument as follows:

> 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 for the general purpose of meeting with his client. Further, there is no indication in this record that Gibson was prevented or limited in any way from consulting with his counsel concerning the exercise of juror challenges. **On this record, no objection to the court's procedure was ever made.** In

> short, Gibson has demonstrated neither error nor prejudice on the record before this Court.

Id. at 290-291 (emphasis added, citation omitted). The Court in Gibson thus implied that a defendant must object to his or her absence from any bench conference at which the parties exercise their jury challenges in order to preserve the Coney issue for appellate review. See also Hardwick v. Dugger, 648 So. 2d 100, 105 (Fla. 1994) (defendant's failure to participate in bench conferences held during trial was not fundamental error); Shriner v. State, 452 So. 2d 929, 930 (Fla. 1984) (defendant's absence from "various bench conferences" not fundamental error). The State now asks this Court to clarify Coney by **expressly** stating that a defendant may not raise the Coney issue for the first time on appeal.

The requirement of a contemporaneous objection to preserve the Coney issue is compatible with the approach taken by the federal courts. Under Fed. R. Crim. P. 43, which is comparable to Rule 3.180, a defendant need not be warned of the right to be present, and the defendant waives that right unless he or she expressly invokes it. See Fed. R. Crim. P. 43(b)(1) and (3); and United States v. Gagnon, 470 U.S. 522, 527-530, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985) (right waived where defendant did not ask

to be present during in camera discussion among judge, juror, and one of the defense lawyers). Moreover, contrary to petitioner's argument here, a defendant's absence from sidebar conferences where the parties announce their peremptory challenges does **not** offend the constitution. See, e.g., United States v. Gayles, 1 F.3d 735, 738 (8th Cir. 1993) (defendant was absent from courtroom when attorney announced strikes over the lunch break, but he was present when clerk gave strikes effect by reading off list of selected jurors); United States v. McCoy, 8 F.3d 495, 496-497 (7th Cir. 1993) (defendant was not present at sidebar conference where "the attorneys discussed their peremptory challenges, only one of which raised any concern"); United States v. Bascaro, 742 F.2d 1335, 1349-1350 (11th Cir. 1984) (defendants in courtroom entire time but lawyers left courtroom briefly to confer collectively to decide on peremptory strikes). Again, this Court should clarify Coney to require a contemporaneous objection before a defendant may argue on appeal that he or she was improperly excluded from a sidebar conference during which the parties' lawyers announced their peremptory challenges; and because petitioner in the case at bar wholly failed to object to his absence from the bench conference, his Coney claim was not

cognizable on direct appeal before the First District, and it is not cognizable in this Court.

Finally, petitioner briefly asserts that the State is "estopped" from presenting any argument in this case on the Coney issue because the assistant attorney general who represented the State in Coney conceded that error occurred when Coney was absent from the bench conference where the parties exercised their jury challenges. See Coney v. State, 653 So. 2d at 1013 ("The State concedes that this rule violation was error, but claims that it was harmless."). However, contrary to petitioner's claim, the State is **not** "estopped" from advancing inconsistent arguments on the law in different cases. There are three estoppel doctrines: mutual collateral, nonmutual collateral, and judicial. Judicial estoppel does not apply here because that doctrine is limited to a party's positions on the "facts." Rand G. Boyers, Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 NW. U. L. Rev. 1244, 1262 (1986). Further, mutual collateral estoppel does not apply here because that doctrine requires that the parties be the same; that is, the defendant must be the same in both proceedings. Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). Moreover, nonmutual (different parties, as here) collateral estoppel does

not extend to the government. United States v. Mendoza, 464 U.S. 154, 104 S. Ct. 568, 78 L. Ed. 2d 379 (1984); Standefer v. United States, 447 U.S. 10, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980); Nichols v. Scott, 69 F.3d 1255, 1268-1274 (5th Cir. 1995). Finally, pure questions of law, such as the one at issue here (i.e., what does a rule of procedure mean), arising in unrelated cases are excepted from the collateral estoppel doctrine. Mendoza, 464 U.S. at 162 n.7.

Petitioner relies on State v. Pitts, 249 So. 2d 47 (Fla. 1st DCA 1971), for the proposition that the Equal Protection Clause prohibits the State from taking different positions on a legal issue. However, petitioner misreads that case. A party's "confession of error," as occurred in Pitts and Coney, is nothing more than the party's opinion on the law. That opinion does not bind the Court, State v. Lozano, 616 So. 2d 73, 75 n.4 (Fla. 1st DCA 1993); L.S. v. State, 547 So. 2d 1032 (Fla. 3d DCA 1989), for the obvious reason that only the Court has the power to say what the law means. State v. Smith, 547 So. 2d 613, 616 (Fla. 1989). It is only when the Court adopts the opinion of a party as its own that it becomes the law, and it is at this point that it must be applied equally to everyone. This is what was of concern to the Pitts court.

The Equal Protection Clause requires the government to apply the law, **not** the government's opinion on the law, equally to all similarly situated persons. The government's opinion on the law may be wrong, either to the defendant's detriment or his benefit. If it is to the defendant's detriment, the harm will be remedied. If it is to the defendant's benefit, the windfall stands. Although windfalls cannot be undone, the government can prevent others from unjustly reaping the benefit of the error. Mendoza, 464 U.S. at 161-162.[3] Petitioner therefore is incorrect in his assertion that the State may not present a different argument in the case at bar than it did in its brief in Coney, and this Court should reject that claim.

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[3]The contemporaneous objection rule limits the arguments that the losing party can advance on appeal. State v. Applegate, 591 P. 2d 371, 373 (Ore. App. 1979), sets out the many policy reasons for this rule. The prevailing party, however, is not limited by what it argued in the lower court. This is so because of the procedural rule which requires appellate courts to affirm the decisions of lower courts if correct, even though based on faulty reasoning. Stuart v. State, 360 So. 2d 406, 408 (Fla. 1978). The primary purpose for this rule is obvious: "It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate." Securities and Exchange Comm'n v. Chenery Corp., 318 U.S. 80, 88, 63 S. Ct. 454, 87 L. Ed. 626 (1943).

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question, if the Court decides to address it, should be answered in the negative, the Court should decline to review the issue not certified, and the decision of the First District Court of Appeal, affirming the trial court, should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Raymond Dix, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401, North; 301 South Monroe Street; Tallahassee, Florida 32301, this 24th day of September, 1996.

Giselle Lyden Rivera
Assistant Attorney General

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