IN THE SUPREME COURT OF FLORIDA

RICKIE RENORIED MATHIS, :

Petitioner, :

v. : SUP.CT. CASE NO. 88,517
1ST DCA CASE NO. 94-2465

STATE OF FLORIDA, :

Respondent. :

_____/

ON REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL,
FIRST DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

I. PRELIMINARY STATEMENT

This case is before the Court on a certified question from the First District Court of Appeal. The Petitioner is Ricky Renoried Mathis, defendant and appellant below, who shall be referred to by his name or as Petitioner.

Record designations are as follows:

"R.____" - Record on Direct Appeal to this Court.

"T.____" - Transcript of proceedings held on April 27 and 29, 1994.

"S.____" - Sentencing held June 29. 1994.

"SUP1.___" _ First Supplemental Record on Appeal: Supplemental Transcript, Vol I-IV, of the Hearing on challenge to habitual offender statute, February 28, 1994.

"SUP2.____" - Second Supplemental Record on Appeal: Record on appeal of the Hearing on Challenge to habitual offender statute, February 28, 1994.

"SUP3.__" - Third Supplemental Record on Appeal including exhibits, motions, and:

"M.____" - Motion Hearings of March 31, 1994, June 16, 1994, and April 19, 1994, part of 3rd Supp.ROA.

"SUP4.__" - Fourth Supplemental Record on Appeal: Jury Selection of April 27, 1993.

"SUP5.__" - Supplemental Record on Direct Appeal: Psychological Report of James G. Brown, dated August 18, 1993, which the trial court indicated was in the court file. (S.12).

The opinion in the case below was issued by the First District Court of Appeal June 27, 1996. (Appendix A1-3). The Notice To Invoke Discretionary Jurisdiction was filed timely filed July 17, 1996. (Appendix A4-5).

All other cites will be self-explanatory or will otherwise be explained.

II. STATEMENT AND HISTORY OF THE CASE

The original appeal of this case was taken from a jury trial in Circuit court, Gadsden County, Florida, held before Judge Charles McClure and acting Circuit Judge, Jill Walker, on April 27 and 29, 1994.

The Petitioner was charged by information with armed robbery with a firearm for the armed robbery of a Suwannee Swifty store in Gadsden County. (R.3).

MOTION IN LIMINE

A motion in limine to exclude the pretrial photographic lineup was made, (R.4-5), and argued before Judge McClure on March 31, 1993. (M.3-72). The Petitioner waived his presence at the hearing. (M.3).

The hearing revolved around showing the victim a single photograph of the petitioner the day of or the day after the robbery. (M.15-16, 25, 36)(Sup3, state's exh 1). The photograph showed him with a beard and mustache, and the robber did not have facial hair, (M.16), however, the victim noted that it was the facial features, particularly the eyes which caused her to identify him. (M.17, 39). Later, she was able to again pick out the same individual from another photo array. (M.17-18, 41-42)(Sup3, state's exh 3). The victim also claims to have recognized the appellant when his mother, Mary Washington, later brought him into the store. (M.19-20).

There was testimony indicating that the robber was 5'8", 180 pounds, and though he stayed crouched down most of the time, he stood up to remove the telephone wire, and was 9 to 10 feet from

the 5'5" victim at the time. (T.22). However she states that part of her identification was a very muscular body build in the shoulders. (M.27).

Deputy Haire presented hearsay testimony at the hearing, but not at trial, that Henry Washington, Mary's husband, said that the appellant had come by the house the morning of the incident and taken his mother's car. (M.34). It should be noted however, that Mary Washington testified at the trial that the only key to the car was kept in her purse under the head of her bed, and further that Henry Washington was so ill that he sometimes did not even recognize his own sons. (T.117-120). Henry was not called as a witness, neither for this hearing or the trial.

Also not presented at the motion hearing was that Haire had shown pictures of the car to a confidential informant (CI), who suggested Mr. Mathis as a suspect, (M.33, 46), and recommended a possible second suspect, Marcus Jackson, whose picture was placed in the second photo array, yet never identified. (M.46-47). The CI had identified Mr. Mathis as having committed a robbery the night before the actually occurred. (M.49-50). The defense requested the name of the confidential informant, the state objected to its release, and the court sustained the state's objection. (M.47-48, 50-53).

Deputy Haire also testified that the second visit to the victim, with the photo array, was at the suggestion of the prosecutor in this case, Rick Combs. (M.54-55).

The defense argued that showing a single photo was more suggestive than a live show up, the state argued they were the

same. (M.58-69). The trial court found on the evidence at the hearing, that it was not unduly suggestive. (M.69).

REQUEST FOR PSYCHOLOGICAL EVALUATION

While the actual motion is not included in the record, a hearing was held on such a request before Judge Walker, on June 16, 1993. The request was denied. (M.73-74)(However, see Sup5, psychological report of James Brown).

JURY SELECTION

Prior to the jury selection, the defense had challenged the entire venire as being racially non-representative of Gadsden County. The county is 58.8% black, 41.1% white, but the 21 people from which the jury would be chosen was 38.8% black and 61.2% white for a 20% disparity. The defense argued that this was not a fair and impartial cross-section of the community. The trial court rejected the argument, and the defense reserved on the issue. (Sup4.3-6).

Jury selection occurred on April 27, 1993, in front of Judge McClure, with the actual selection appearing at Sup4.73. At one point the state argued that the defense was striking jurors on a racially motivated basis. (Sup4.75, 76-78). However, the defense noted, it had struck two people, one was black, and this, the third strike was a white person, but "[i]nitially, in the first six people, five of them were white." (Sup4.75). After the exercise of peremptory strikes and strikes for cause, the jury was impaneled. (Sup4.80)

FACTS ADDUCED AT TRIAL

The basic facts of the robbery are uncontested, that two black males robbed the store before 8 AM the morning of July 27, 1992. (R.1). One of the two men stood at the door. (T.38). The other man, who looked familiar[1] to the victim/manager, (T.34), was armed with a .25 caliber automatic pistol, (T.33), called the victim by her name, (T.31, 36, 67), was crouched down lower than the victim while she was sitting at her desk. (T.32, 37). There being no money in the safe, he took money ($500) and food stamps out of the computer desk. (T.36). Next the robber had the victim open the cash registers, from which he again removed money. (T.36-37). He then stole some cartons of cigarettes, stood up and removed the cord from the telephone, and left the store with the second man. (T.37-38).

The victim, Lucille McKinney, turned on an alarm, (T.40),and went out to see where the two men had gone. (T.40). She then called the sheriff's department on the pay telephone. (T.42).

The victim had observed the robbers leave in a tan and brown Chevrolet, (T.66), with a dent in the passenger front fender, and noticed that the license tag was bent up. (T.41, 42, 44). As the police were finishing their investigation[2] that morning, a car

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[1] As noted at sentencing, nothing in the police report indicated that she had even mentioned to police that she was familiar with the robber. (T.70)(S.43).

[2] Despite dusting for finger prints, none were found linking Mr. Mathis to the crime -- "no identifiable prints." (M31). Neither money, food stamps, clothing matching the description of the robber, or the telephone wire taken by the armed robber were recovered (T.94) -- and the store did not have a video camera. (M31).

arrived across the street matching the description of the one in which the robbers had fled, (T.74), and which the victim identified as the same car. (T.43-44, 75)(M.14-15). The tag on the Chevrolet was registered to a 4-door Volkswagon in the name of a woman in Tallahassee and another tag found in the glove compartment was registered to the appellant and Mary Baldwin, for a 4-door Plymouth. (T.77-78). The car was driven by Mary Washington and was impounded by law enforcement. (T.92).

Deputy Haire went to Mary Baldwin's where he spoke to the appellant by telephone, collected four .25 caliber pistol cartridges -- but no gun, and was given a 6 month old, (T.85, 107), picture of the appellant standing next to Ms. Baldwin. (T.80-81, 107)(Sup3, state's exh 1).

The victim described the armed robber as "black and big, big shoulders," about 5'8" and 185[3] pounds. (T.42-43). She testified that she observed his face and identified the appellant in court as being the armed robber, (T.35, 49), stating that she had no doubts at all he was the one. (T.49). It was noted on cross that there were only three black males in the court room at the time of her identification, including a deputy, someone in the audience and the appellant -- sitting next to his attorney. (T.60).

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[3] Deputies Suber and Haire testified that she told them the robber 5'8" and 170 pounds. (T.67)(M.33, 56). Deputy Haire described Mr. Mathis in court as actually being 6'5" and about 220-240 pounds, and he "appeared to be a little heavier at the time of the incident. (T.96-97)(M.45). The prosecutor testified that he, Rick Combs, was 6'3", and had Deputy Haire compare his height to that of the appellant, the indication that Mr. Mathis was only 6'3". (T.98).

The day of, or the day following the robbery, the victim was shown a single photograph[4], (T.44-45, 59)(M.16), which Deputy Haire had obtained from Mary Baldwin. (T.80-81). The victim indicated that the robber did not have a beard or mustache, as did the man in the photograph, appellant, Rickie Mathis. (T.45-46, 59)(Sup3, state's exh 1). Nonetheless, she testified that the photograph is of the man who robbed her. (T.46, 84). Several days later, on August 6, (M.44), she was shown a photo array containing 5 photos, and again picked out the photograph of the appellant as the man with the gun. (T.47-48, 86)(Sup3, state's exh 3). However, the victim remained unable to identify the second robber from a 6 person array. (T.46, 83)(Sup3, state's exh 2). At the suppression hearing Deputy Haire had indicated that the individuals in that array were friends or associates of the appellant. (M37).

Two or three days later, (T.61), Mary Washington, the woman who had been driving the car when it returned to the scene the day of the crime brought her son, the appellant, into the store and asked the victim to help her get her car back from the police. The victim asked them to leave and called law enforcement about the visit. (T.48-49). Mr. Mathis cashed three lottery tickets that day, he usually purchased cash three tickets -- no lottery tickets had been stolen during the robbery. (T.62).

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[4] Deputy Haire admitted that presenting one picture to a person, even though he did not say anything to that person, might be suggestive, "but I didn't have any choice in this particular case." (T.95).

When Deputy Haire had spoken with Mr. Mathis by telephone on the 27th, he did not tell Mr. Mathis that he was investigating a crime, only that he wanted to talk to him. (T.101). Mary Baldwin testified that Mr. Mathis had left their home early the morning of the robbery to go to his mother's home, that he returned home later and left again. (T.103-104). While she turned over the pistol cartridges to Haire, she did not find Mr. Mathis small silver pistol, nor did she see him with it that day. (T.107-108).

Nonetheless, the appellant, Rickie Mathis, turned himself into law enforcement on July 30, 1994, three days after the robbery. (T.100). There was no objection or contrary evidence at trial, but at the suppression hearing, Deputy Haire indicated that he did not turn himself in, but that he showed up at the jail and was arrested, (M.43), even though his report indicates that Mr. Mathis turned himself in. (M.44)

The state rested its case with the testimony of McKinney, Suber, Haire, and Baldwin. (T.111). The defense moved for judgment of acquittal in that there was no violence and the victim was not put in fear. (T.112-113). Denied. (T.114).

Mary Washington, the appellant's mother, testified that the appellant did not drive her car -- the one identified by the victim -- because she does not let him drive it, and there is only one key to the car, and she had the key in her pocketbook under the head of her bed. (T.119-120). She had awakened about 6 AM that morning, and she did not see her son that day. (T.139).

When Ms. Washington called the appellant about her car being impounded, he indicated he thought that law enforcement were

after him for child support payments. She asked him and his brother to accompany her to the scene of the crime, and both went willingly. (T.122-123). She denies asking the victim to help her get her car back from the police, (T.147), and testified that when she and her sons were in the store, the victim told Ms. Washington that neither of them were involved. (T.148). She then testified that Rickie wanted to go to the Sheriff's department, because he was afraid they would simply "blow my brains out, and I ain't done nothing." (T.125-126).

Ms. Washington surprised both the state and defense by producing lottery tickets allegedly bought by the appellant on the day he turned himself in, and the day of the robbery, in the store that was robbed. (T.126-127). The state claimed a discovery violation, despite the fact that they had listed her as their own witness. (T.128-130). A Richardson hearing was held, whereby testimony regarding the lottery tickets purchased on the 29th of July would be allowed, but not the tickets purchased on the 27th, the day of the robbery. (T.130-138).

The victim, Lucille McKinney, testified in rebuttal that she called the sheriff when Ms. Washington brought the appellant into the store, because she recognized him as the robber and was afraid, (T.149-150), and that she did not indicate to Ms. Washington or the appellant that she had recognized him at that time. (T.150).

The testimony ended, the defense renewed its motion for JOA, and its continuing motion in limine -- both denied. (T.154). The

jury returned a guilty verdict -- "as charged of armed robbery with a deadly weapon, with a firearm." (T.206).

SENTENCING

Immediately following the trial, the state filed notice of intent to seek habitual offender sentencing, (R.10-11), to which the defense responded with a motion challenging the statute as unconstitutional. (R.12-21).

Sentencing was held before Judge Walker on June 29, 1994. Prior to sentencing, trial counsel had moved to withdraw, (R.29-30), and had been replaced by conflict counsel, Robert Travis[5]. (R.31). Later, counsel for sentencing was Don Modesitt, who also filed a motion for new trial. (R.38-40). The state filed an amended notice of intent to seek habitual offender status. (R.43-44).

Without objection, the state offered evidence indicating the requisite previous convictions for habitual offender status. (S.3-5, 7). It was noted however, that Mr. Modesitt, appellant's counsel at sentencing, had been State Attorney on one of the underlying cases. (S.5). Inquiry was made, and Mr. Mathis waived any objection to Mr. Modesitt's representation. (S.5-6).

A reservation of the objection was noted as to the constitutionality of the habitual offender statute. (S8-9). The psychological report of Dr. James Brown was argued before the trial court. (S.10-12). The appellant was noted to be borderline

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[5] Mr. Travis did NEITHER a motion for new trial, sentencing, or file for appeal; ostensibly because of a conflict with the appellant. While not part of this brief, the conflict is laid out in companion case 1st DCA No. 94-2464, Issues I and III.

mentally retarded, and the psychologist recommended that he not be sentenced as an habitual violent offender. (S.11, 39). Melvin Dill, a training specialist with Life Skills Foundation gave testimony indicating that the appellant had gone through the VIP program and had become a changed person, (S.13-15), having even been elected class spokesperson for graduation. (S.15-16). The appellant's mother, Mary Washington, told of his family history and family and church support. (S.24-28).

Finally, Rickie Mathis, the appellant himself, took the stand concerning the VIP program and the change in attitude it had given him, and how he wanted to be able to take responsibility for support of his daughter. (S.28-32).

There was no Pre Sentence Investigation (PSI) done for this case, and though counsel objected to sentencing without one, (S.45-46), the trial court proceeded to sentence the appellant as an habitual offender. (S.47). Objections were made to some of the convictions scored on the scoresheet, and overruled. (S.49-51)(R.52). Mr. Mathis was sentenced as an habitual offender to life in prison with a minimum of 15 years incarceration. (S.57) (R.45-51, 54-56).

III. SUMMARY OF THE ARGUMENT

The trial court abused it's discretion in allowing into evidence a pretrial, out-of-court, single photograph identification, which was impermissibly suggestive. There was no other evidence against the appellant except that identification, and it was tainted.

The trial court failed to follow longstanding law which required the appellant to be present at the bench during jury selection.

IV. FIRST ARGUMENT

ISSUE PRESENTED: DID THE TRIAL COURT ERR IN ITS ADMISSION OF EVIDENCE OF A PRETRIAL PHOTOGRAPHIC IDENTIFICATION WHICH WAS IMPERMISSIBLY SUGGESTIVE.

The conviction of Rickie Mathis is based totally on one eyewitness identification, -- identification which was tainted by an impermissibly suggestive single photographic array.

Neither fingerprints, nor proceeds of the robbery were ever found or linked to Mr. Mathis. No co-defendant was produced even though police showed the witness a photo array of Mr. Mathis friends and associates. (M.37). No weapon has been found, and cartridges found at Mr. Mathis home have not only NOT been linked to the crime -- but not even definitely to Mr. Mathis. Thus, only the identification by the victim links Mr. Mathis to the crime.

The United States Supreme Court, in United States v. Wade, 388 U.S. 218, 229, 87 S.Ct. 1926, 1933, 18 L.Ed.2d 1149 (1967), cited with approval Wall's Eyewitness Identification in Criminal Cases where in it was noted that:

> "[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor -- perhaps it is responsible for more miscarriages of justice than all other factors combined."

Wade, 388 U.S. at 229, 87 S.Ct. at 1933; See, e.g., Judd v. State, 402 So.2d 1279, 1280 (Fla. 4th DCA 1981).

A motion in limine to exclude the pre trial photographic lineup, (R.4-5), was argued before Judge McClure on March 31, 1993, (M.3-72), concerning whether the police used an unnecessarily suggestive procedure in obtaining an out-of-court

identification, and if so; did the suggestive procedure give rise to a substantial likelihood of an irreparable misidentification. (M.4-5). This is ostensibly the test required by Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). See also, Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L. Ed.2d 140 (1977); Grant v. State, 390 So.2d 341 (Fla. 1980); Carrasco v. State, 470 So.2d 858 (Fla. 1st DCA 1985).

The victim was shown a single photograph of the petitioner shortly after the robbery. (M.15-16, 25, 36)(Sup3, state's exh 1). The 7 month-old-photograph showed petitioner with a beard and mustache. The robber did not have facial hair. (M.16). The victim said it was the eyes which caused her to identify him. (M.16-17, 39)(T.44-45, 59, 80-81).

Deputy Haire allegedly walked in and laid the picture of the appellant on the counter before the victim -- without saying a word. (M.16). Even if this is so, as the defense argued at the suppression hearing:

> in giving that picture to the victim, you say: What do you think? We think he is. But without saying it, you don't have to say that, you just throw it in front of them and they go: Hmmm.

(M.67).

The damage was done, the identification tainted. Had the victim seen Mr. Mathis in a live show-up, as opposed to a picture, she would have realized that he was CONSIDERABLY larger than the man who robbed her, according to her description of him.

The victim had described the armed robber to the deputies as black and big, 5'8" and 170 pounds, (T.67)(M.33, 56). However, Deputy Haire described Mr. Mathis in court as actually being 6'5"

and about 220-240 pounds, and he "appeared to be a little heavier at the time of the incident. (T.96-97)(M.45). While there was also an indication that Mr. Mathis was only 6'3", (T.98), Mr. Mathis is still as much as 7 inches taller and 50 to 70 pounds heavier than the robber the victim described to the deputies.

Deputy Haire was correct when he admitted that presenting one picture to a person, even though he did not say anything to that person, might be suggestive. However, he alleged, "I didn't have any choice in this particular case." (T.95). This does not remove the taint.

Later, the victim was able to again pick out the same individual from a photo array, once again based on the face. (M.17-18, 41-42). Even if the photo array were in and of itself not overly suggestive, where it followed the single picture ID, it becomes unreliable. The second identification may well be based on the first photo -- not the actual observation.

Rickie Mathis is much larger than the person who committed this crime, and whether or not he looks something like the person is unknown because the identification is tainted. As Mr. Mathis said at sentencing:

> I would like to let the Court know that I'm innocent. I'm sorry for whatever happened to Ms. McKinney. I don't see where she came up with me until after they carried a picture of me and my girlfriend to the store.
>
> * * *
>
> It wasn't me and I'm sorry that she felt like it was.
>
> * * *
>
> She have stated to some people went by (sic) and talked to her about it, she said that the police knew who it

> was, so she didn't have no other choice but to say it was me.

(S.53-54).

The victim also claims to have recognized the appellant when his mother, Mary Washington, later brought him into the store. (M.19-20). However, that was AFTER she had seen the single photograph of him -- after the suggestion had been planted that he was the robber.

The trial court found that the identification was not unduly suggestive. (M.69).

On appellate review, the question of whether the due process standard for photographic identification has been met and whether an out of court identification should be excluded is determined by a two-pronged test: (1) did the police employ an unnecessarily suggestive procedure in obtaining the out-of-court identification; and (2) if so, considering all of the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification. See, e.g., Way v. State, 502 So.2d 1321, 1323 (Fla. 1st DCA 1987).

> Even a lineup or a photo spread of a number of individuals can be impermissibly suggestive, depending on the composition of the lineup or photo spread. Certainly, use of a single photograph is one of the most suggestive methods of identification possible and is impermissibly suggestive under most circumstances.

Way, at 1323.

Way involved "vague and indefinite" identification, and the court recommended the second part of the test. Here, the identification is indefinite in the first picture -- it looked like the robber, and that tainted the identification in the multi-

picture photo array, and all subsequent identifications. The single picture identification was impermissibly suggestive, and the composition of the photo spread was impermissibly suggestive.

The victim's original description was also vague and indefinite: "black and big, big shoulders," about 5'8" and 185 pounds. (T.42-43). Considering the surrounding circumstances, the lack of solid circumstantial evidence, and especially the fact that Mr. Mathis is 7 inches taller and 70 pounds heavier than the robber the victim described -- it is clear that misidentification occurred.

In some cases the courts have relied upon clear and positive in-court identifications by the witnesses as an important factor to show the reliability of suggestive photographic displays. United States v. Cueto, 611 F.2d 1056 (5th Cir. 1980). This did not occur in Mr. Mathis' trial because the "in-court" identification was essentially worthless. As the defense attorney pointed out -- there were only three black males in the court room at the time of the in court identification, including a deputy, someone in the audience and the appellant -- sitting next to his attorney. (T.60). Certainly, this sham cannot be considered a clear and positive in-court identification. See also, Judd v. State, 402 So.2d 1279, 1280 (Fla. 4th DCA 1981).

Under these facts and circumstances, both of the requirements of the two-pronged test have been conclusively met. Accordingly, this Court, should hold that the evidence of the identification should have been excluded, should reverse Mr. Mathis conviction and should remand this case for a new trial.

V. SECOND ARGUMENT (CERTIFIED QUESTION)

ISSUE PRESENTED: 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?

The answer to this question should be yes. Whether Coney[6] is a clarification of existing law or new law, it must be applied to pipeline cases.[7] Even were Coney not applied to this case, the statute and case law preceding Coney must be applied in the same manner as they were in Coney, and again the answer is yes.

A. Facts of the Case.

Jury selection occurred on April 27, 1993, in front of Judge McClure, with the actual selection appearing at Sup4.73. The record shows that during jury selection, the court requested of **counsel**, "Okay. When you're ready, approach the bench." (Sup4.73).

After the exercise of peremptory strikes and strikes for cause, the jury was impaneled. (Sup4.80). Nowhere on the record does it indicate that inquiries were made to Mr. Mathis regarding his acceptance of the jury or the strikes made by defense counsel.

Furthermore, the record fails to show that counsel left the bench to consult with Mr. Mathis during the actual striking of

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

[7] This Court should also be aware that this issue has been raised and briefed in depth in Lett v. State, Case No. 87,541; (Lazaro) Martinez v. State, Case No. 85,450; and addressed at oral argument in Boyett v. State, Case No. 81,971.

the jurors, and the record implies that Mr. Mathis was not physically present at the bench as counsel was sent to confer with him.

Following the exercise of peremptory challenges, petitioner made no comment. Petitioner did not personally, or through counsel, object to this procedure. However, what is important to this issue is not so much what appears on the record, as what does not appear:

- Nowhere is it reflected the petitioner was informed of his right to be present at the bench.
- Nowhere is it indicated the petitioner was present at the bench.
- Nowhere does the trial court **inquire** if the petitioner's absence from the bench is voluntary.
- Nowhere does the trial court **certify** that the petitioner's absence from the bench is voluntary.
- Nowhere does the trial court ask the petitioner to **ratify** the choice of jurors made by his counsel.

The record is entirely silent regarding whether Petitioner understood the process of jury selection and, in particular, understood that the defense and the prosecution had the right to exercise peremptory challenges. Additionally, it is beyond dispute that lay persons typically do not understand what a "peremptory" challenge is.

NOTE: THE FOLLOWING ARGUMENT IS ADOPTED AND MODIFIED FROM *Lett v. State*, F.S.C Case No. 87,541.

B. *Coney* and pre-*Coney* Law.

The law applied in Coney is based upon both a Florida Rule of Criminal Procedure and case law, which in turn is based on both the Florida and U.S. Constitutions.

Rule 3.180(a)(4), of the Florida Rules of Criminal Procedure, requires that a defendant in a criminal case be present "at the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury" and this Court has ruled that this provision means exactly what it says. Coney, at 1013

A defendant is not present during the challenging of jurors if he is not at the location where the selection process is taking place. Thus, it is not enough that he be present somewhere in the courtroom. He must be able to hear the proceedings and participate in them. If he is seated at the defense table while a whispered selection conference is being conducted at the judge's bench, he cannot be said to be present and participating.

In Coney v State, 653 So.2d 1009 (Fla. 1995) this Court wrote:

> We conclude that the rule means just what it says: The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised. See Francis v. State, 413 So.2d 1175 (Fla. 1982). Where this is impractical, such as where a bench conference is required, the defendant can waive this right and exercise constructive presence through counsel. In such a case, the court must certify through proper inquiry that the waiver is knowing, intelligent and voluntary.
>
> Alternatively, the defendant can ratify strikes made outside his presence by acquiescing in the strikes after they are made. See State v. Melendez, 244 So.2d 137 (Fla. 1971). Again, the court must certify the defendant's approval of the strikes through proper inquiry. Obviously, no contemporaneous objection by the defendant is required to preserve this issue for review, since the defendant cannot be imputed with a lawyer's knowledge of the rules of criminal procedure. Our ruling today clarifying this issue is prospective only.

Id.

A waiver of the right to be present must be certified by the court to be knowing, intelligent, and voluntary. The judge in petitioner's case made no inquiry or certification whatsoever. None of the requirements listed in the above quotation were met in the lower court.

In addition to violating Rule 3.180(a)(4), the absence of the accused at this critical stage of trial also constituted a denial of due process under the state and federal constitutions because fundamental fairness might have been thwarted by his absence. Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982); Snyder v. Massachusetts, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934); Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Rule 3.180 is specifically designed to safeguard those constitutional rights. Thus, when the rule is clearly violated, the constitutional rights it safeguards are also violated.

B1. Only Part of *Coney* Appears to Be "Prospective," and Such Language Has No Effect on "Pipeline Cases" Such as This.

As argued below, the entire Coney decision should apply to Petitioner since his case was on appeal at the time Coney was decided. A fair reading of this Court's opinion in Coney indicates that the only prospective parts of Coney are the requirements that the trial judge **certify** on the record a waiver of a defendant's right to be present at the bench or a **ratification** of counsel's action (or inaction) in the defendant's absence.

However, the state and the First District Court of Appeal apparently believe that the defendant's right to be present at bench conferences where peremptory challenges are exercised is also a prospective rule. This is not so, and is refuted by this Court's **reasoning** in Coney.

This Court said Fla. R. Crim. P. 3.180 (a) meant what it says, and has always said, that a defendant has the right to be present at the immediate location where juror challenges are being made. See, Francis v. State, 413 So.2d 1175 (Fla. 1982). The state conceded error in Coney because the defendant was not present at a bench conference where juror challenges were made and the record was silent as to waiver or ratification. Coney, at 1013. SURELY, THE STATE WOULD NOT CONCEDE ERROR BASED ON A RULE YET TO BE ANNOUNCED!

Thus, the **RIGHT** to be present at the bench during the actual selection process pre-existed Coney, and the only "prospective" part must have been the requirements placed on the trial courts that they **inquire** and **certify** concerning alleged waivers, and **ratify** the actions of counsel ON THE RECORD.

B2. State Estopped from Arguing Lack of Error.

The State of Florida is estopped from arguing that Petitioner's absence from the bench conference where challenges to prospective jurors were made was not error. In Coney, when faced with the same facts, the state conceded error. Id. At 1013. The state cannot assert otherwise in this case without violating Petitioner's right to equal protection of the law. See, State v. Pitts, 249 So.2d 47, 48-50 (Fla. 1st DCA 1971)(violation of equal

protection for the **state** to take contrary positions on the same issue in different cases).

This Court pointed out the state's concession of error in its opinion:

> Coney was not present at the sidebar where the initial challenges were made, and the record fails to show that he waived his presence or ratified the strikes. **The State concedes this rule violation was error**, but claims that it was harmless.

Coney, at 1013 (**bold** emphasis added). The case was then decided adversely to Coney on the basis of harmless error because only challenges for **cause**[8] were made in his absence. Ibid.

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

C. *Coney* and the Principles of Law Underlying *Coney* Must Be Applied to This, a "Pipeline Case."

Whether Coney is a clarification of existing law or new law, it must be applied to this case. Furthermore, whether or not Coney itself is applied to this case, the same law upon which the decision in Coney rests must be applied to this case. To do less violates state and federal constitutional priciples

C1. *Coney* as a Clarification of Existing Law.

Both a Florida Rule of Criminal Procedure and the due process clauses of the state and federal Constitutions provide that a criminal defendant has the right to be present during any "critical" or "essential" stage of trial. See Fla. R. Crim. P.

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

3.180; Faretta v. California, 422 U.S. 806, 819 n.5, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Francis v. State, 413 So.2d 1175, 1177 (Fla. 1982).

Although petitioner was present in the courtroom, as was Coney, he was not physically present at the sidebar. Inferentially, petitioner could no more hear what was happening at the bench than the jury could, and the jury was also present in the courtroom. Thus, petitioner was as effectively excluded from this critical stage of the trial as was the jury. The exclusion of the jury was proper, of course. The absence of the accused was not.

C1-a. Florida Rule of Criminal Procedure 3.180(a)(4).

Rule 3.180(a)(4), Fla. R. Crim. P., expressly provides:

> (a) Presence of Defendant. In all prosecutions for crime the defendant shall be present:
>
> * * *
>
> (4) At the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury; . . .

C1-b. Case law.

In Turner v. State, 530 So. 2d 45, 47-48, 49 (Fla. 1987), this Court stated:

> We recognized in Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982), that the defendant has the constitutional right to be present at the stages of his trial where fundamental fairness **might be** thwarted by his [48] absence. Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed.674 (1934). See also, Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

> Florida Rule of Criminal Procedure 3.180(a)(4) recognizes the challenging of jurors as one of the essential stages of a criminal trial where a defendant's presence is mandated.
>
> * * *
>
> A defendant's waiver of the right to be present at essential stages of trial must be knowing, intelligent and voluntary. Amazon v. State, 487 So. 2d 8 (Fla.), cert. denied, 479 U.S. 914, 107 S. Ct. 314, 93 L. Ed. 2d 288 (1986); Peede v. State, 474 So. 2d 808 (Fla. 1985), cert. denied, 477 U.S. 909, 106 S.Ct. 3286, 91 L.Ed.2d 575 (1986).

Id. [**Bold** added].

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

This Court further addressed the same issue in Coney v. State, 653 So. 2d 1009 (Fla. 1995) holding:

> As to Coney's absence from the bench conference, this Court has ruled:
>
> > [The defendant] has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence. Florida Rule of Criminal Procedure 3.180(a)(4) recognizes the challenging of jurors as one of the essential stages of a criminal trial where a defendant's presence is mandated.
>
> Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982)
>
> * * *

> **We conclude that the rule means just what it says: The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised.** See Francis.

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

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

Numerous decisions of both this Court and the U.S. Supreme Court have recognized that the right to be present is one of the most "fundamental" rights accorded to criminal defendants. "The right to be present has been called a right scarcely less important to the accused than the right to trial itself." 14A Fla. Jur. 2D, *Criminal Law*, Sect. 1253, at 298 (1993)(Citing state and federal cases); see also Mack v. State, 537 So.2d 109, 110 (Fla. 1989)(Grimes, J., concurring)(characterizing a criminal defendant's right to be present, along with right to counsel and right to a jury trial, as one of "those rights which go to the very heart of the adjudicatory process").

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

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

> We conclude that **the rule means just what it says**: The defendant has a right to be physically present at the immediate site

> where pretrial juror challenges are exercised.

Id. At 1013 (**bold** emphasis added).

Where, as here, an appellate court's decision is based on the plain language of a statute, the court does not announce a new rule. See Murray v. State, 803 P.2d 225, 227 (Nev. 1990). Furthermore, where, as here, a judicial decision is "merely intrepreting the plain language of the relevant statute," the "rule" is not new and should be applied retroactively. John Deere Harvester Works v. Indust. Comm'n, 629 N.E. 834, 836 (Ill. App. 1994).

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

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

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

> To determine what counts as a new rule,... courts [must] ask whether the rule [that a defendant] seeks can be meaningfully distinguished from that established by [prior] precedent.... If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful, and [the rule in the latter case is not 'new'].

Wright v. West, 505 U.S. 277, 112 S.Ct. 2482, 2497, 120 L. Ed.2d 225 (1992)(O'Connor, J., concurring, joined by Blackmum & Stevens, JJ.).

A rule of law is deemed "new" if it "breaks new ground or imposes a new obligation on the States or the Federal Government.... To put it differently, a case announces a new rule if the result was not dictated by [prior] precedent...." Teague v. Lane, 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Johnson v. United States, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed. 2d 202 (1982) refered to the breaking of new ground as being a "clear break" with the past. Johnson was overruled by Griffith v. Kentucy, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) which continued to refer to a new rule as a "clear break" with prior precedent.

C1-e. *Coney* Is Not a Clear Break with Prior Precedent.

The "clarification" of the law announced in Coney was not a "new rule" of law under the definition in Teague: no part of Coney's procedural requirements was a "clear break" with the past. Johnson; Griffith. Florida courts had previously applied the right to be present in the context of bench conferences at which jury selection occurred. See Jones v. State, 569 So.2d 1234, 1237 (Fla. 1990); Smith v. State, 476 So. 2d 748 (Fla. 3rd DCA 1985); cf. Lane v. State, 459 So. 2d 1145, 1146 (Fla. 3rd DCA 1984)(defendant present in court room, but excluded from proceedings where peremptories were exercised in hallway "due to the small size of the courtroom"). In Coney itself, the state conceded that Coney's right to be present **was violated** by his absence from the bench conference. (Id. 1013)

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

In **Florida**, this Court has repeatedly held that a defendant's waiver of the small class of "fundamental" rights can only be accomplished by a personal, on-the-record waiver. See e.g., Torres-Arboledo v. State, 524 So.2d 403, 410-411 (Fla. 1982); Armstrong v. State, 579 So. 2d 734, 735 n.1 (Fla. 1991).

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

Courts in **other jurisdictions** have also required on-the-record waivers. See e.g., Larson v. Tansy, 911 F.2d 392, 396 (10th Cir. 1990)("Several circuits have held tht defense counsel cannot waive a defendant's right of presence at trial."); United States v. Gordon, 829 F.2d 119, 124-26 (D.C. Cir. 1987). On-the-record waiver is done in compliance with the constitutional axiom that "courts indulge every reasonable presumption against waiver

of fundamental constitutional rights and that [courts] do not presume acquiescence in the loss of fundamental rights." Carnley v. Cochran, 369 U.S. 506, 514, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962) (citing Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938)).

C2. *Coney* as New Law.

Even assuming for the sake of argument that Coney announced a "new rule" that would not qualify for retroactive application to Petitioner's direct appeal under traditional standards of retroactivity, recent state and federal constitutional cases require that Petitioner be permitted to benefit from Coney.

In Griffith v. Kentucky, 479 U.S. 314 (1987), the Supreme Court abandoned its former retroactivity doctrine[9] and held that all new rules of criminal procedure rooted in the federal Constitution must be applied to all applicable criminal cases pending at trial or on direct appeal at the time that the new rule was announced.

The Supreme Court's bright-line retroactivity rule in Griffith is rooted in the U.S. Constitution and state appellate courts **must** apply the Griffith retroactivity procedure when announcing a new rule that implicates federal constitutional guarantees. The Supreme Court has ruled:

> The Supremacy Clause ... does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own

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

> interpretations of state law ... cannot extend to interpretations of federal law.

Harper v. Virginia Department of Taxation, 113 S.Ct. 2510, 2518, 125 L.Ed.2d 74 (1993); See also, James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S.Ct. 2439, 2443, 115 L.Ed.2d 481 (1991)("where the [new] rule at issue itself derives from federal law, constitutional or otherwise,"state courts must apply the new rule to all litigants whose cases were pending at the time that the new rule was decided).

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

Clearly, Coney is based in part on the U.S. Constitution in addition to Fla. R. Crim. P. 3.180. Consider in the plain language of Coney,(and in Turner and Francis which Coney follows), the cites to the Constitution, and to federal cases.

In Coney, this Court ruled:

> [The defendant] has the **constitutional right** to be present at the stages of his trial where **fundamental fairness** might be thwarted by his absence. Florida Rule of Criminal Procedure 3.180(a)(4) recognizes the challenging of jurors as one of the **essential stages** of a criminal trial where a defendant's presence is mandated. (citing Francis, at 1177)

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

Turning again to Turner this Court stated:

> We recognized in Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982), that the defendant has the **constitutional right** to be present at the stages of his trial where **fundamental fairness** might be thwarted by his absence. Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed.674 (1934). See also, Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).
>
> * * *
>
> A defendant's waiver of the right to be present at **essential stages of trial** must be knowing, intelligent and voluntary. Amazon v. State, 487 So. 2d 8 (Fla.), cert. denied, 479 U.S. 914, 107 S. Ct. 314, 93 L. Ed. 2d 288 (1986); Peede v. State, 474 So. 2d 808 (Fla. 1985), cert. denied, 477 U.S. 909, 106 S.Ct. 3286, 91 L.Ed.2d 575 (1986).

Turner, 47-48, 49 [**Bold** added].

Furthermore, the procedural requirement of an on-the-record, personal waiver by a defendant also implicates the U.S. Constitution. As noted in section E, infra, such a waiver of the fundamental constitutional right to be present at a critical stage of the trial is itself constitutionally mandated.

Thus, the "new" rule of procedure in Coney does not "rest [] on adequate and independent state grounds [because] the state court decision fairly appears to ... be interwoven with federal law." Caldwell v. Mississippi, 472 U.S. 320, 327, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Under such circumstances, the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution require this Court to give Coney, retroactive application to Petitioner's direct appeal.

Even if Coney were based only on state law, which it clearly is not, the Equal Protection and Due Process provisions of the Florida Constitution would require that this Court apply the decision retroactively to Petitioner's appeal. This Court has applied the reasoning in Griffith to new state law based rules as well as new federal law based rules.

In Smith v. State, 598 So.2d 1063 (Fla. 1992)[10], this Court agreed with "the principles of fairness and equal treatment underlying Griffith," and adopted the same bright line law as in Griffith. Then, in several subsequent cases, those priciples of fairness and equal treatment seemed to be forgotten, culminating in the decision in Wuornos v. State, 644 So.2d 1000 (Fla. 1994) where this Court refused to apply a (state) "new law" announced in Castro v. State, 597 So.2d 259 (1992) to a pipeline case. See Wuornos, at 107-008.

However, in State v. Brown, 655 So. 2d 82 (Fla. 1995) this Court appears to have embraced the principles of fairness and equal treatment again, holding that Smith "established a blanket rule of retrospective application to all nonfinal cases for new rules of law announced by this Court." Id. at 83. Then, shortly after Brown, in Davis v. State, 661 So.2d 1193 (Fla. 1995), this Court noted that Smith was limited by Wuornos and refused to apply a "new rule" to a **collateral** appeal. Despite denial of relief, this Court stated:

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

> Had Davis's appeal been pending at the time we issued Smith, and had he raised the sentencing error on **direct appeal**, he could have sought relief under Smith.

Id. At 1195 (**bold** emphasis added)

The integrity of judicial review requires this Court, once and for all, to abandon its pre-Smith *ad hoc* approach to retroactivity and adopt the bright-line approach set forth in Smith and Griffith for all significant "new rules," whether based on state or federal law. See Taylor v. State, 422 S.E. 2d 430, 432 (Ga. 1992)(adopting Griffith's approach to retroactivity); State v. Mendoza, 823 P.2d 63, 66 (Ariz. App. 1990)("The reasoning of Griffith applies to a case ... even if the new rule is not of constitutional dimension.)

New law or not, Petitioner's appeal was pending at the time that Coney was issued, he sought releif based on Coney, and relief should therefore be granted by this Court. Failure to do so will violate Petitioner's rights under the United States and Florida Constitutions.

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

Even in the absence of the application of the "on-the-record" language in Coney's case, Turner and Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982) require reversal. "[T]he rule means just what it says: The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised." Coney, citing Francis.

Thus, the rule meant what it said **prior** to Coney. It was clearly Petitioner's right to be present at this critical stage

of the trial, under Rule 3.180(a)(4), and that right was violated. The rule is specifically designed to protect constitutional rights.

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

Prior to Coney, a defendant could personally waive his right to be present prior to leaving the courtroom; such waiver being accomplished through personal questioning by the trial Court. See Chandler v. State, 534 So.2d 701, 704 (Fla. 1988). Defendant's presence could also be waived by counsel -- provided that the defendant subsequently **ratified** or **acquiesced** in the counsel's waiver on the record, if said waiver were made knowingly, voluntarily, and intelligently. State v. Melendez, 244 So.2d 137, 139 (Fla. 1971). Furthermore, a defendant could effectively waive his right to be present though misconduct, such as disrupting the trial. Capuzzo v. State, 596 So.2d 438, 440 (Fla. 1992).

In this case, Petitioner neither absented himself from the courtroom, nor acquiesced or ratified any waiver by counsel, nor did he engage in any misconduct which could have been considered waiver. Thus, under the law as it existed prior to Coney, there

was no waiver, and Petitioner had the right to be present at the bench during jury selection.[11]

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

Common sense dictates that the right to be present would be meaningless if it were not applied to the absence of a defendant at sidebar conferences during which peremptory AND cause challenges are or should be exercised.

Challenges for cause are a matter of law; however, peremptory challenges are based on many factors and can be exercised in an arbitrary manner. While a defendant may not be qualified to exercise cause challenges due to his lack of knowledge of the law, this is not true of peremptory challenges. Peremptory challenges can be exercised simply because one's personal preference, or even instinct, dictates such a result. These challenges are clearly within the abilities of the defendant and denying him the opportunity to participate deprives him of an important right.

However, the problem occurs not only where defense counsel exercises peremptory challenges; it is even worse where counsel **fails** to exercise peremptory challenges.

Petitioner may have had contemporaneous input to make to counsel as to the exercise of his peremptory challenges -- because they are often exercised arbitrarily and capriciously, for real or imagined partiality, often on sudden impressions and unaccountable prejudices based only on bare looks or gestures.

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

Francis, 413 So. 2d at 1176. Thus, the very concept of peremptory challenges implies constant imput from the defendant.

The process of the exercise of peremptory challenges by both sides is a dynamic process, and results in a rapidly and ever-changing face of the jury. This depends upon which individuals have been struck and which party exercised the strikes. It is highly fluid, requiring constant evaluation and reevaluation of who should or should not be struck as the dynamic situation unfolds.

In certain situations which cannot be foreseen, as a strategy, the accused might prefer not striking an objectionable juror, leaving that person on the jury, rather than exercising the final challenge which would result in the seating another against whom the defendant has more vehement objections. In short, the defendant may prefer to elect the lesser of two evils, as he might see it.

Even though counsel may have consulted with petitioner prior to the sidebar, and perhaps even again during the process, that itself is not sufficient. If the defendant were present and contemporaneously aware of how the situation was developing, he may have expressed additional or other preferences. He may have wished to strike others on the jury who had not been previously discussed with counsel.

The accused may have suggestions to strike or back strike jurors already seated, even though he had not earlier expressed any particular dislike for them, simply in order to force the seating of a juror the defendant would much more prefer. Again,

peremptory challenges are often made on the sudden impressions and unaccountable prejudices.

The entire selection process is like a game of checkers or chess in that regard. Not uncommonly a player will intentionally sacrifice a man (exercise a strike) simply in order to force a move which is advantageous to him or disadvantageous to the opponent. That input cannot be made until the situation actively develops in that direction during the dynamic course of the challenging process.

Thus, an accused may have very valuable input as to the exercise of all his challenges, input which is only meaningful where it can be made contemporaneously with the developments during the on-going challenging process.

However, petitioner was as effectively excluded from this critical stage of the trial.

E. Petitioner Did Not Waive His Right.

Nothing petitioner did or did not do, waived his right to be present. The record fails to show that he even knew of his right such that a voluntary waiver can be found -- and **a waiver cannot be inferred from his silence or from his failure to object** to the procedure or his absence from the sidebar. See State v. Melendez, 244 So.2d 137 (Fla. 1971).

As noted previously, the absence of the accused at this critical stage of trial constitutes a denial of due process under the state and federal constitutions. Francis, at 1177; Snyder; Faretta. The waiver by inaction of a Constitutional right or presuming waiver by a silent record flies in the face of opinions

of the United States Supreme Court. In addressing a similar waiver (of speedy trial) the Court held:

> Such an approach, by presuming waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights. The Court has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." (Cite omitted). Courts should "indulge every reasonable presumption against waiver," (Cite omitted) and they should not presume acquiescence in the loss of fundamental rights." (Cite omitted). In Carnley v. Cochran, 369 US 506, 8 L Ed 2d 70, 82 S Ct 884 (1962), we held:
>
> > "presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not waiver. Id., at 516, 8 L Ed 2d at 77.
>
> The Court has ruled similarly with respect to waiver of other rights designed to protect the accused. (Cites omitted).

Barker v. Wingo, 407 U.S. 514, 525, 92 S.Ct. 2182, 33 L.Ed.2d 101, 114 (1972).

The challenging of the jury is a critical stage of trial. Francis. Petitioner's right to be physically present such that he can meaningfully participate through consultation with his attorney is absolute -- in the absence of a knowing, intelligent and voluntary waiver. There is no waiver here.

This Court said in Coney that Rule 3.180 means just what it says. This record does not establish, "with the certainty and clarity necessary to support the waiver of constitutional rights Rule 3.180 is designed to safeguard,"[12] that Mr. Lett's absence

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

at this critical state of his trial was voluntary. Rule 3.180 was clearly designed to safeguard his constitutional right to be present at this critical stage. The violation of the rule was also a violation of the constitutional right it was designed to protect. His absence was clear error. Coney, Turner, and Francis mandate reversal.

There was no waiver, and no contemporaneous objection should be required to preserve this issue in the absence of a showing on the record that Lett knew he had the right to be present -- such that he knew he might be required to object to the procedure employed or to his absence.

F. No Objection Need Be Made to Preserve This Issue.

No defendant must stand up and insist that he be present at trial or at any critical stage thereof. Compare, e.g., Brown v. Wainwright, 665 F. 2d 607 (5th Cir. 1982)(right to counsel in force until waived, right to self-representation does not attach until asserted). The First District Court of Appeal has addressed whether an objection is required to preserve this issue, and has held:

> Regarding the state's preservation argument, we note that the initial version of the Coney opinion includes the following sentence, which was deleted, without explanation, after both sides had filed motions for rehearing: "Obviously, no contemporaneous objection by the defendant is required to preserve this issue for review, since the defendant cannot be imputed with a lawyer's knowledge of the rules of criminal procedure." Coney v. State, 20 Fla. L. Weekly S16, 17 (Fla. Jan. 5, 1995). The state argues that this deletion "indicates that appellant must preserve the issue." We are unwilling to read so much into such a revision. But see Gibson v. State, 661 So.2d 288, 291 (Fla. 1995)(denying claim that defendant's right to be present at bench conferences at which challenges for cause were made by his counsel had been violated and noting, in apparent

dicta, that "no objection to the court's procedure was ever made").

> According to the supreme court, "[t]he exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant." Francis v. State, 413 So.2d 1175, 1178-79 (Fla. 1982)(citing Pointer v. United States, 151 U.S. 396, 14 S.Ct. 410 38 L.Ed. 208 (1894), and Lewis v. United States, 146 U.S. 370, 13 S.Ct 136, 36 L.Ed. 1011 (1892). Clearly, it is because this is considered such a critical stage of the proceedings that the court has undertaken to ensure that a defendant's right to meaningful participation in the decision of how peremptory challenges are to be used is assiduously protected. If a contemporaneous objection were required to preserve for appeal the issue of deprivation of that right, it seems to us that, as a practical matter, the right would be rendered meaningless. Accordingly, to ensure the viability of the rule laid down (or "clarified") by the supreme court in Coney, we conclude that a violation of that rule constitutes fundamental error, which may be raised for the first time on appeal, notwithstanding the lack of a contemporaneous objection. See State v. Johnson, 616 So.2d 1, 3 (Fla. 1993)("for an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process"); Salcedo v. State, 497 So.2d 1294, 1295 (Fla. 1st DCA 1986)(allegation that defendant was absent from courtroom during the exercise of peremptory challenges "alleged reasonable possibility that the error contributed to the conviction." State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986).

Mejia v. State, ___ So.2d ___, 21 Fla. L. Weekly D1355 (Fla. 1st DCA June 13, 1996).

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

Petitioner's absence from the bench where, as here, he could have influenced the process, may be considered harmful ***per se*** under certain analysis. See Hegler v. Borg, 50 F.3d 1472, 1476 (9th Cir. 1995)(violation of defendant's right to presence is "structural defect" not amenable to harmless error analysis if

the defendant's presence could have "influenced the process" of that critical stage of the trial).

As was conceded by the state in Coney, it was error for the Petitioner not to have been present at the bench, plain and simple. Because there was error, the burden lies upon the state to show beyond a reasonable doubt that the error could not in any way have affected the fairness of the trial process. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Garcia v. State, 492 So.2d 360, 364 (Fla. 1986)(citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

H. Analysis of Prejudice.

As noted previously, the absence of the accused at this critical stage of trial constitutes a denial of due process under the state and federal constitutions. Francis, at 1177; Snyder; Faretta. Since the trial court also failed to ask Petitioner to ratify the choices of trial counsel, this Court has no way of knowing what damage was done.

This Court's analysis in Francis v. State, 413 So. 2d 1176-1179, is important on the question of the prejudice flowing from the involuntary absence of the defendant during the challenging of the jury:

> Since we find that the court erred in proceeding with the jury selection process in Francis' absence, we also consider whether this error is harmless. We are not satisfied beyond a reasonable doubt that this error in the particular factual context of this case is harmless. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

* * *

> **In the present case, we are unable to assess the extent of prejudice, if any, Francis sustained by not being present to consult with his counsel during the time his peremptory challenges were exercised.** Accordingly, we conclude that his involuntary absence without waiver by consent or subsequent ratification was reversible error and that Francis is entitled to a new trial.

Francis, 1176-1179. (**Bold** emphasis added).

There was error. There was prejudice. Thus, the Petitioner is entitled to a new trial (even if properly admitted evidence were sufficient to support the jury verdict) where the court cannot say beyond a reasonable doubt that this error did not affect the fairness of the trial. If this Court is unable to assess the extent of prejudice sustained by petitioner's absence, his involuntary absence was reversible error and the error was by definition harmful. State v. Lee, 531 So. 2d 133 (Fla. 1988); Francis, at 1179. Moreover, the absence of the accused at a critical stage of trial must be presumed harmful unless the state can show beyond a reasonable doubt to the contrary.

Accordingly, because the error in this case is not harmless beyond a reasonable doubt, this Court must reverse Petitioner's conviction and sentence and remand for a new trial.

VI. CONCLUSION

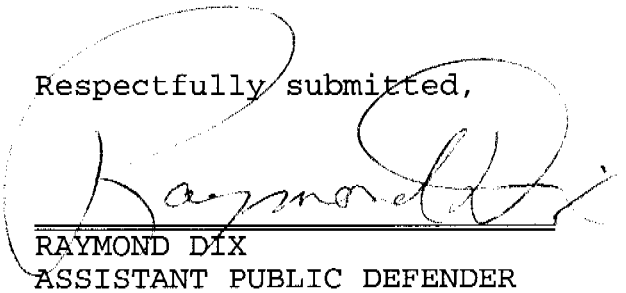
The certified question posed by the First District Court of Appeal must be answered YES. The holdings in Coney must be applied to "pipeline cases" such as this.

Based on the law and facts above, Petitioner, RICKIE RENORIED MATHIS, respectfully requests this Court to reverse his conviction and sentence, to remand with orders for dismissal of charges or for a new trial, and grant all other relief which this court deems just and equitable.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief on the Merits has been furnished by delivery to Vincent Altieri, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Mr. Rickie R. Mathis, on this 30th day of July, 1996.

Respectfully submitted,



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IN THE SUPREME COURT OF FLORIDA

RICKIE RENORIED MATHIS, :

Petitioner, :

v. : SUP.CT. CASE NO. 88,517
1ST DCA CASE NO. 94-2465

STATE OF FLORIDA, :

Respondent. :

_____/

A P P E N D I X

TO

BRIEF OF PETITIONER ON THE MERITS

ITEMS **PAGE(S)**

IN THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT, STATE OF FLORIDA

RICKIE RENORIED MATHIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

CASE NO. 94-2465

Opinion filed June 27, 1996.

An appeal from the Circuit Court for Gadsden County.
William Gary, Judge.

Nancy A. Daniels, Public Defender; Raymond Dix, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Vincent Altieri, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

In this direct criminal 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 a new 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 CASES WERE PENDING ON DIRECT APPEAL OR OTHERWISE NOT YET FINAL 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).

AFFIRMED.

WEBSTER, MICKLE and LAWRENCE, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

RICKIE RENORIED MATHIS,	:	
Appellant/Petitioner,	:	
v.	:	CASE NO. 94-2465
STATE OF FLORIDA,	:	
Appellee/Respondent.	:	
	:	

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that RICKIE RENORIED MATHIS, Petitioner, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered **June 27, 1996.** This decision passes upon a question certified to be of great public importance.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Vincent Altieri, Assistant Attorney General, Department of Legal Affairs, Criminal Appeals Division, The Capital, Plaza Level, Tallahassee, FL, 32301, on this 12th day of July, 1996.

RAYMOND DIX