In The Supreme Court of Florida

NO. 88,535

MARY ANTONIA PAGE,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW OF A DECISION OF THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

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IN THE SUPREME COURT OF FLORIDA

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THE STATE OF FLORIDA,

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_____/

PRELIMINARY STATEMENT

This case is before the Court on a question certified by the First District Court of Appeal, to-wit:

> 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 NOT YET FINAL WHEN THE OPINION WAS RELEASED?

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ARGUMENT

ISSUE I

THE ACCUSED WAS INVOLUNTARILY ABSENT FROM THE SIDEBAR WHEN PEREMPTORY CHALLENGES WERE EXERCISED DURING THE CHALLENGING OF THE JURY. THERE IS NO RECORD OF A KNOWING AND VOLUNTARY WAIVER OF HER PRESENCE. THERE IS NO RECORD THAT PETITIONER RATIFIED OR APPROVED THE PEREMPTORY STRIKES. THE TRIAL COURT ERRED IN FAILING TO MAKE ANY INQUIRY AS TO WHETHER PETITIONER'S ABSENCE WAS VOLUNTARY OR WHETHER SHE APPROVED OR RATIFIED THE STRIKES. THE COURT FURTHER FAILED TO CERTIFY THAT PETITIONER'S ABSENCE WAS VOLUNTARY OR THAT SHE RATIFIED THE PEREMPTORY STRIKES. THE INVOLUNTARY ABSENCE OF PETITIONER AT A CRITICAL STAGE OF TRIAL WAS A CLEAR VIOLATION OF RULE 3.180 AND A DENIAL OF DUE PROCESS UNDER THE STATE AND FEDERAL CONSTITUTIONS

Jurisdiction and Exercise of Jurisdiction

This Court has jurisdiction pursuant to Article V, § 3(b)(4) of the Florida Constitution. For the reason which follow, this Court should exercise jurisdiction to answer the certified question and to clarify its intent regarding the retroactivity and prospectivity of its holding in *Coney v. State*, 653 So. 2d 1009 (Fla. 1995), cert. denied, __U.S.__, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995).

Contrary to the respondent's argument that the issue has already been decided, the issue certified to the Court is a question of great public importance, particularly in view of the fact that the critical part of the decision in *Coney* appears to

be patently a clarification of existing law. The question certified to this court – and the immensely vexing problems the decision in *Coney* created relative to the retroactivity of the holding – was recently illuminated in *Mejia v. State*, 675 So. 2d 996 (Fla. 1st DCA 1996), in which Judge Webster, writing for the majority, stated:

> "The supreme court's failure to elucidate as to its intent when it pronounced the holding in *Coney* was to be "prospective only "(653 So. 2d at 1013) had engendered considerable confusion, in both trial and appeal courts, regarding the applicability of the holding to "pipeline," and other cases . . . .

Id. at 999. Petitioner has sought to further illuminate the nature of the ambiguity in, and confusion created by, *Coney* regarding this Court's actual intent on that question in his initial brief.

Petitioner urges this Court to accept jurisdiction and to resolve the application of *Coney* to "pipeline" cases as well as to clarify whether prospectivity was intended to be limited only to the new procedural requirements (regarding certifications by the trial court on the record regarding waiver and/or ratification). Petitioner also requests that the Court resolve whether the Court also intended to apply the clarification of the law as previously set down in *Francis v. State*, 413 So. 2d 1175,

1177 (Fla. 1982) – set forth in the first sentence of the critical paragraph of the decision – as prospective only as well.

A Matter of Substance

The right to be present during peremptory challenging of the jury is, however, a right of constitutional magnitude under *Francis* and *Coney*. While the Court's requirement that the trial court certify a waiver of the right to be present and/or ratification of peremptory strikes on the record may be procedural such that prospective application only of the obligation to certify might be appropriate, the question of violation of the right to be present during peremptory challenging or of a waiver of that right is one of constitutional substance, and not mere procedure.

The constitutional guarantees underpinning the right to be present under *Francis*, *Turner v. State*, 530 So. 2d 45 (Fla. 1987), *Coney*, and Rule 3.180(a)(4) is partially rooted in the rights to due process; in some instances, in the rights of confrontation; but most significantly, is primarily rooted in the right to assistance of counsel under the Counsel Clauses of the Florida and United States Constitution. *Johnson v. Wainwright*, 463 So. 2d 207 (Fla. 1985).

The right of the accused to be present in the courtroom

> throughout his trial derives from and is an effectuation of, we believe, two constitutional rights of the accused under the sixth amendment to the United States Constitution: the right "to be confronted with the witnesses against him" and the right "to have the assistance of counsel for his defense." The former guarantees the right of cross examination and guards against "conviction . . . upon depositions or ex parte affidavits." *Dowdell v. United States*, 221 U.S. 325, 330, 31 S.Ct. 590, 55 L.Ed. 753 (1911). The latter pertains in this context to the presence of the accused when his presence is important to the fairness of the proceeding. Just as the accused has the right to the assistance of counsel, he also has the right to assist his counsel in conducting the defense. *See 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). Thus in *Francis* the **defendant's presence during the exercise of peremptories was deemed important because of the aid the accused could have given to his counsel.**

Id. at 210-211 (**bold** emphasis added).

Because the right to be present is inextricably intertwined with and, indeed, rooted in the federal and state constitutional rights to the assistance of counsel, that right is as fundamental a constitutional right as the right to counsel itself, and the right to be present during peremptory challenging is substantive, and not merely procedural. The decision in *Francis* and in *Coney* are of constitutional magnitude.

Petitioner may have had contemporaneous input to make to counsel as to the exercise of his peremptory challenges – because they are often exercised arbitrarily and capriciously, for real

or imagined partiality, often on sudden impressions and unaccountable prejudices based only on bare looks or gestures. *Francis*, 413 So. 2d at 1176. Thus, the very concept of peremptory challenges necessitates constant and contemporaneous input from the accused to counsel, and vice versa. *See Johnson v. Wainwright*, 463 So. 2d 207, 210-211 (Fla. 1985). The exercise of peremptory challenges "is not a mere 'mechanical function' but may involve the formulation of on-the-spot strategy decisions which may be influenced by the acts of the state at the time. The exercise of peremptory challenges is essential to the fairness of a trial by jury." *Walker v. State*, 438 So. 2d 969, 970 (Fla. 2d DCA 1983), citing *Francis* at 1179; *Salcedo v. State*, 497 So. 2d 1294, 1295 (Fla. 1st DCA 1986).

This Trial Error Was Not Only A Matter of Violation of Coney

The issue raised before the district court was not predicated solely on a claim of violation of this Court's holding in *Coney*, but rested equally on this Court's decisions in *Francis* and *Turner*.

Since *Francis*, Florida courts have 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"). *See also Mack v. State*, 537 So. 2d 109, 110 (Fla. 1989); *Rose v. State*, 617 So. 2d 291 (Fla. 1993); *Salcedo v. State*, 497 So. 2d 1294 (Fla. 1st DCA 1986); *Alen v. State*, 596 So. 2d 1083, 1095-1096 (Fla. 3d DCA 1992); *Summerall v. State*, 588 So. 2d 31, 32 (Fla. 3d DCA 1991), all progeny of *Francis*.

In *Salcedo v. State*, 497 So. 2d 1294 (Fla. 1st DCA 1986), the First District found the error under *Francis* to be fundamental. That court reasoned:

> The trial court denied Salcedo's motion on the ground that his counsel failed to object to his absence at the time the peremptory challenges were being exercised. While it is the general rule that a point argued on appeal must be preserved by appropriate objection at trial, it is well settled that fundamental error can be considered on appeal without objection in the lower court. *Sanford v. Rubin*, 237 So.2d 134, 137 (Fla.1970); *Cato v. West Florida Hospital, Inc.*, 471 So.2d 598 (Fla. 1st DCA 1985). *We see no reason why this principle should not govern motions for new trial as well as direct appeals and hold that, if the error alleged by a criminal defendant in a motion for new trial is fundamental, any failure to object with regard to that error does not require that the motion be denied.*
>
> The United States Constitution guarantees a criminal defendant the right to be present during

> crucial stages of his trial or at the stages of his trial where fundamental fairness might be thwarted by his absence. *Smith v. State*, 453 So. 2d 505, 506 (Fla. 4th DCA 1984), *p.f.r.d.* 462 So. 2d 1107 (Fla. 1985), citing *Francis v. State*, 413 So. 2d 1175, 1177 (Fla. 1982).
>
> The challenge of jurors is one of the essential stages of a criminal trial where the defendant's presence is required. *Lane v. State*, 459 So. 2d 1145, 1146 (Fla. 3d DCA 1984). It is not a mere "mechanical function" but may involve the formulation of on-the-spot strategy decisions which may be influenced by the acts of the state at the time. The exercise of peremptory challenges is essential to the fairness of a trial by jury. *Walker v. State*, 438 So. 2d 969, 970 (Fla. 2d DCA 1983) citing *Francis* at 1179. *Based on these authorities, we find that Salcedo's motion for new trial alleged fundamental error which no objection was necessary to preserve.*

Id., at 1295 (emphasis added).

Very recently, the First District likewise found a violation of the rule ("or clarification") in *Coney* to be fundamental in *Mejia* (at 999), reasoning that to require a contemporaneous objection to the violation, as a practical matter, would render the right meaningless in view of the fact that how peremptory challenges are to be used is assiduously protected. Page's failure to interpose a timely objection to being excluded from this side bar is not fatal to appellate review. Where peremptory challenges are used, the trial court's failure to comply with requirements of *Coney* constitutes fundamental error which may be

raised for the first time on appeal. *Wilson v. State*, 21 Fla. L. Weekly D2069 (Fla. 3d DCA September 18, 1996); *Butler v. State*, 676 So. 2d 1034 (Fla. 1st DCA 1996); *Mejia v. State*, 675 So. 2d 996 (Fla. 1st DCA 1996).

Similarly, petitioner has argued that to require a contemporaneous objection to involuntary exclusion in the process – considering that this Court since *Francis* has required an affirmative waiver of the right to be present after sufficient inquiry – would also constitute, as a practical matter, an impermissible waiver of the right by silence or acquiescence of that right. This Court has held unequivocally that the right to be present during peremptory challenging is one requiring a knowing, intelligent and voluntary waiver after an adequate inquiry by the trial court. *Francis*. That principle was resoundingly reaffirmed in *Coney* when the Court imposed a requirement that the trial court certify on the record a waiver of the right after a proper inquiry. *Coney* at 1013. Such an inquiry and waiver must be spread upon, and supported by, the record. Thus, the notion of imposition of a procedural bar under the contemporaneous objection rule where the defendant is involuntarily absent during peremptory challenging of the jury is entirely inconsistent with, and indeed absolutely antagonistic

to, the fundamental principle that the right to be present must be knowingly, intelligently, and voluntarily waived by affirmative action of the accused on the record. *See Turner*, 530 So. 2d at 49.

Petitioner is aware of the Court's decision in *Gibson v. State*, 661 So. 2d 288 (Fla. 1995), upon which the state places such great reliance for the contention that a contemporaneous objection is required to preserve a claim under *Coney* and *Francis*. However, the Court did not suggest in *Gibson* that it intended to recede from the holding in *Coney* that obligates the trial court to make a proper inquiry regarding the defendant's personal waiver. *See Butler v. State*, at 1034. Nor did the Court suggest in *Gibson* that it intended in any way to recede from the previous holdings in *Francis* and *Turner* which require a knowing, intelligent and voluntary waiver of the right to be present by the defendant. That portion of the opinion in *Gibson*, noting that "no objection to the court's procedure was ever made" concerning the defendant's absence from the bench in that case has been viewed as dicta. *Mejia* at 999. We contend it was dicta because the primary issue appeared to be the court's denial of counsel's request to confer which his client during the sidebar at which only challenges for cause were made. Petitioner

contends that *Gibson* is not dispositive on the requirement of a contemporaneous objection to the procedure or to the defendant's absence to preserve the issue.

In any event, *Gibson*, to the extent it may be read as requiring a contemporaneous objection to preserve a *Francis* or *Coney* issue, is flatly contrary to the principle of law that a right which requires a knowing, intelligent and voluntary waiver on the record cannot be waived by silence or acquiescence, particularly where the accused was never informed of the existence of his right to be present. The right cannot be waived by inference or by silence of the accused or by the failure to object. *See, State v. Melendez*, 244 So. 2d 137 (Fla. 1971). The right cannot be waived by counsel, or by counsel's failure to object. *Barker v. Wingo*, 407 U.S. 514, 525, 92 S.Ct. 2182, 33 L.Ed.2d 101, 114 (1972); *Larson v. Tansy*, 911 F.2d 392, 396 (10th Cir. 1990)(defense counsel cannot waive a defendant's right of presence; *United States v. Gordon*, 829 F.2d 119, 124-26 (D.C. Cir. 1987). The right is personal to the accused and can only be waived by him after proper inquiry. *Coney; Francis.*

The involuntary exclusion of the defendant from the sidebar during peremptory challenging may additionally constitute an interference with, or a denial of, the right to the assistance of

counsel and/or the concomitant right to assist counsel because the right to be present is rooted in the right to counsel. *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984); *Johnson v. Wainwright*.

For these reasons, and those presented in the initial brief, this Court should answer the certified question in the affirmative. Further, for the reasons argued, this Court should reverse and remand for a new trial under *Francis* and *Coney*.

CONCLUSION

Petitioner, Mary Page, based on all of the foregoing, respectfully urges the Court to accept jurisdiction, answer the certified question in the affirmative, vacate petitioner's conviction and sentence, to remand the case for a new trial, and to grant all other relief which the Court deems just and equitable.

Respectfully submitted,

NANCY A. DANIELS
Public Defender
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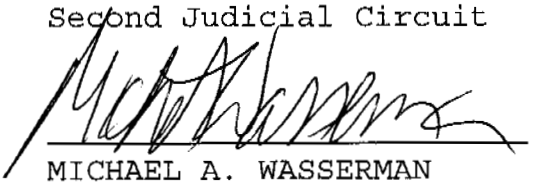

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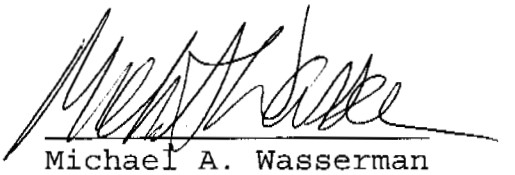
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by delivery to: Amelia L. Beisner, Esq., Assistant Attorney General, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to the Petitioner by U.S. Mail, first-class postage pre-paid, on October 4th, 1996.



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