IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 88,568

CARLOS OMAR MEJIA,

Respondent.

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

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v. CASE NO. 88,568

CARLOS OMAR MEJIA,

Respondent.

BRIEF OF RESPONDENT ON THE MERITS

I PRELIMINARY STATEMENT

Respondent was the defendant in the trial court and the appellant in the lower tribunal. Attached hereto as an appendix is the opinion of the lower tribunal, which has been reported as Mejia v. State, 675 So. 2d 996 (Fla. 1st DCA 1995). Mr. Mejia also filed a notice to invoke discretionary jurisdiction on August 5, 1996, and it is presently pending under case no. 88,684. The issue presented here is currently before this Court upon a certified question from the decision in Henderson v. State, 679 So. 2d 805, 808 (Fla. 3rd DCA 1996), rev. *pending*, case no. 89,178

> 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 CASES IN WHICH THE JURY SELECTION PROCESS TOOK PLACE AND THE ENTIRE TRIAL CONCLUDED DURING THE PERIOD OF TIME AFTER THE ISSUANCE OF THE *CONEY* OPINION BUT PRIOR TO THE TIME THAT *CONEY* BECAME FINAL BY THE DISPOSITION OF ALL MOTIONS FOR REHEARING DIRECTED TO THAT OPINION?

II STATEMENT OF THE CASE AND FACTS

Mr. Mejia accepts the state's recitation at PB at 1-2, with the following clarifications. The lower tribunal's (decision properly recites that: "Jury selection commenced on January 23, 1995, eighteen days after the release of the opinion in" Coney v. State, 20 Fla. L. Weekly S16 (Fla. Jan. 5, 1995). [Coney I] 675 So. 2d at 997. The lower tribunal's opinion erroneously recites: "the [Coney] decision did not become final. until April 27, 1995, four days after appellant's trial had begun." 675 So. 2d at 998-99. The state's brief at 13 also makes this error. Respondent's trial began on January 23, 1995 (T 7), and concluded on January 28, 1995 (R 101).

The lower tribunal's opinion correctly recites that respondent was present and consulted with counsel during the conference in chambers at which three prospective jurors were struck by the defense. However, the lower tribunal's opinion concludes that Mr. Mejia's counsel "consistently consulted" with him prior to the last three bench conferences at which more defense peremptory challenges were exercised. 675 So. 2d at 1000.

Mr. Mejia disagrees with this conclusion. The true facts are set forth in the transcript of jury selection:

> THE COURT: All right. Mr. White, Mr. Adams, you all need just a moment?
>
> MR. ADAMS: Yes.
>
> THE COURT: You may be at ease for a minute.

(Brief pause in proceedings)

MR. ADAMS: Can we approach? And we did waive that other matter, for the record.

(Conference at sidebar off the record) (T 168).

* * *

THE COURT: You all need just a minute?

MR. ADAMS: Yes.

THE COURT: Ladies and gentlemen, you can just sort of rest in place.

(Conference at sidebar off the record)

(Upon resuming)

MR. ADAMS: Judge, I want the record to reflect that the defendant has waived his presence at these bench conferences. (T 202).

* * *

MR. ADAMS: . . . The court will probably explain to you that we need twelve jurors plus two alternates, and I have got to go through them and see where we are. Thank you very much.

(Conference at sidebar off the record)

(Upon resuming)

THE COURT: AS I call your name, I will ask you to step down, T think we are probably almost to a closing for today. (T 223).

The affidavits of the trial judge and the prosecutor, contained in the supplemental record, do not assert that Mr. Adams, now deceased, consulted with Mr. Mejia during these three episodes (SR 2-5)

III SUMMARY OF THE ARGUMENT

The state's brief seems to assert that Coney I and Coney v. State, 653 So. 2d 1009 (Fla.), *cert. den.* ___ U.S. ___, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995) [Coney II], were never the law and cannot be applied to Mr. Mejia's trial in January of 1995. Mr. Mejia will argue in this brief that although this Court has receded from Coney I and Coney II, there remains a "window" period from the date of the original Coney opinion, January 5, 1995, until this Court changed the law in late 1996. The Third and Fourth Districts have so recognized.

Mr. Mejia should receive the benefit of that window period, because the parties at trial, although attempting to comply with their understanding of Coney I, did not ensure that Mr. Mejia had been consulted by his attorney about the exercise of his peremptory challenges prior to the three unreported bench conferences. Other areas of criminal law have given defendants the benefit of a "window" period before the law is changed.

Mr. Mejia will also argue that the lower tribunal misconstrued the record in finding that his attorney consulted with him during the three brief pauses in the proceedings.

Mr. Mejia will also argue that the error must be *per se* reversible and can never be harmless, because we cannot know what effect his lack of participation would have had in the jury selection process and in the jury's composition and in its verdict.

IV ARGUMENT

THE LOWER TRIBUNAL PROPERLY FOUND THAT CONEY I APPLIED TO RESPONDENT'S JANUARY, 1995, TRIAL, BUT MISCONSTRUED THE RECORD AND ERRONEOUSLY FOUND THE ERROR TO BE HARMLESS.

Coney I was issued on January 5, 1995. Respondent's trial commenced on January 23, 1995. Coney II was issued on April 27, 1995. This Court receded from Coney I and II by issuing the Amendments to the Florida Rules of Criminal Procedure, 21 Fla. L. Weekly S518 (Fla. Nov. 27, 1996), and Boyett v. State, 21 Fla. L. Weekly S535 (Fla. Dec.:. 5, 1996).[1]

The state's brief seems to assert that Coney I and II were never the law and cannot be applied to Mr. Mejia's trial in January of 1995 (T 7-223). Although this Court has receded from Coney I and II, there remains a "window" period from the date of the original Coney I opinion, January 5, 1995, until this Court changed the law in late 1.996.:'

The lower tribunal 'held that, during the window period after Coney I, it was fundamental error for the judge to allow the defense attorney to exercise peremptory challenges at the bench without the defendant being present and without the defendant having given an intelligent and voluntary waiver of

---

'Boyett's trial was prior to Coney *I,* and he argued he should get the hencfit of *Coney I* because he was in the appellate "pipeline" at the time Coney *I* was issued. This Court held that *Coney I* was prospective only, and denied Boyett relief. But respondent's jury selection was 18 days after *Coney 1.*

"Even if the window is limited to the time between *Coney I* and *Gibson v. State,* 661 so. 2d 288 (Fla. 1995) (October 5, 1995), respondent's trial still falls within the window.

his right to be present. This ruling was correct.'

Other appellate courts have recognized the window created by Coney I and II. In Williams v. State, 22 Fla. L. Weekly D204 (Fla. 3rd DCA Jan. 15, 1997), the defendant went on trial in November of 1995. The court held that Coney applied. The court further held that his attorney waived his presence at the bench conferences, and so the error was invited. Significantly, while the court cited Mejia with approval, it also noted that: "the record contains independent confirmation that there was consultation between the defendant and his counsel on jury selection." Here, there was no such 'Independent confirmation," unless one reads that into counsel's requests, ("may I have a moment, Your Honor?") as the lower tribunal has done.

In Matthews v. State, 22 Fla. L. Weekly D296 (Fla. 4th DCA Jan. 29, 1997), the court applied Coney and granted a new trial where the defendant was not present at two bench conferences. The court noted that the new Fla. R. Crim. P. 3.180(b) had superseded Coney, but gave the defendant the benefit of the window period." Contra: Henderson v. State, *supra*. The Matthews court also held the error could not be harmless beyond a reasonable doubt.

'The "window" is not to be confused with the "pipeline" cases, such as ***Boyett.***

'Curiously, the lower tribunal applied the window in ***Vann v. State,*** 22 Fla. L. Weekly D168 (Fla. 1st DCA Jan. 6, 1997), but did not discuss *Mejia* or the new rule or ***Boyett.***

In Coney I, this Court held:

> We conclude that [former Rule 3.180(a)(4)] 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.* 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.

20 Fla. L. Weekly at S17; bold and double underlined emphasis added.

Respondent's trial occurred shortly after this Court's clear pronouncement in Coney I, that after "today," *i.e.*, January 5, 1995, the judge had to ensure that the defendant's waiver of his presence at the bench was voluntary. The parties below and the trial judge here attempted to comply with Coney I but did not, as even the lower tribunal recognized.

Respondent should receive the benefit of Coney 1. No lower Florida court was free to disregard this Court's clear pronouncement. It would be a nullification of this Court's authority to conclude that where a decision is announced 15

days before a trial, a trial judge is not required to follow that decision until a motion for rehearing is denied or until the decision becomes final without a rehearing. That a party has the right to file a motion for rehearing does not and should not confer the power upon that party to actually control, by delaying the ultimate rendition of the final decision, whether the decision is applicable to pending trials.

Such a view does not serve judicial economy and encourages parties to file motions for rehearing, not in good faith, just tc delay the effective date of a decision. Only this Court should have the power to tell the parties and the trial judge when one of its decisions has become the applicable law, and this Court did so in Coney I by saying its decision "today" was prospective only.

This Court in Boyett, supra, clearly stated its view that Coney I had announced a new rule of law which applied to any trial which commenced after January 5, 1995:

> In Coney, we interpreted the definition of "presence" as used in Florida Rule of Criminal Procedure 3.180. We expanded our analysis from *Francis v. State,* 413 So.2d 1175 (Fla. 1982), which concerned both a defendant whose right to be present had been unlawfully waived by defense counsel, and a jury selection process which took place in a different room than the one where the defendant was located. In *Coney,* we held for the first time that a defendant has a right under rule 3.180 to be physically present at the ***immediate site*** where challenges are exercised. See Coney, 653 So. 2d at 1013. Thus, we find Boyett's argument on this issue to be without merit.

> Boyett's second Coney argument -- that the rule of that case should apply because Boyett's case was non-final when the decision issued -- is also without merit. In Coney, we expressly held that "our ruling today clarifying this issue is prospective only." Coney, 653 So. 2d at *1013.* Unless we explicitly state otherwise, a rule of law which is to be given prospective application does not apply to those cases which have been *tried* before the rule is announced, *See* *Armstrong* v. *State,* *642* So.2d *730,* at 737-38 (Fla. 1994), cert. denied, *115* S. Ct. 1799, 131 L. Ed. 2d *726* (1995). Because Boyett had already been tried when *Coney* issued, *Coney* does not apply.

21 Fla. L. Weekly S535; italics in original; bold emphasis added; footnote omitted. Respondent was tried after Coney I was issued; this Court's use of the term "issued" means that Coney I applied to trials after January *5,* 1995, and not just to trials after it became final after rehearing in the form of Coney II.

This Court has applied a window period to grant defendants relief in other instances where the law has changed. For example, those defendants who were improperly sentenced as habitual offenders during the window period of State v. Johnson, 616 So. 2d 1 (Fla. 1993), received relief. Steele v. State, 626 So. 2d 653 (Fla. 1993). Likewise, those defendants who were improperly sentenced on duplicate crimes during the window period of Carawan v. State, 515 So. 2d 161 (Fla. 1987), received relief. State v. Smith, 547 So. 2d 613 (Fla. 1989).

The lower tribunal misconstrued the record in finding that his attorney consulted with respondent during the three brief pauses in the proceedings. The lower tribunal assumed that

respondent was consulted by his counsel about the peremptory challenges during the three brief pauses in the proceedings:

> THE COURT: All right. Mr. White, Mr. Adams, you all need just a moment?
>
> MR. ADAMS: Yes.
>
> THE COURT: You may be at ease for a minute.
>
> (Brief pause in proceedings)
>
> MR. ADAMS: Can we approach? And we did waive that other matter, for the record.
>
> (Conference at sidebar off the record) (T 168; emphasis added).

Specifically, as to this passage in the record, the lower tribunal found: "It is apparent that defense counsel then conferred with appellant regarding the prospective jury panel." 675 So. 2d at 998. Respondent submits that it is sheer speculation for this Court to conclude that is what occurred during the brief pause in the proceedings. It is equally possible that counsel was reviewing his notes of the voir dire by himself, or talking to the prosecutor, or looking at the jury panel, or looking out the window, or doing any number of things other than consulting with respondent.

Moreover, the lower tribunal's conclusion is contradicted by other portions of the record. If counsel had consulted with respondent, then he would have had no need to immediately say "And we did waive that other matter, for the record." (T 168). If counsel had consulted with respondent, the affidavits of the prosecutor and the judge, contained in the supplemental record

(SR 2-5), would have said that he had consulted with respondent. All they set forth is the legal conclusion that respondent "waived" his presence, a position that the lower tribunal's opinion properly rejected.

Likewise, the lower tribunal assumed ("Again, it is apparent that defense counsel conferred with appellant." *Id.*) that counsel had consulted with respondent at sometime during the following passages:

> THE COURT: You all need just a minute?
>
> MR. ADAMS: Yes.
>
> THE COURT: Ladies and gentlemen, you can just sort of rest in place.
>
> (Conference at sidebar off the record)
>
> (Upon resuming)
>
> MR. ADAMS: Judge, I want the record to reflect that the defendant has waived his presence at these bench conferences. (T 202; emphasis added).
>
> * * *
>
> MR. ADAMS: ___ The court will probably explain to you that we need twelve jurors plus two alternates, and I have got to go through them and see where we are. Thank you very much.
>
> (Conference at sidebar off the record)
>
> (Upon resuming)
>
> THE COURT: AS I call your name, I will ask you to step down, I think we are probably almost to a closing for today. (T 223; emphasis added).

Again, the record does not support the lower tribunal's naked assumption. Even if the first assumption was correct, there

is no "brief pause in proceedings" as there was in the earlier passage. Significantly, counsel stated "I have got to go through them." He did not say "We have to go through them." He did not say "Mr. Mejia and I have to go through them." Again, respondent submits that it is even more than sheer speculation for this Court to conclude that is what occurred during this passage, where no brief pause in the proceedings is noted. It is equally possible that counsel was reviewing his notes of the voir dire by himself, or talking to the prosecutor, or looking at the jury panel, or looking out the window, or doing any number of things other than consulting with respondent.

Moreover, the lower tribunal's conclusion is contradicted by other portions of the record. If counsel had consulted with respondent, then he would not have immediately said "I have to go through them."? If counsel had consulted with respondent, then the affidavits of the prosecutor and the judge, contained in the supplemental record, would have said that he had consulted with respondent. All they set forth is the legal conclusion that respondent "waived" his presence, a position that the lower tribunal's opinion properly rejected.

But the lower tribunal was incorrect to find the error to be harmless. The proper test for harmless error is stated in State v. Diguilio, 491 So. 2d 1129 (Fla. 1986):

> The harmless error test, as set forth in *Chapman* [v. *California, 386* U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)] and progeny, places the burden on the state,

> as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that **there is no reasonable possibility that the error contributed to the conviction.** ***See Chapman,*** 386 U.S. at, 24, 87 S.Ct. at 823.
>
> * * *
>
> The test is not A sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a. device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is **whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state.** If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

491 so. 2d at 1135, 1139; emphasis added.

Respondent's position is that this constitutional. error can never be harmless, because it is impossible to determine whether respondent was prejudiced by the failure to comply with Coney I. If peremptory challenges were or were not exercised by counsel, without respondent's concurrence, the validity of the entire proceeding was thrown into doubt, and no one can say if the outcome would have been different if respondent had been present with counsel. This position was stated in Francis v. State, 413 so. 2d 1175, 1178-79 (Fla. 1982) :

> 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). The 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. *Pointer v. United States, 151 U.S.* 396, 14 S.Ct. 410, 38 L.Ed. 208 (1894); *Lewis v. United States, 146* U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892). It is an arbitrary and capricious right which must be exercised freely to accomplish its purpose. It permits rejection for real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another or upon a juror's habits and associations. It is sometimes exercised on grounds normally thought irrelevant to legal proceedings or official action, such as the race, religion, nationality, occupation or affiliations of people summoned for jury duty. *Swain v. Alabama, 380 U.S. 202, 85* S.Ct. 824, 13 L.Ed.2d 759 (1965). 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.

(Emphasis added).

There are many situations in which constitutional error constitutes *per se* reversible error, without regard to harmless error. For example, the failure to allow the defendant to "backstrike" a potential juror before the jury is

sworn is *per* se reversible error:

> Gilliam declined to challenge any prospective jurors during panel selection. He sought to strike the panel as a whole, or as many jurors as he was allowed to peremptorily challenge, at the completion of the state's jury selection. The court refused, even though the panel had not yet been sworn, finding that he had waived his right to participate in jury selection. Gilliam argues reversible error. We agree. Florida Rule of Criminal Procedure 3.310 provides that a defendant may challenge a prospective juror before the jury is sworn. We reaffirmed this right in *Tedder v. Video Electronics, Inc.*, 491 So.2d 533 (Fla. 1986); *Jackson v. State*, 464 So.2d 1181 (Fla. 1985); *Rivers v. State*, 458 So.2d 762 (Fla. 1984); and *Jones v. State*, *332* So.2d 615 (Fla. 1976); and held that "[a]l trial judge has no authority to infringe upon a party's right to challenge any juror, either peremptorily or for cause, prior to the time the jury is sworn." *Jackson*, *464* So.2d at 1183. The denial of this right is per se reversible error. We recede from Jones and *Rivers* to the extent that they hold otherwise.

Gilliam v. State, 514 so. 2d 1098, 1099 (Fla. 1987); emphasis added. Just as a defendant has the absolute right to challenge a juror prior to the jury being sworn, he also had tne absolute right to be physically present when the peremptory challenges were exercised during the window period. Harmless error never comes into play.

Likewise, in Guess v. State, 579 So. 2d 339 (Fla. 1st DCA 1991), *approved*, 613 So. 2d 406 (Fla. 1993), the lower tribunal and this Court held that the failure to receive the defendant's testimony on the voluntariness of his confession was *per* se reversible error. Likewise, in State v. Franklin,

618 So. 2d 171 (Fla. 1993), this Court held that the failure of the defendant and his attorney to be present when the judge reinstructed the jury was pew se reversible error:

> In the case sub judice the State invites us to recede from *Williams* and its progenitor *Ivory,* or limit them to their facts. The State urges us to dispose of the prophylactic per se reversible error rule and instead expand the reach of the harmless error analysis discussed in State *v. DiGuilio,* 491 So.2d 1129 (Fla. 1986), to a trial court's failure to comply with the strictures of rule 3.410. We decline this invitation and reaffirm the per se reversible error rule expressed in *Williams* and Ivory.
>
> The per se reversible error rule, relating to a jury's request for additional instructions under rule 3.410, exists for two distinct reasons. First, it is clear that **due process requires that the defendant and defendant's counsel be afforded the opportunity to be present** whenever the trial court communicates with the jury. *Ivory,* 351 So.2d at 28. Secondly:
>
> > Any communication with the jury outside the presence of the prosecutor, the defendant, and defendant's counsel is so fraught with potential prejudice that it cannot be considered harmless.
> >
> > *Id.*
>
> Wc recognize that prejudice is not the inevitable result of such communication. However, **we believe that the potential fox prejudice and the danger of an incomplete record** of the trial court's communication with the jury **are so great as to warrant the imposition of a prophylactic per se reversible error rule. We therefore decline to apply a harmless error analysis** to communications between the trial court and the jury made in violation of rule 3.410.

618 So. 2d at 173; footnote omitted; emphasis added. The same prophylactic rule must be applied to a Coney violation to preserve the defendant's right to participate in the jury selection process through the meaningful exercise of peremptory challenges. Harmless error should never come into play. See also Salcedo v. State, 497 So. 2d 1294 (Fla. 1st DCA 1986) (fundamental error for the defendant to be absent during jury selection)

In State v. Upton, 658 So. 2d 86, 88 (Fla. 1995), the Court held that it was *per* se reversible error to accept a lawyer's written waiver of jury trial without inquiring of the defendant:

> In the instant case, there was no affirmative showing on the record establishing that Upton agreed with the waiver his attorney had signed. The trial judge did not conduct a colloquy with Upton concerning the waiver nor did Upton make any statements regarding the written waiver. The mere fact that Upton remained silent during the trial and did not object to the judge sitting as the fact-finder was insufficient to demonstrate that he agreed with the waiver. Thus, we cannot conclude that Upton knowingly, voluntarily and intelligently waived his right to a trial by jury. (Emphasis added).

Likewise, the fact that respondent, who did not understand much English, sat silently by while his attorney exercised peremptory challenges and waived his presence at the bench "was insufficient to demonstrate that he agreed with the waiver."

Likewise, in Mills v. State, 620 So. 2d 1006, 1008 (Fla 1993), this Court held that it was per se reversible error to

reinstruct the jury without giving counsel the opportunity to object, even if the instruction was correct, and even though the defendant was present when the jury was reinstructed:

> Mills and his counsel were present when the jury's question was answered, and Mills was given an opportunity to argue his position and present his objections, but only after the jury was instructed. There is a substantial difference between allowing discussion before the question is answered and allowing discussion after the question is answered and the jury is sent back to deliberate. (Emphasis added).

Likewise, there is a "substantial difference" between consulting with counsel about peremptory challenges before they are exercised.

In Jarrett v. State, 654 So. 2d 973, 975 (Fla. 1st DCA 1995), the lower tribunal recognized that Coney I. and II were controlling:

> The supreme court has "conclude[d] that the rule means just what it says." *Coney v. State,* 653 So.2d 1009 (Fla. 1995). To the extent the defendant can, during the course of trial, waive rights under the rule in favor of the "exercise [of] constructive presence through counsel . . . . the court must certify through proper inquiry that the waiver is knowing, intelligent, and voluntary," *id.,* except as provided in Rule 3.180(b).
>
> There has been no such inquiry or certification here. The record in the present case does not demonstrate a waiver. *Cf. State v. Melendez, 244* So.2d 137 (Fla. 1971). (Emphasis added).

Respondent's absence from the bench where he could have influenced the exercise of his peremptory challenges should be considered harmful error per se as a structural defect in the

trial. See Hegler v. Borg, 50 F.3d 1472, 1476 (9th Cir.), cert. *den.* ___ U.S. ___, 116 S.Ct. 675, *133* L.Ed.2d 524 (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). The Supreme Court has divided the class of constitutional errors that may occur during the course of a criminal proceeding into two categories; trial error and structural error. Structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302, 331 (1991). Denial or interference with the right to counsel, or a right rooted in the right to counsel, is a structural defect. Where a criminal proceeding is undermined by a structural error, the "criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence," and the defendant's conviction must be reversed. *Id.* On the other hand, trial error is error "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless. *Id.*, *499* U.S. at 307-308, 111 S.Ct. at 1263-64.

The accused's absence from the challenging of the jury through peremptory challenges is a structural error requiring

automatic reversal. Being absent from the bench during jury selection is a structural defect, reaching the very heart of the trial process itself, and so harmless error does not apply. Fulminante, *supra*

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, Mr. Mejia asks this Court to grant him the benefit of the Coney I window and reverse the judgment and sentence and remand for a new trial.

Respectfully Submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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CERTIFICATE; OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Giselle Lylen Rivera, Assistant Attorney General, at The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to respondent, this ___ day of February, 1997.

P. DOUGLAS BRINKMEYER

IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 88,568

CARLOS OMAR MEJIA,

Respondent.

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

APPENDIX TO BRIEF OF RESPONDENT ON THE MERITS

NANCY A. DANIELS
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SECOND JUDICIAL CIRCUIT

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*996 675 So.2d 996

21 Fla. L. Weekly D1355

Carlos Omar MEJIA, Appellant,
v.
STATE of Florida, Appellee.

No. 95-1182.
District Court of Appeal of Florida,
First District.
June 13, 1996.
Rehearing Denied July 12, 1996.

Defendant was convicted in the Circuit Court, Washington County, Russell A. Cole, Jr., J., of first-degree murder and robbery, and he appealed. The District Court of Appeal, Webster, J., held that: (1) trial court's failure to ensure that defendant's waiver of his right to be present at bench conferences during which peremptory challenges were exercised was harmless, and (2) defendant was not entitled to instruct on defense of voluntary intoxication.

Affirmed.

Lawrence, J., concurred in part and dissented in part and filed an opinion.

1. CRIMINAL LAW ⚿1035(3)
110 ----
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1035 Proceedings at Trial in General
110k1035(3) Course and conduct of trial in general.
Fla.App. 1 Dist. 1996.

Violation of rule giving defendant right to be present when pretrial juror challenges are exercised constitutes fundamental error, which may be raised for first time on appeal, notwithstanding lack of a contemporaneous objection. West's F.S.A. RCrP Rule 3.180(a)(4).

2. CRIMINAL LAW ⚿1030(1)
110 ----
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1030 Necessity of Objections in General
110k1030(1) In general.
Fla.App. 1 Dist. 1996.

Fact that an error may be classified as fundamental, so that it may be raised for first time on appeal, does not necessarily preclude application of harmless error analysis.

3. CRIMINAL LAW ⚿636(1)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k636 Presence of Accused
110k636(1) In general.
Fla.App. 1 Dist. 1996.

Trial court is required to ensure through proper inquiry that defendant's waiver of right to be present at bench conferences regarding peremptory challenges is intelligent and voluntary, or is required to obtain an intelligent and voluntary ratification by defendant of jury chosen. West's F.S.A. RCrP Rule 3.180(a)(4).

4. CRIMINAL LAW ⚿ 1166.14
110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166.5 Conduct of Trial in General
110k1166.14 Absence of accused.
Fla.App. 1 Dist. 1996.

Defendant was not prejudiced by trial court's erroneous failure to ensure that defendant intelligently and voluntarily waived his right to be present at bench conferences during which peremptory challenges were exercised; defendant understood that he had the right to participate in choice of jurors, and defendant's counsel consistently consulted with defendant regarding exercise of peremptory challenges. West's F.S.A. RCrP Rule 3.180(a)(4).

5. CRIMINAL LAW ⚿55
110 ----
110VI Capacity to Commit and Responsibility for Crime
110k52 Drunkenness
110k55 Existence of specific intent essential to offense.

See headnote text below]

5. HOMICIDE ⚿28
203 ----
20311 Murder
203k28 Intoxication.
Fla.App. 1 Dist. 1996.

First-degree murder and robbery are specific intent crimes, as to which voluntary intoxication may be a valid affirmative defense.

6. CRIMINAL LAW ⚷772(6)
10 ---
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k772 Elements and Incidents of Offense, and Defenses in General
110k772(6) Defenses in general.
Fla.App. 1 Dist. 1996.
As a general rule, defendant is entitled to have jury instructed on rules of law applicable to his theory of defense if there is any evidence in support such instructions.

7. CRIMINAL LAW ⚷814(8)
110 ---
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficictiy
110k814 Application of Instructions to Case
110k814(8) Matters of defense in general.
Fla.App. 1 Dist. 1996.
To entitle defendant to an instruction on an affirmative defense, it is not sufficient that there be evidence to support such a defense; requested instruction must also be consistent with defendant's theory of defense.

8. CRIMINAL LAW ⚷814(10)
110 ---
110XX Trial-id
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k814 Application of Instructions to Case
110k814(10) Insanity or intoxication.
Fla.App. 1 Dist. 1996.
Defendant was not entitled to an instruction on defense of voluntary intoxication, where defendant's testimony was that another person had been responsible for charged crimes.

Nancy A. Daniels, Public Defender; P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Jean-Jacques Darius, Assistant Attorney General, Tallahassee, for Appellee.

***997** WEBSTER, Judge.

In this direct criminal appeal, appellant argues that the trial court committed two errors, either of which entitles him to a new trial: (1) failing to ensure that appellant's absence from bench conferences at which jury challenges were exercised was the result of an intelligent and voluntary choice; and (2) denying appellant's requested jury instruction on voluntary intoxication as a defense to first-degree murder and robbery. Appellant also asserts that the trial court failed to grant credit on his sentences for time spent in jail prior to sentencing. We affirm.

Participation in Jury Selection

Appellant was charged by indictment with first-degree murder and robbery. Jury selection commenced on January 23, 1995, eighteen days after 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 210 (1995). In *Coney*, the supreme court purported to "clarify" the intent behind Florida Rule of Criminal Procedure 3.180(a)(4), which states that, "[i]n all prosecutions for crime[,] the defendant shall be present at the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury": and its previous decision on the same subject in *Francis v. State*, 413 So.2d 1175 (Fla.1982). It held:

> The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised.... 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.... Again, the court must certify the defendant's approval of the strikes through proper inquiry.

653 So.2d at 1013 (citations omitted). The court held, further, that a violation of rule 3.180(a)(4), as interpreted, is subject to a harmless error analysis. *Id.* Without elucidation, the court pronounced that its holding was "prospective only." *Id.*

Although appellant, a native of Honduras, spoke and understood some English, at his request, an interpreter was appointed to translate during the trial. The record reflects that counsel and the trial court were aware of the recently released *Coney* opinion, and that they attempted to comply with what they understood it to require. When it came time to discuss challenges to the prospective jurors, the trial court, counsel, appellant and the interpreter all adjourned to chambers, at which point the transcript reflects the following:

THE COURT: All right.

[DEFENSE COUNSEL]: (To the Interpreter) You tell him this is a hearing, and he has a right to be here any time. He can waive it, though, like during the trial when the lawyers go up to the bench to see the judge. We may be discussing an objection or some legal point. He can waive his coming up to the bench. or he can come up there and have you conic up and say what is going on.

TIIE DEFENDANT: (In English) Okay.

[DEFENSE COUNSEL]: Well--

THE INTERPRETER: It is okay.

DEFENSE COUNSEL]: Is he waiving it?

THE DEFENDANT: (In English) Yes.

[DEFENSE COUNSEL]: Good idea. Okay.

After three prospective jurors had been stricken for cause. the trial court asked counsel whether they wished to address peremptory challenges in chambers, or in the courtroom. With appellant still present in chambers, defense counsel responded:

If I can have a moment, Judge, I may be able lo kind of--I had told the defendant to look them over and tell me, too, and he had a couple. I will see if we can--I can do sonic of our peremptories now, provided we have an additional opportunity when I see who is in the box.

Defense counsel then struck three jurors, after which he said that he "would like for *998 the defendant to have ar opportunity when wc put them back in the box to just take a quick look at them."

After everyone, including appellant, had returned it1 the courtroom, the trial court dismissed the stricken jurors. replacing them with new prospective Jurors. At'tcr the new jurors had been questioned, the trial court asked counsel if they needed "a moment." Defense counsel responded in the affirmative. It is apparent that defense counsel then conferred with appellant regarding the prospective jury panel. Defense counsel then asked if counsel could approach the bench, saying that "we did waive that other matter, for the record," an obvious reference to the fact that appellant had waived his right lo be present al bench conferences. Although the transcript reflects that a bench conference followed, it was not recorded. Clearly, however, the subject was peremptory challenges, as seven additional prospective jurors were excused. Additional jurors were called and questioned. The trial court again asked if counsel needed "a minute," and defense counsel again responded in the affirmative. Again, it is apparent that defense counsel conferred with appellant. Another unreported bench conference took place, after which defense counsel said, "Judge, I want the record to reflect that the defendant has waived his presence at these bench conferences." Seven additional jurors were then excused. These jurors were replaced and, after the replacements had been questioned, another unreported bench conference took place. Four more jurors were excused, after which both parties accepted the panel. The record reflects that defense counsel exercised all ten of his peremptory challcngcs.

At the conclusion of the presentation of evidence, the trial court, counsel, appellant and the interpreter adjourned to chambers for the charge conference. Before taking up the matter of jury instructions, the following took place:

THE COURT: Well, let me put a couple of things on the record first.

Mr. Mejia, arc you satisfied with the translator's services . ?

[THE DEFENDANT]: Yes.

[TIIE DEFENDANT]: (Through the interpreter) **Yes.**

THE COURT: Mr-. Adams [defense counsel], we have had a number of bench conferences, I think, earlier on. **You** waived the defendant's presence, but we have also had sonic that were not on the record I think wc ought to reflect on the record that nothing took place during those conferences where we did not have the reporter present that would in any way affect the outcome of this trial or would affect an appealable issue.

[DEFENSE COUNSEL]: That's correct, Your Honor. And I did discuss that through the intcrprctct with [the defendant], and he waived his presence. It is a much more orderly fashion, and we all know that is in light the [sic] relatively new case.

On appeal, appellant argues that *Coney* applies, and that he is entitled to a new trial because the trial court

failed either to certify after a proper inquiry, that appellant's waiver of his right **to hc** present **at** bench conferences during which peremptory challenges were exercised by his counsel was intelligent and voluntary; or to require appellant to ratify the strikes after they had been made, and to certify, after proper inquiry, that such ratification was intelligent and voluntary. According to appellant, his absence from the bench conferences "thwarted the fundamental fairness of the proceedings" and "was, in my event, a clear violation of [r]ule 3.180(a)(4)." Moreover, appellant argues that the trial court's error cannot be considered harmless because it is impossible "to assess the extent of prejudice sustained by appellant's absence" and, therefore, one cannot conclude "beyond a reasonable doubt that this error did not affect the fairness of the trial."

The state responds, first, that any error was not preserved by contemporaneous objection. Next, the state argues that *Coney* is inapplicable because the supreme court expressly stated that the holding was to be "prospective only" (653 So.2d at 1013), and the decision did not become final until April 27, 1995, four days after appellant's trial had ***999** begun. According to the state, under pre-*Coney* case law, it was sufficient if a defendant was physically present in the courtroom during jury selection--actual presence at bench conferences was not required. Finally, the state argues that, even if *Coney* is applicable, reversal is not appropriate because it is apparent from the record that appellant's "absence at [sic] the bench conferences did not prejudice him" and, therefore, any technical error on the part of the trial court was clearly harmless.

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").

[1] 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 exercise of peremptory challenges "alleged fundamental error which no objection was necessary to preserve"), *review denied*, 506 So.2d 1043 (Fla.1987).

The supreme court's failure to elucidate as to its intent when it pronounced that the holding in *Coney* was to be "prospective only" (653 So.2d at 1013) has engendered considerable confusion, in both trial and appellate courts, regarding the applicability of the holding to "pipeline," and other, cases. *E.g., Lett v. State*, 668 So.2d 1094 (Fla. 1st DCA 1996) (certifying question of great public importance on motion for rehearing). However, because we conclude that appellant is not entitled to a new trial even if *Coney* applies, we find it unnecessary to undertake the task of prognostication in an effort to divine the court's intent regarding those cases **to** which *Coney* will apply. Instead, we assume, for purposes of this opinion, that *Coney* does apply.

[2] Section 924.33, Florida Statutes (1995), mandates that "[n]o [criminal] judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that

error injuriously affected the substantial rights of the appellant." Referring to this statute, the supreme court has said that, "[u]nder both the statutory law and case law of this state, a [criminal] judgment shall not be reversal unless the appellate ***1000** court is of the opinion that the error injuriously affected the substantial rights of the appellant." *Small v. State,* 630 So.2d 1087, 1089 (Fla. 1994). According to the supreme court, in applying this harmless error test, "the burden is] on the state, as the beneficiary of the error, to prov 2 beyond a reasonable doubt that the error complained of did not contribute lo the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." *State v DiGuilio,* 491 So.2d l 129, l 138 (Fla. 1986). The fact that an error may be classified as fundamental, so that it may he raised for the first time on appeal, does nct necessarily preclude application of a harmless error analysis. *State v. Clark,* 6 14 So.2d 453 (Fla.1992). In fact, the supreme court expressly applied a harmless error analysis in *Coney.* 653 So.2d at l 013

[3] Although it is apparent that, at trial, all parties concerned were attempting to comply with what they understood the recently released *Coney* decision to require it is equally apparent that the trial court failed fully to comply with the rule laid down. A waiver of appellant's right to be present at bench conferences during which peremptory challenges were exercised was obtained. However, the trial court failed either to ensure, "through proper inquiry," that appellant's waiver was intelligent and voluntary; or to obtain an intelligent and voluntary ratification of the jury chosen. *Id.* This was error. Accordingly, we must next determi ne whether there is any reasonable possibility that thi s error had an adverse i mpact on appellant's right to a fair trial.

[4] It seems relatively clear that the procedural rule set out in *Coney* is intended to ensure that a defendant's right to meaningful participation in decisions regarding the exercise of challenges, particularly peremptory challenges, is zealously protected. Assuming such an underly ing purpose, our review of the record satisfies us, to the exclusion of all reasonable doubt, that appellant suffered no prejudice to his right lo a fair trial as the result of the trial court's technical failure to comply with all of *Coney's* requirements. It is apparent from tt ic trial transcript that appellant understood that he had the right to participate in the choice of jurors. It is equally apparent that appellant's counsel consistently consulted with appellant regarding the exercise of peremptory challenges. Accordingly, thct-c can be no question but that, although tic was not "physically present al the immediate site where pretrial juroi challenges were] exercised" (*id.*)--i.e., at the bench--appellant did participate in a meaningful way in the decisions regarding the exercise of peremptory challenges. Thus, it would seem that the important right which the *Coney* decision was intended to protect was not impaired in any way.

Appellant offers nothing to suggest that he was, in tact, prejudiced as a result of the technical error committed hy the trial court. Instead, he relies on *Francis v. State, 4* 13 So.2d l 175 (Fla. 1982), for the proposition that, because it is possible that he might have been prejudiced as a result of the error, we should not conclude that the error was harmless. However, we beticvc that *Francis* is factually distinguishable. In *Francis,* the defendant was permitted to leave the courtroom to go to the bathroom. While he was gone, his counsel waived his presence without consulting him, and jury selection commenced. The defendant returned to the courtroom before the selection process had been completed. However, the court and counsel then decided to conduct the remainder of the process in chambers, because it was too crowded around the bench. When everyone else adjourned to chambers, the defendant was left sitting in the courtroom. The defendant was never asked whether he waived his presence, or lo ratify the jury selected. On appeal, the supreme court concluded that it was unable lo say that the error was harmless because it was "unable lo assess the extent of prejudice, if any, Francis sustained hy not being present to consult with his counsel during the time his peremptory chattcngcs were exercised." *Id.* at 1179. Here, in contrast, it is apparent that appellant was not prejudiced, because tic did consult with counsel prior to the exercise of his peremptory challenges. Accordingly, wc hold that the trial court's failure to ensure that appellant's waiver of his right lo be present at the bench conferences during ***1001** which peremptory challenges were exercised was intelligent and voluntary, or lo obtain an intelligent and voluntary ratification of the jury chosen, was harmless. *See Turner v. State,* 530 So.2d 4 5 , 4 9 (Fla.1987) (opinion after remand) (holding that defendant did not waive right to be present during exercise of juroi challenges, or constructively ratify counsel's actions; but that, notwithstanding absence when challenges were actually exercised, error was harmless because defendant "had an opportunity to participate in choosing which jurors would be stricken").

Voluntary Intoxication

Appellant next complains about the trial court's refusal lo give a requested voluntary intoxication

instruction to the jury. He argues that both of the charges against him were specific intent crimes, and that there was evidence that he was intoxicated at relevant times. Therefore, he asserts that the trial court was obliged to give a voluntary intoxication instruction upon request, and that the refusal to do so entitles him to a new trial. We disagree.

[5] [6] [7] It is true, as appellant argues, that both first-degree murder and robbery are specific intent crimes, as to which voluntary intoxication may be a valid affirmative defense. *Gardner v. State,* 480 So.2d 91 (Fla.1985). It is also true that there was evidence that appellant was intoxicated at relevant times. As a general rule, a "[d]efendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instructions." *Hooper v. State,* 476 So.2d 1253, 1256 (Fla.1985), *cert. denied,* 475 U.S. 1098, 106 S.Ct. 1501, 89 L.Ed.2d 901 (1986). However, as the supreme court made clear in *Hooper,* to entitle a defendant to an instruction on an affirmative defense, it is not sufficient that there be evidence to support such a defense--the requested instruction must also be consistent with the defendant's theory of defense.

In *Hooper,* the defendant argued that the trial court had committed reversible error when it denied his requested instruction on voluntary intoxication in a first degree murder case. The defendant had taken the stand at trial and denied that he had committed the offenses with which he was charged. Instead, he had testified that the offenses had been committed by an unknown intruder, whom he described in some detail. According to the supreme court, the defendant's "entire defense rested on his claim that someone else had committed the[ ] murders." *Id.* at 1255. Because "intoxication was not defendant's theory of defense," the court affirmed the refusal to give the requested voluntary intoxication instruction. *Id.* at 1256. *See also Brunson v. State,* 505 So.2d 1361, 1363 (Fla. 1st DCA) (affirming refusal to give voluntary intoxication instruction, in part, because defense of intoxication was "totally inconsistent with the defense presented at trial"), *review denied,* 518 So.2d 1273 (Fla. 1987). One compelling reason for refusing to require an instruction on a defense which is inconsistent with that asserted at trial is to discourage (or, at least, not to reward) perjury. *See Wilson v. State,* 577 So.2d 1300 (Fla. 1991) (affirming refusal to give instruction on entrapment when defendant testified, denying having committed acts constituting crime charged).

[8] Here, as in *Hooper,* appellant took the stand and denied under oath that he had committed the offenses with which he was charged. Instead, he testified that another person, whom he identified by name, had been responsible for the crimes. Accordingly, here, as in *Hooper,* we conclude that, because appellant elected to rely on a defense built around the assertion that someone else had committed the crimes, which defense was inconsistent with a voluntary intoxication defense, it was not error to refuse to give an instruction on voluntary intoxication.

Jail-Time Credit

Finally, appellant asserts that, although, at sentencing, the trial court orally credited 412 days spent in jail against his sentence, the written judgment does not reflect any credit. The state concedes error on this point. Frankly, we are puzzled by the parties' positions regarding the 412 days of jail credit because, although there are two written judgments in the record, both reflect that ***1002** appellant is to receive such credit. Accordingly, we affirm on this point, as well.

AFFIRMED.

MICKLE, J., concurs.

LAWRENCE, J., concurs in part and dissents in part with written opinion.

LAWRENCE, Judge, concurring in part and dissenting in part.

I fully concur in affirming the judgment and sentences in this case. However, I must respectfully dissent from the language of the majority opinion which holds that a violation of Florida Rule of Criminal Procedure 3.180(a)(4) constitutes fundamental error, thus permitting the issue to be raised for the first time on appeal without a proper objection in the trial court.

I agree that *Coney v. State,* 653 So.2d 1009 (Fla. 1995), *cert. denied,* -- U.S. ----, 116 S.Ct. 315, 133 L.Ed.2d 216 (1995), did not specifically address this issue. Nevertheless, nine months after rendition of its opinion in *Coney,* the supreme court decided *Gibson v. State,* 661 So.2d 288 (Fla. 1995), and in addressing a *Coney* issue said:

> Based on this brief exchange, Gibson claims error in two respects. First, he argues that the trial court violated his right to be present with counsel during the challenging of jurors by conducting the challenges in a bench conference. Second, he argues that the trial court violated his right to the assistance of

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

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. *Cf. Coney v. State*, 653 So.2d 1009, 1013 (Fla. 1995) (holding trial court's **error** in conducting pretrial conference where juror challenges were exercised in absence of defendant was harmless beyond reasonable doubt).

Gibson v. State, 661 So.2d at 290-91

I cannot reconcile this language with the majority view of fundamental error in the instant case. We cannot tell whether the date of the trial in *Gibson* occurred before or after the decision in *Coney*. (FN1) Either way, there was no logical reason for the supreme court, in its *Gibson* decision rendered nine months after its opinion in *Coney*, to dwell on the failure of Gibson to preserve the issue, unless the court intended that preservation constitute a requirement for review.

The majority also cites *Francis v. State*, 413 **So.2d** 1175 (Fla. 1982), in support **of** its position. However, the circumstances in *Francis* were much more egregious than those in the instant case. There, the defendant was excused for the purpose of going to the rest room. Jury selection continued during his absence; then the prosecutor, defense **counsel,** and judge retired to the jury room for the purpose of exercising peremptory challenges. They returned to the courtroom and a jury was sworn without consultation between the defendant and his counsel. Francis testified on his motion for new trial that he had been told by his counsel that he would not be permitted to go into the jury room for the purpose of selecting, the jury. In contrast, the trial judge in the instant case *** 1003.** was aware of the decision in *Coney*, but simply failed to follow it flawlessly.

I find it difficult to conclude that a routine trial practice followed in the vast majority of cases in the State of Florida for a period of almost 15 years (FN2) was so fundamentally flawed that it amounted **to** a denial of due process. To do so is to likewise conclude that those same cases spanning a 15-year period resulted in a denial of due process. (FN3) Thus, I would **hold** that violation of Florida Rule of Criminal Procedure 3.180(a)(4) is not fundamental error, and therefore may not be raised for the first time on appeal.

FN1. The opinion in *Gibson* does not reflect the date of the trial in that case, although the capital offense was committed on September 30, 1991. Therefore, it is more likely that the trial in *Gibson* predated the decision in *Coney*.

FN2. The Florida Rules of Criminal Procedure were amended in 1980 to provide that peremptory challenges be made outside the hearing of the jury panel.

FN3. The holding in *Coney* was prospective only.