IN THE SUPREME COURT OF FLORIDA

CASE **NO. 88,734**

ORLANDO IGNACIO GARCIA,

Petitioner,

-vs-

THE STATE OF **FLORIDA,**

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Petitioner, ORLANDO IGNACIO GARCIA, was the Defendant in the trial court and the Appellant in the Third District Court of Appeal. The State of Florida was the prosecution in the trial court and the Appellee in the Third District Court of Appeal. In this brief, the parties will be referred to as they stood in the trial court. The symbols "R." and "T." will refer to the record on appeal and the transcripts of the proceedings, respectively.

STATEMENT OF THE CASE AND FACTS

The State accepts the Defendant's statement of the case and facts as substantially correct. Any additional facts will be reflected in the Argument section with appropriate record citations.

SUMMARY OF THE ARGUMENT

The question certified by the district court has already been answered and does not rise to the level of a question of great public importance. Thus, discretionary review should be denied. This Court should also decline review because the Defendant is not a member of the pipeline class who could benefit from an affirmative answer to the certified question, as he did not raise the issue at trial,

Finally, the state urges that if this Court answers the question, that it answer the question in the negative. The question should be answered in the negative because the issue has been decided; because this Court has the authority to make its decisions prospective; and because modifications of rules of procedure are appropriately prospective only.

ARGUMENT

CERTIFIED OUESTION

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?

Jurisdiction

Pursuant to Article V §3(b)(4) Fla. Const. this Court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be one of great public importance." The District Court of Appeal of Florida, Third District has certified the above stated question, therefore, this Court has discretion to exercise jurisdiction.

Exercise of Jurisdiction

While this Court has jurisdiction to answer this question certified by the lower tribunal, it also has the discretion to decline to do so. State v. Burgess, 326 So. 2d 441 (Fla. 1976), Stein v. Darby, 134 So. 2d 232 (Fla. 1961) The State urges this Court to exercise its discretion and decline to review this case. Coffin v. State, 374 So. 2d 504, 508 (Fla. 1979).

The certified question improperly asks this Court to conduct a rehearing of its decision in Conev v. State, 653 So.2d 1009, 1013

(Fla. 1995). In Coney, this Court interpreted Fla. R. Crim. P. 3.180(a) and stated that "Our ruling today clarifying this issue is prospective only." Id. at 1013

In certifying its question, the Third District acknowledged that it understood the meaning of the language used by this Court in Coney. That is, the Third District specifically noted that it had previously held that Coney "applies prospectively only." Garcia v. State, 21 Fla. L. Weekly D1726 (Fla. 3d DCA July 31, 1996). Moreover, the Third District noted that "both the First and Fourth District Courts of Appeal have also held that Coney applies prospectively only..." Id. The Third District nevertheless certified the above question because "there will continue to be numerous Coney-type cases on appeal..." Id.

The Third District's perception that an issue remains to be resolved is erroneous. Following this Court's decision in Smith v. State, 598 So. 2d 1063 (Fla. 1992), this Court has answered the question of how decisions of this Court are to be applied by the courts of this state. That is, in Wuornos v. State, 644 So. 2d 1000 (Fla. 1994), this Court addressed the proper reading of Smith and held that Smith means that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise. Moreover, the issue

was readdressed in Dombers v. State, 661 So. 2d 285 (Fla. 1995) where this Court referred to Smith in the following way:

> Smith v. State, 598 So. 2d 1063 (Fla. 1992), limited by Wuornos v. State, 644 So. 2d 1000, 1008 n.4 (Fla. 1994) (Smith read to mean that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise), cert. denied U.S. , 115 S.Ct. 1705, 131 L.Ed.2d 566 (1995); State v. Jones, 485 So. 2d 1283 (Fla. 1986).

Domberq 661 So. 2d at 287. Thus, the issue of how Smith is to be read has been decided.

Since the issue presented by the certified question has been put to rest by recent decisions of this Court, it cannot be said that the certified question is one of any public importance. Therefore, this Court should decline to exercise its jurisdiction to answer the already decided question presented by this case. See Stein, supra.

Additionally, this Court should decline to exercise its jurisdiction in this case because the instant case is not a "pipeline case" entitled to obtain the benefit from a new decision. A pipeline case is one in which the issue is properly preserved in an appeal which is not final at the time the change in law occurs. In order to be a pipeline case, an appellant must establish that he is similarly situated and his issue is properly preserved.

This was made clear by this Court's holding in Gibson v. State, 661 So. 2d 288 (Fla. 1995). In Gibson this Court held that issues relating to a defendant's presence during jury voir dire (like other jury voir dire issues) must be preserved in the trial court by contemporaneous objection. The Gibson case presented this Court with the following issue:

> 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.

Id. This Court specifically held:

> 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 demon-

> strated neither error nor prejudice on the record before this Court. Cf. Conev v. State, 653 So.2d 1009, 1013 (Fla. 1995)

Gibson at 290-291

This Court rejected Gibson's attempt to raise a Coney issue for the first time on appeal because it was not properly preserved. This rule of law operates independently of Coney and applies even to cases where the trial takes place after Coney issued, In the instant case, as noted by the Third District, the Petitioner did not object in the trial court (T. 97-102), and his case is thus indistinguishable from Gibson. Since the the Coney issue was not preserved by a contemporaneous **objection**, this Court should decline to exercise its discretionary jurisdiction.

It should also be noted that this "Coney" issue has been repeatedly certified by the lower tribunal in cases which do not contain any objection to the trial court procedure. See Branch v. **State**, No 87,717; Bell v. State, No. 87,716; Lett v. State, No. 87,541; Lee v. State, No. 87,715; Horn v. State, No. 87,789. Continuation of this practice should be discouraged.

Merits

This Court, if it exercises discretionary review, should answer the certified question in the negative.

To begin with, as a matter of common sense, it is clear that

Coney should not be applied retrospectively because the defendant in Coney did not get the benefit of the decision in that case. If the defendant in Coney did not get the benefit of the decision in his case, how can it be said that the Defendant, whose trial occurred before the effective date of the Coney decision, should get the benefit of Coney?

In any event, as discussed above, this Court specifically answered the question of how its decisions are to be applied in Wuornos v. State, 644 so. 2d 1000 (Fla. 1994), where this Court addressed the proper reading of Smith and held that Smith means that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise. This Court also noted that it has repeatedly held that it has the authority to make new rules prospective, and this Court cited a series of cases in which it had dictated that the new rule was to be prospective only.

The issue was again addressed in Dombers v. State, 661 So. 2d 285 (Fla. 1995) a case dealing with retroactivity. In Domberg, this Court referred to Smith in the following way:

> Smith v. State, 598 So. 2d 1063 (Fla. 1992), limited by Wuornos v. State, 644 So. 2d 1000, 1008 n.4 (Fla. 1994) (Smith read to mean that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says

Otherwise), cert. denied U.S. , 115 S.Ct. 1705, 131 L.Ed.2d 566 (1995); State v. Jones, 485 So. 2d 1283 (Fla. 1986).

Domberg at 287. Since this Court specifically stated that Conev was to be applied prospectively only, Coney 653 So. 2d at 1013, the Defendant's argument that he is entitled to the retrospective benefit of Coney defies logic.

Moreover, the Defendant's arguments that he should get the benefit of the Conev decision are based on a fundamental misunderstanding of the nature and scope of this Court's authority. Unlike the United States Supreme Court, this Court has the authority to promulgate procedural rules and modify them when necessary. For obvious reasons, changes to procedural rules are almost always prospective. Tucker v. State, 357 So.2d 719 (Fla. 1978) Thus, there will be many occasions for this Court's rulings to be prospective only. Adopting a rule akin to the United States Supreme Court rule in Griffin v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) would be inappropriate given this Court's rule making authority, and it would unduly restrict this Court's ability to modify the rules.

Additionally, this court should reject the Defendant's arguments given the subject of this litigation. Like the decision in R.J.A v. Foster, 603 So. 2d 1167 (Fla. 1992) where this Court

found that the procedural rule superseded the statutory juvenile speedy trial provision, Fla. R. Crim. P. 3.180 superseded the provisions of §914.01 Fla. Statutes. See Thomas v. State, 65 So. 2d 866, 868 (Fla. 1953). Thus, Fla. R. Crim. P. 3.180 is a procedural mechanism to implement a substantive right.

It must also be recognized that the rights provided in the rule and the rights mandated by the constitution are not synonymous. In Shriner v. State, 452 So. 2d 929 (Fla. 1984) this Court held that it was not fundamental error when a defendant was absent from bench conferences because he was present in the courtroom, Likewise, in Jones v. State, 569 So. 2d 1234, (Fla. 1990), this Court found no error when Jones was not at the sidebar during selection of the jury even though the record did not reflect an affirmative waiver. Thus, the Coney interpretation of the term present is not constitutionally mandated but a modification of a rule of procedure setting out the manner in which the constitutional right should be implemented. See R.J.A., supra.

Furthermore, this Court should reject the Defendant argument that pursuant to the Supreme Court's decision in Griffith, supra, "Coney must be applied to cases pending at the time Coney's case was decided because the decision implicates the defendant's federal constitutional rights" (Petitioner's brief at 17). The Defendant's

reliance on Griffith is misplaced.

In Griffith, the Court held that decisions of the United States Supreme Court establishing a new constitutional rule for the conduct of criminal prosecutions are to be applied retroactively to all cases pending on direct appeal and not yet final when the new rule is announced. Because this Court's decision in Coney, interpreting Fla. R. Crim. P. 3.180, is neither a decision made by the United States Supreme Court nor a decision involving a federal constitutional right or violation, Petitioner's claim that Griffith requires retroactive application of the Coney decision is meritless.

Where a defendant is present in the courtroom during voir dire and consults with counsel before counsel exercises strikes and challenges to the jury, there is no federal constitutional right to also be physically standing next to counsel at a bench conference when the strikes and challenges are actually made. There is also no federal constitutional requirement that the trial judge obtain a personal waiver of the defendant's presence at such a bench conference. See e.g. United States v, McCoy, 8 F.3d 495, 496-497 (7th Cir. 1993) (The defendant was not entitled to any "due process right to attend" a side bar conference, where counsel for the parties were discussing "their peremptory challenges, only one of

which raised any concern"); United States v. Gavles, 1 F.3d 735, 738 (8th Cir. 1993) (citing United States v. Chrisco, 493 F.2d 232, 236-237 (8th Cir.), cert. denied, 419 U.S. 847 95, S.Ct. 84, 42 L.Ed.2d 77 (1974)) (Where the defendant was absent from the courtroom when his attorney exercised jury challenges and strikes over the lunch break but was present when the clerk gave the strikes effect by reading the names of the jurors who had not been stricken, the defendant was "sufficiently present at the jury's impaneling to satisfy Rule 43 and the Constitution"); United States v. Bascaro, 742 F. 2d 1335, 1349-1350 (11th Cir. 1984) (No violation of any constitutional rights where the defendants were present in the courtroom during voir dire but their attorneys left the room to confer collectively as to the exercise of peremptory challenges). See also Ross v. Oklahoma, 487 U.S. 81, 89-90, 108 S. ct. 2273, 101 L.Ed. 2d 80 (1988) (While acknowledging that the "right to exercise peremptory challenges is 'one of the most important rights secured to the accused,'...," the Court held that "it is for the state to ... define their purpose and the manner of their exercise.... As such, the 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive that which state law provides."); United States v. Gagnon, 470 U.S. 522, 527-529, 105 S.Ct. 1482, 84 L.Ed. 2d 486 (1985) (No violation of

federal constitutional due process rights, where the defendants were excluded from an in camera hearing during trial between the judge, counsel and a juror to determine the latter's possible bias; where a defendant knows of a proceeding, he must invoke his right to personally attend and no express waiver is required); Snyder v. Massachusetts, **291 U.S. 97,** 106-07, 114-15, 54 S.Ct. 330, 78 L.Ed.2d 674 (1934) (due process does not require the defendant's presence "when [his] presence would be useless, or the benefit but a shadow," thus, the courts must evaluate the defendant's exclusion from a trial proceeding in light of the entire record).

In fact, where the trial court has announced its intent to conduct a conference deemed to be stage of trial in which the defendant's presence is required, the defendant must assert any right he may have to be present at the conference; failure to do so will be considered a waiver of the claim for appellate purposes In United States v. Gagnon, supra, the Court stated

> We disagree with the Court of Appeal that failure to object is irrelevant to whether a defendant has voluntarily absented himself under Rule 43 [the counterpart to Fla. R. Crim. P. 3.1801 from an in camera conference of which he is aware. The district court need not get an express 'on the record' waiver from the defendant for every trial conference which a defendant may have a right to attend. . . . A defendant knowing of such a discussion must assert whatever right he may have under Rule

43 to be present.

470 U.S. at 528.

Because there is no federal constitutional right to be present at a bench conference where juror challenges are exercised, and since the failure to even assert such a right constitutes a waiver thereof, the ruling in Coney requiring either the defendant's presence during jury selection, a personal waiver of the defendant's presence, or ratification of counsel's actions in the defendant's absence is based strictly upon a reading of Fla. R. Crim. P. 3.180. In light of the fact that the Defendant was present in the courtroom during voir dire, consulted with counsel prior to the bench conference, failed to assert his right to be present at the bench, and failed to object to the jury selected by counsel (T. 97-102) the Defendant has failed to establish a federal constitutional error. Accordingly, Griffith v. Kentucky does not require that the decision in Coney be applied retroactively to all cases pending on direct appeal when Coney was decided.

CONCLUSION

WHEREFORE, based upon the authorities and arguments cited herein, this Court should decline to exercise its discretionary jurisdiction. If this Court accepts jurisdiction, this Court should answer the certified question in the negative.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was mailed this ~~day~~ 21st of November, 1996, to Lisa Walsh, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida, 33125.

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