ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,734

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ORLANDO IGNACIO GARCIA,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW OF A DECISION
IN THE THIRD DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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ON DISCRETIONARY REVIEW OF A DECISION
IN THE THIRD DISTRICT COURT OF APPEAL

INTRODUCTION

This case is on discretionary review of a question certified to this Court by the Third District Court of Appeal. Acceptance of jurisdiction has been postponed by this Court. The petitioner, Orlando Ignacio Garcia, was the defendant in the trial court below, and the appellant in the Third District Court of Appeal. The Respondent, the State of Florida, was the prosecution in the trial court below, and the appellee in the lower court. Appellant will refer to the parties as they stood in the lower court. The designation "R" will refer to the record on appeal and the symbol "T" will be used to designate the separately-bound transcript of proceedings.

STATEMENT OF THE CASE AND FACTS

Orlando Garcia was tried on an information charge of attempted first degree murder. (R. 1).

Following questioning of the panel of jurors, the state and defense counsel exercised juror strikes at a sidebar bench conference. (T. 97). The defendant was not present during the exercise of peremptory strikes. (T. 97). When questioned by the trial court about the absence of his client at the bench conference, the following occurred:

> THE COURT: OK. First of all, note for the record that the defendant has been present since the beginning of the proceedings. Do you want your client up here at sidebar with you?
>
> [DEFENSE COUNSEL]: No.
>
> THE COURT: You have had enough time to discuss the selection with him?
>
> [DEFENSE COUNSEL]: Yes.

(T. 97). The trial court did not personally inquire of the defendant whether he waived his presence at the bench conference.

When questioned by the trial judge as to whether he accepted or would exercise a challenge to Ms. Layton, a prospective juror, defense counsel stated "I am going to take a chance and accept her." [1] (T. 99). Following the exercise of peremptory strikes, defense

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[1] During jury selection, the trial judge questioned the panel whether any juror was concerned that the Spanish-speaking defendant used the services of an interpreter. (T.16). Prospective Juror Layton, stated in response "this is an American court of law. That's why we all speak English. That's how I feel about it." (T. 16). Ms. Layton expressed reservations about Spanish-speaking, Hispanic people, noting "that's a problem in our community, with people not being Americanized or taking on American

counsel accepted the panel at the sidebar bench conference without conferring with Mr. Garcia. (T. 101, 102). The jury was sworn, and the trial judge did not question the defendant whether he ratified the peremptory strikes exercised by his counsel in his absence.

At trial, the complaining witness, Magdaleno De Los Santos, testified for the state that Mr. Garcia arrived at his home the day before the shooting in a "bad temper" and told De Los Santos that he would take a woman who was with De Los Santos away from him. (T. 134). The next day, Mr. Garcia returned to the De Los Santos residence, demanded that De Los Santos come out of the house, and when De Los Santos opened the door, shot him. (T. 133, 136). De Los Santos testified that the defendant then, at gunpoint, forced the woman who was in De Los Santos' house to leave with him. (T. 134).

Based on information provided by the complaining witness, [2] the police arrested Mr. Garcia for the shooting. (T. 167).

The defendant was found guilty of attempted second degree murder and was adjudicated guilty. (T. 258; R. 13). The defendant was sentenced to a state prison term

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ways. A lot of crime as a result of that has developed, I believe." (T. 84). Ms. Layton then stated, in response to the prosecutor's questioning, "I would try to be fair." (T. 84).

The same juror also discussed the fact that her daughter, mother and sister had been victims of violent crime. (T. 39, 40). In response to questioning by the trial court as to whether she would take her life experience into the case with her, Ms. Layton expressed her "fear of crime, tremendous fear of crime in the area." (T. 40).

[2] While **De Los Santos was unable to orally testify and testified by writing his responses to questions in Spanish and having his answers translated into English by an interpreter, the police testified that De Los Santos orally gave them detailed information which led to the defendant's arrest. (T. 129-30).**

of fifteen years. (R. 15). The scoresheet used in calculating the defendant's sentencing guidelines was prepared in error. The state conceded on appeal that the scoresheet error required reversal of the defendant's sentence and remand for resentencing. (Initial Brief of Appellee to the Third District Court of Appeal, p. 13). The Third District Court of Appeal reversed the defendants sentence and the matter is currently pending resentencing in the trial court.

The Third District Court of Appeal certified the following question to this Court:

> DOES THE DECISION IN CONEY APPLY TO "PIPELINE CASES," 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 THIS OPINION?

The petitioner filed a timely notice to invoke discretionary review.

QUESTION CERTIFIED

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?[3]

[3] The same or substantially similar questions have been certified to this Court in the following cases: ***Henderson v. State, 21*** Fla. L. Weekly D1710 (Fla. 3d DCA), question certified, No. 95-1421 (Fla. 3d DCA September ***18, 1996); Rafael v. State,*** 21 Fla. L. Weekly D1920 (Fla. 1 st DCA August ***20, 1996); Page v. State,*** 677 So. 2d 55 (Fla. 1st DCA ***1996); Mathis v. State,*** 675 So. 2d 1027 (Fla. 1 st DCA ***1996); Caldwell v. State,*** 676 So. 2d 44 (Fla. ***1*** st DCA ***1006); Horn v. State,*** 677 So. 2d 320 (Fla. 1 st DCA ***1996); Gainer v. State,*** 671 So. 2d 240 (Fla. 1st DCA ***1996); Bowick v. State,*** 671 So. 2d 232 (Fla. 1 st DCA ***1996); Bell v. State,*** 671 So. 2d 226 (Fla. 1st DCA 1996); ***Branch v. State,*** 671 So. 2d 224 (Fla. 1st DCA ***1996); Howard v. State,*** 670 So. 2d 1149 (Fla. 1 st DCA ***1996); Lee v. State,*** 670 So. 2d 169 (Fla. 1 st DCA 1996).

SUMMARY OF ARGUMENT

This Court's opinion in Coney v. State, 653 So. 2d 1008 (Fla. 1995), is controlling. The record affirmatively discloses that the defendant was absent from a sidebar bench conference where peremptory challenges were exercised and the trial judge neither inquired whether the defendant acquiesced to the waiver nor inquired whether the defendant ratified the peremptory challenges exercised by defense counsel during the conference.

This Court's holding in Coney should apply to the defendant's case. Precedent at the time of the defendant's trial as well as the plain language of Rule 3.180, Florida Rules of Criminal Procedure, provide that the defendant has the right to be present during the impanelling of the jury, and the defendant's presence should mean actual physical presence at the site where strikes are exercised. Furthermore, precedent at the time of the defendant's trial also required that personal inquiry be taken of a defendant where his presence is waived during a critical stage of trial proceedings. Because the decision in Coney did not break new ground, the decision did not create a "new rule" which is subject to Florida retroactivity law and must be applied to the defendant's case.

Furthermore, a fair reading of the opinion in Coney suggests that the only part of Coney which arguably created a "new rule," is the requirement that the trial judge take personal inquiry of the defendant where there is a waiver of his presence,

Should this Court find that a new rule of law was created in the Coney opinion, this Court must apply Coney to the defendant's case. United States Supreme Court caselaw is binding on this Court, in that where a state court promulgates a new rule of law that

implicates federal rights, the new rule shall apply to a case that is pending on appeal or not yet final. The right to be physically present at the site where peremptory challenges are exercised is grounded in a defendant's federal constitutional rights and is a fundamental right which goes to the heart of the adjudicatory process. Therefore, the rule must be applied to the defendant's case, in the pipeline.

If this Court finds that this defendant's federal constitutional rights were not implicated by his being absented from jury selection without personal acquiescence or ratification, this Court should still apply Coney to the defendant's case under Florida's retroactivity doctrine. This Court has held that decisions of Florida courts should be applied in a uniform fashion, and has adopted the federal approach to retroactivity. While this Court has receded from Its position in several cases, It should re-establish that new rules will apply to cases which are pending on direct appeal or not yet final.

ARGUMENT

THIS COURT'S HOLDING *IN CONEY V. STATE* SHOULD APPLY TO A CASE IN THE "PIPELINE," OR A CASE WHICH IS PENDING ON DIRECT APPEAL OR NOT YET FINAL, AND THEREFORE, THE TRIAL COURT ERRED IN FAILING TO PERSONALLY INQUIRE OF THE DEFENDANT WHETHER HE ACQUIESCED TO OR RATIFIED WAIVER OF HIS PRESENCE AT A BENCH CONFERENCE WHERE PEREMPTORY JUROR CHALLENGES WERE EXERCISED, IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

A. The defendant's case falls within this Court's decision in Coney.

This Court held in *Coney V. State, 653 So.* 2d 1009 (Fla.), certiorari *denied,* __ *U.S.* __, 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995), that presence of the defendant means:

> 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.

653 So. 2d at 1013 (citing *Francis V. State, 413 So.* 2d 1175 (Fla. 1982)).

The defendant was not present at the sidebar bench conference where peremptory challenges were exercised, and the trial court neither inquired whether the defendant acquiesced in the waiver nor inquired whether he ratified the actions of

counsel made during the sidebar.[4] (T. 97). Nothing in the record indicates that the defendant was aware that he had a right to be present. The facts in the instant case fall squarely within the holding in *Coney.* Failure to personally inquire of the defendant whether he acquiesced in or ratified waiver of his presence during a bench conference where peremptory strikes were exercised constitutes harmful error and warrants reversal.[5] 653 So.2d at 1013.

The defendant's case is a "pipeline case," because it was tried prior to the

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[4] THE COURT: OK. First of all, note for the record that the defendant has been present since the beginning of the proceedings. Do you want your client up here at sidebar with you?

[DEFENSE COUNSEL]: No.

THE COURT: You have had enough time to discuss the selection with him?

[DEFENSE COUNSEL]: Yes.

(T. 97).

[5] Particularly noteworthy is defense counsel's decision to accept juror Layton. During voir dire, Ms. Layton had several times expressed difficulty with the fact that the Spanish-speaking defendant used the services of an interpreter. (T. 16). Ms. Layton at one point stated "that's a problem in our community, with people not being Americanized or taking on American ways. *A lot of crime as a result of that has developed, I believe.*" (T. 84)(emphasis added). Juror Layton also disclosed her "fear of crime, tremendous fear of crime in the area." (T. 40). When deciding whether or not to challenge Ms. Layton, defense counsel stated at the sidebar conference "I am going to take a chance and accept her." (T. 99). The defendant had no opportunity to hear that exchange at sidebar or participate in that decision. At the conclusion of the jury challenging, defense counsel and the state accepted the panel. (T. 102). The trial court never certified defense counsel's exercise of strikes through any inquiry of the defendant.

decision in *Coney* and was pending on appeal and not yet final at the time *Coney* was decided. (R. 19-20). The Third District Court of Appeal has held that the language in *Coney,* 653 So. 2d at 1013, that the holding is "prospective only," means that a case in the pipeline will not receive the benefit of *Coney. Ogden v. State, 658 So.* 2d 621, 622 (Fla. 3d DCA), rev. *den.* 666 So. 2d 144 (Fla. 1995), *petition for cert. filed* (U.S. Mar. 15, 1996). Accordingly, in reviewing this defendant's conviction, the Third District Court of Appeal affirmed and certified this issue as a matter of great public importance. *Garcia v. State,* 21 Fla. L. Weekly Dl726 (Fla. 3d DCA July 31, 1996).

The holding in *Coney* governs the defendant's case for several reasons. First, the principles clarified in *Coney* were well established and constituted reversible error prior to the defendant's trial and therefore did not amount to a "new rule" subject to Florida's retroactivity doctrine. Second, even if the clarification in *Coney* is considered to be a "new rule," the defendant's federal constitutional rights were implicated by the trial court's failure to personally inquire of the defendant whether he acquiesced in or ratified waiver of his presence, and therefore this Court must follow federal precedent and apply the rule in *Coney* to this case. Finally, if this Court finds that no federal rights are implicated by the holding in *Coney,* this Court should reaffirm its holding in *Smith v. State,* 598 So. 2d 1063 (Fla. 1992), and again adopt the federal bright-line rule of retroactivity, that new rules of law will apply to cases which are pending on direct appeal or not yet final.

B. The decision in *Coney* did not create a "new rule" which would be subject to retroactivity analysis.

Analysis of whether this Court's decision in *Coney* applies to the defendant's case begins with whether the holding in *Coney* established a new rule of law. If this Court's clarification in *Coney* did not establish a new rule of law, it is not subject to retroactivity analysis and must be applied to the defendant's case.

The Supreme Court has held:

> A case announces a "new rule" when it breaks new ground or imposes a new obligation on the States or Federal government. . . . To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

Teague v. Lane, 489 U.S. 288, 301, 109 S. Ct. 1060, 1070, 73 L. Ed. 2d 202 (1989). The plain language of the applicable rule and precedent in existence at the time of Mr. Garcia's trial required the same result as reached by this Court in *Coney,* and therefore the decision in *Coney* was a "clarification" of existing law and not a new rule of law subject to retroactivity analysis.

The plain language of Rule 3.180(a)(4) established the right of the defendant to be present at the site where juror challenges are exercised. Fla.R.Crim.P [6] This Court

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[6] Rule 3.180. Presence of Defendant.
(a) Presence of Defendant. In all prosecutions for crime the defendant shall be present:

* * *

(4) at the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury;

Fla.R.Crim.P.

in *Coney* concluded that the plain language of the rule "means just what it says: The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised." 653 So.2d at 1013. The rule was in effect at the time of the defendant's trial and *Coney,* in adopting the plain language of the rule, did not "break new ground" or reach a result not dictated by precedent.

Furthermore, precedent at the time of the defendant's trial dictated that he had the right to be physically present at the site where juror challenges were exercised. *See Francis v. State,* 413 So. 2d 1175, 1177 (Fla. 1982)(where defendant involuntarily absented from conference where juror challenges exercised, Court held defendant "has the constitutional right to be present at stages of his trial where fundamental fairness might be thwarted by his absence.").

The portion of *Coney* which requires a personal, on-the-record waiver by the defendant of his presence was also a clarification of existing law. In *Melendez v. State,* 244 So. 2d 137, 140 (Fla. 1971), this Court held that where defense counsel waives his client's presence at a proceeding where the defendant knows or should have known the nature of the proceeding, the trial judge has the discretion to decide whether "the defendant on his appearance in court should be allowed to acquiesce in or actually ratify the actions taken by his counsel." A defendant's absence, due to lack of notice "or which is otherwise involuntary," cannot be cured by silent acquiescence, without a showing of actual or constructive knowledge. *Melendez,* 244 So. 2d at 140.

The defendant, by sitting in the courtroom while his attorney goes sidebar,

cannot be said to have notice of the nature of the proceedings, or the jury, also sitting in the courtroom, would be imputed with the same knowledge. Clearly, the reason for exercising strikes at sidebar, rather than in open court, is to place the jury out of earshot of the proceedings. If the jury does not have actual or constructive knowledge of the proceedings, it cannot be said that the defendant knows what is occurring at the sidebar, and his ensuing silence is therefore insufficient to waive his right to be present.

This Court readdressed its requirement of ratification or acquiescence in Francis, where It reversed a conviction because the defendant, who had been involuntarily absented during jury selection, did not waive his right to be present, and was not questioned by the court as to whether he ratified his counsel's actions. 413 So. 2d at 1178. The requirement of ratification or acquiescence was also addressed in *Garcia v. State,* 492 So. 2d 360, 363 (Fla.), *certiorari denied, 479* U.S. 1022, 107 S. Ct. 680, 93 L. Ed. 2d 730 (1986), where the defendant was absent from a pretrial conference preceding jury selection. The court held, in part, that "[i]t is . . . true that counsel's waiver of a defendant's absence at a crucial stage of a trial, without acquiescence or ratification by the defendant, is error." *Garcia, 492 So.* 2d at 363. In *Garcia,* however, because the defendant's absence did not result in any prejudice to him, the error did not warrant reversal. *Id.*

In addition, this Court held in *Turner v. State, 530 So.* 2d 45, 49 (Fla. 1987), that where the defendant was not present at the site where peremptory strikes were exercised and "the record does not indicate that the trial court informed [the

defendant] of his right [to be present] or questioned him as to any ratification of counsel's exercise of challenges in his absence," the defendant did not make a "knowing, intelligent and voluntary" waiver. At the time of Mr. Garcia's trial, the trial judge was on notice that waiver of the defendant's presence must be knowing, intelligent, and voluntary and such a finding can only be effectuated by personal inquiry.[7]

Both the plain language of Rule 3.180(a)(4), Florida Rules of Criminal Procedure, and caselaw binding on the trial court at the time of the defendant's trial mandated the same result reached by this Court in *Coney,* and therefore, the holding in *Coney* must be applied to this case, and is not subject to retroactivity analysis.

C. The only "new rule" arguably created by Coney is the requirement that a trial court conduct a personal inquiry of the defendant in the event the defendant's presence is waived .

The wording of the opinion in *Coney* suggests that if a new rule is meant by the decision, the new rule refers only to the requirement that a trial judge conduct a personal inquiry into whether the defendant acquiesces in or ratifies the waiver. 653

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[7] In *Turner,* unlike in the instant case, defense counsel conferred with his client on numerous occasions before and after exercising strikes. 530 So. 2d at 49. This Court held in *Turner* that the numerous attempts to involve the defendant in the selection process rendered the defendant's involuntary waiver harmless. 530 So. 2d at 49-50. A similar situation arose in *Mejia v. State,* 21 Fla. L. Weekly D 1355-56 (Fla. 1 st DCA June 13, 1996), where the First District Court of Appeal held harmless a defendant's absence during jury selection, where defense counsel made numerous attempts to involve his client in the decision making process of jury selection. In the instant case, the record is silent as to whether the defendant was informed that he had a right to be present, and defense counsel never conferred with his client after the selection process had begun. (T. 97).

So, 2d at 101 3.[8] The admonition, "[a]gain, the court must certify the defendant's approval of the strikes through proper inquiry," immediately precedes the phrase "our ruling clarifying this issue is prospective only." 653 So. 2d at 1013. A fair reading of this wording suggests that it is the requirement for personal inquiry that is the clarified "issue," and not the right of the defendant to be present.

D. If the *Coney* decision created a new rule, federal precedent requires that *Coney* be applied to the defendant's case.

Because Coney implicates both the defendant's federal and state constitutional rights, this Court is bound by federal precedent in applying its holding in *Coney* retroactively.

D1. Federal rights are implicated by the holding in *Coney.*

The safeguarding of the defendant's right to be present during the impanelling of the jury is grounded both in the Florida and federal constitutions. This Court held

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[8] This Court held:

> We conclude the rule means just what is says: The defendant has the right to be physically present at the immediate site where pretrial juror challenges are exercised. See *Francis.* Where this is impracticable, 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. Our ruling today clarifying this issue is prospective only.

653 So. 2d at 1013. (emphasis added).

in *Garcia v. State, 492* So. 2d 360, 363 (Fla. 1986), that there is a constitutional right imputed to a defendant to be present at "all crucial stages of his trial where his absence might frustrate the fairness of the proceedings." (citing *Faretta v. California, 422* U.S. *806, 95 S.* Ct. *2525, 45* L. Ed. 2d *562* (1975); *Snyder v. Massachussetts,* 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934)). This Court described the right to be present as "one of the most important rights secured to a defendant." *Francis v. State,* 413 So. 2d 1175, 1 178-79 (Fla. 1982)(citing *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)).

Furthermore, this Court has expressly ruled that personal, on-the-record waivers by the defendant are not required "in anything but those rights which go to the very heart of the adjudicatory process, such as . . . the right to be present at a critical stage of the proceeding." *Mack v. State,* 537 So. 2d 109, 1 10 (Fla. 1989).

The right to be present during the impanelling of the jury further implicates the Sixth Amendment to the United States Constitution's guarantee of the right to counsel. As noted by the *court* in *Salcedo v. State, 497 So.* 2d 1294, 1295 (Fla. 1 st DCA 1986), the "United States Constitution guarantees a criminal defendant the right to be present during crucial stages of his trial or at the stages where fundamental fairness might be thwarted by his absence." The court explained that the exercise of peremptory challenges involved more than mere mechanics, but on-the-spot strategy decisions, which are influenced by actions of the state. *Id.*

The right to the effective representation of a criminal defendant by counsel

extends to this moment-by-moment decision making process. The right to communicate with and confer with counsel is essential to effective representation by counsel. Attorneys do not approach the jury selection process and exercise agreed-upon challenges all at once. Each litigant makes strategic decisions based upon the decisions made by opposing counsel. The process is unpredictable, and decisions concerning which jurors are acceptable and which will be challenged peremptorily are often decisions between lesser and greater evils. In guaranteeing Mr. Garcia's right to effective representation of counsel, he should have been permitted to communicate and confer with counsel during the jury selection process and partake in the selection decisions defense counsel made.

D2. If *Coney* established a new rule of law, federal precedent mandates retroactive application to the defendant's case.

If the clarification in *Coney* constituted a "new rule," *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. *Griffith v. Kentucky, 479* U.S. 314, 107 S. Ct. 708, 713, 93 L. Ed. 2d 649 (1987). Prior to Its decision in *Griffith,* the Supreme Court's decisions on whether a new rule of law would apply retroactively or even to the litigants at bar varied case by case. *See United States v. Johnson, 457* U.S. 537, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982)(Court criticizes Its prior inconsistent application of new rules of law)[9].

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[9] *See Linkletter V. Walker,* 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed.2d 618 (1965)(a change in the law will be given effect while a case is on direct review, but collateral application will depend upon several factors); *Stovall v. Denno, 388 U.S.*

In *Griffith,* the Court held that "failure to apply a newly declared constitutional rule to criminal cases pending on direct appeal violates basic norms of constitutional adjudication." 479 U.S. at 322 (citing Justice Harlan's view in *Mackay v. United States,* 401 U.S. 667, 675, 91 S. Ct. 1160, 1164, 28 L. Ed. 2d 404 (1971)). The Court reasoned:

> Unlike a legislature, we do not promulgate new rules of constitutional criminal procedure on a broad basis. Rather, the nature of judicial review requires that we adjudicate specific cases and each case usually becomes the vehicle for announcement of a new rule. But after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply the rule to all similar cases pending on direct review.

479 U.S. at 322. (emphasis added)."

The Court also reasoned that new rules apply to all cases pending on direct review to avoid violating the principle of treating similarly situated defendants

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293, 87 S. Ct. 1967, 18 L. Ed.2d 1199 (1967)(retroactivity of new rule of constitutional criminal procedure governed by three factors: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c)the effect on the administration of justice of a retroactive application of the new standards"); *Williams v. United States, 401* U.S. 646, 91 S. Ct. 1148, 28 L. Ed.2d 388 (1971)(no constitutional difference between retroactive application of cases on direct review and cases on collateral review); *Mackey v. United States,* 401 U.S. 667, 91 S. Ct. 1160, 28 L. Ed.2d 404 (1971)(where no threat to reliability of the factfinding process at trial, retroactivity of new law not required).

[10] The Court observed that "it is the nature of judicial review that precludes us from . [s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule."' *Id.* (quoting Justice Harlan's opinion concurring in judgment in *Mackay v. United States, 401* U.S. 667, 679, 91 S. Ct. 1160, 1173, 28 L. Ed. 2d 404 (1971)).

differently. *Griffith,* 107 S. Ct. At 713. The Court's decision in *Griffith* applies irrespective of whether the new rule is a "clear break" with the past. 107 S. Ct. at *715.*

In the instant case, the defendant meets the requirements of *Griffith* to receive the retroactive benefit of the clarification announced in *Coney.* The defendant's case was pending at the time the clarification in *Coney* was announced. The rule announced in *Coney* is grounded in federal constitutional principles, as well as state law. *See Francis,* 413 So.2d at 1177. The Supreme Court has held that "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper v. Virginia Department of Taxation,* 113 S. Ct. 2510, 2517, 125 L. Ed. 2d 74 (1993).

E. Even if federal rights are not implicated by Coney, Florida should apply its decision in *Smith v. State,* 598 So. 2d 1063 (Fla. 1992), and apply *Coney* to the defendant's case.

This Court adopted the federal retroactivity doctrine articulated in *Griffith* in *Smith v. State,* 598 So. 2d 1063, 1066 (Fla. 1992), in holding "that any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final." (citing Article I, Sections 9, 16, Fla. Const.). In *Smith,* this Court applied a new rule which

was announced in *Ree v. State,* 565 So. 2d 1329 (Fla.1990),[11] to a case pending on direct review. In adopting the holding in *Griffith,* this Court abandoned the former case-by-case approach to retroactivity, which had resulted in arbitrary application of new rules to pending cases, and applied a bright line rule. *Smith, 598 So.* 2d at 1066.

This Court later retreated from its position in *Smith* in a series of cases culminating in *Wuomos v. State,* 644 So. 2d 1000, 1007-1008 (Fla. 1994). In *Wuornos,* this Court did not apply a rule established in *Castro v. State, 597 So.* 2d 259 (Fla. 1992), to a case pending on appeal. This Court stated, "[w]e read *Smith* to mean that any new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise." *Wuornos,* 644 So. 2d at 1007-1008 (emphasis added).

This language in *Wuornos* has resulted in retroactive application of new rules no longer being implemented in a uniform fashion. Shortly after the decision in *Wuornos,* this Court addressed retroactivity of new rules in *State v. Brown,* 655 So. 2d 82 (Fla. *1995).* The issue in *Brown* was whether the rule announced in *Ree* would apply retroactively to a petitioner whose case was pending on direct review when *Ree* was decided, but who raised the issue on collateral review following the opinion in *Smith. Brown,* 655 So.2d at 83. This Court applied the rule retroactively. *Brown, 655 So.* 2d at 83.

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[11] In *Ree,* 565 So. 2d 1329, 1331, this Court held that written reasons for departure from the sentencing guidelines must be produced at the sentencing hearing.

The decision in *Brown* is important, considering that the rule in *Ree* contains the same language as that found in *Coney,* "[t]his holding . . . shall only be applied prospectively." Ree, 565 So. 2d at 1331. This Court decided to apply a new rule of law to a petitioner who was on direct review at the time the rule was announced, despite the modification of retroactivity law spoken of in *Wuornos. 644* So.2d at 1007-1008. This Court "said otherwise" in *Ree,* and yet, applied the rule in *Brown.* This Court also applied the new rule despite the fact that *Brown* addressed the issue on collateral review. This decision appears to approve the decision in *Smith. No* mention was made of the decision in *Wuornos* limiting retroactive application of new rules.

Later, this Court decided *Davis v. State,* 661 So.2d 1 193 (Fla. 1995), in which the issue was whether the rule announced in *Ree* would apply to a case affirmed prior to the decision in *Smith.* Although this Court cited *Wuornos* as limiting *Smith,* It stated that had the appeal been pending at the time *Smith* was decided, the petitioner could have sought relief under *Smith. Davis, 661* So.2d at 1 195. This Court recognized in *Davis* that the rule announced in *Ree* contains language limiting its application, but stated that *Smith* "modified *Ree's* prospective-only application to all cases not yet final when the mandate issued . . . ." 661 So.2d at 1195. No rationale was given for this Court's modification of the prospective-only application of the rule in *Ree.*

Because federal as well as state constitutional concerns are implicated in *Coney,* this Court should follow the bright line rule set out in *Smith* and *Griffith,* apply the rule

in *Coney* to the defendant's case and reverse his conviction. Even if this Court finds that no federal rights are implicated by the decision in *Coney,* this Court should again abandon its case-by-case approach to application of new rules to cases which are pending on direct appeal or not yet final, apply *Coney* to the defendant's case, and reverse his conviction.

CONCLUSION

Based on the foregoing, the Petitioner respectfully requests this Court to reverse his conviction and remand this cause for a new trial.

Respectfully submitted,

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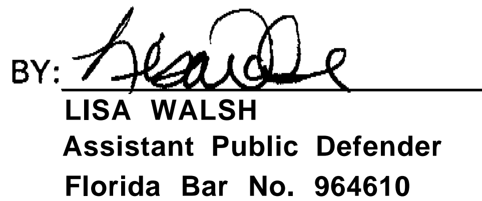
BY: 
LISA WALSH
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Florida Bar No. 964610

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 444 Brickell Avenue, Suite #950, Miami, Florida 33131, this 30th day of September, 1996.

LISA WALSH
Assistant Public Defender

APPENDIX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1996

ORLANDO IGNACIO GARCIA,	**	
Appellant,	**	
vs.	**	CASE NO. 96-295
THE STATE OF FLORIDA,	**	LOWER TRIBUNAL NO. 93-40107
Appellee.	**	

Opinion filed July 31, 1996.

An Appeal from the Circuit Court for Dade County, Barbara Levenson, Judge.

Bennett H. **Brummer,** Public Defender, and Lisa Walsh, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Keith S. Kromash, Assistant Attorney General, for appellee.

Before **BARKDULL,** JORGENSON and LEVY, JJ.

BARKDULL, Judge.

Appellant Garcia was charged with one count of first degree murder and the jury returned a verdict of guilty of second degree murder with a firearm. Garcia appeals his conviction and sentence contending that the failure of the trial court to personally inquire whether he waived his presence at a bench

conference, during which strikes and challenges to the jury were made, was reversible error. The defendant relies on Conev v. State, 653 So. 2d 1009 (Fla. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995) and asserts that the trial court's failure to obtain an express waiver constitutes fundamental error. The State answers that the defendant waived his right to be present at the bench conference because he made no objection and as such, the issue is not preserved for review. The State also contends that even if it were preserved, pre-Conev law applies to this case.

We agree with the State that the defendant waived his right to be present at the bench when the jury challenges were exercised. This court has held that Conev v. State, 653 So. 2d 1009 (Fla. 1995), which established the requirement that the trial court obtain an express waiver from the defendant himself of the right to be personally present at such a bench conference, applies prospectively only. Ogden v. State, 658 So. 2d 621 (Fla. 3d DCA 1995), rev. denied, 666 So. 2d 144 (Fla. 1995). In Ogden, as in this case, defense counsel had an opportunity to consult with the defendant just prior to the bench conference and the trial occurred well before the decision in Conev. Under these facts, there is no reversible error shown. See also Jones v. State, 569 So. 2d 1234, (Fla. 1990), cert. denied, 510 U.S. 836, 114 S.Ct. 112, 126 L.Ed.2d 78 (1993).

We note that both the First and Fourth District Courts of Appeal have also held that Conev applies prospectively only, see

Lett v. State, 668 So. 2d 1094 (Fla. 1st DCA 1996); Quince v. State, 660 So. 2d 370 (Fla, 4th DCA 1995), although the First District has certified that question to the Florida Supreme Court in Lett and several cases that follow.[1] Since there will continue to be numerous Coney-type cases on appeal, we certify to the Florida Supreme Court the same question certified by the First District:

> 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?

As to the defendant's second point on appeal, the State concedes that the trial court sentenced the defendant based upon an incorrectly calculated scoresheet. Since the correct point total would have placed the defendant in the next lower cell, we reverse and remand for resentencing based upon a correctly calculated scoresheet. See Diaz v. State, 667 So. 2d 991 (Fla. 3d DCA 1996).

Affirmed in part, reversed in part and remanded for resentencing.

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[1] Horn v. State, 21 Fla. Law Weekly D867 (Fla. 1st DCA April 12, 1996); Gainer v. State, 671 So. 2d 240 (Fla. 1st DCA 1996); Bowick v. State, 671 So. 2d 232 (Fla. 1st DCA 1996); Bell v. State, 671 So. 2d 226 (Fla. 1st DCA 1996); Branch v. State, 671 so. 2d 224 (Fla. 1st DCA 1996); Howard v. State, 670 So. 2d 1149 (Fla. 1st DCA 1996); Lee v. State, 670 So. 2d 169 (Fla. 1st DCA 1996).