IN THE SUPREME COURT OF FLORIDA

RAUL ZAPANTA RAFAEL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 88,828

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER

PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Raul Zapanta Rafael, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Petitioner or his proper name.

The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of the trial court's proceedings; "IB" will designate the Initial Brief of Petitioner. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

In preparing this brief, the undersigned has adopted, with few alterations, the argument with regard to issue two presented in the State's brief in Bowick v. State, No. 87,826 (Fla.), which concerns the same certified question at issue in this case. The identical issue is also currently pending before this Court in, among others, the following cases:

Bruce H. Bell v. State, No. 87,716

Eric Scott Branch v. State, No. 87,717
Glen Michael Caldwell v. State, No. 88,510
Reginald Donald Gainer v. State, No. 87,720
Maurice M. Horn v. State, No. 87,789
Dino Howard v. State, No. 87,856
Brian David Lee v. State, No. 87,715
Alfedco Lett v. State, No. 87,541
Rickie Renoried Mathis v. State, No. 88,517
Mary Antonia Page v. State, No. 88,535

STATEMENT OF THE CASE AND FACTS

The State agrees with the Petitioner's statement of the case and facts, except for the following matters ommitted therefrom which relate to the lower court's opinion. That opinion, entered August 20, 1996, states, with regard to the issue presented herein:

By his first issue, appellant asserts that he is entitled to a new trial because he was not physically present at a bench conference during which jury challenges were exercised. Appellant's trial took place before release of the opinion in Coney v. State, 653 So. 2d 1009 (Fla.), cert. denied, ___ U.S. ___, 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995). Accordingly, we conclude that Coney is inapplicable. Lett v. State, 668 So. 2d 1094 (Fla. 1st DCA 1996). Appellant has failed to demonstrate that his rights were violated pursuant to the rule which preceded that announced in Coney. Francis v. State, 413 So. 2d 1175 (Fla.

1982). We therefore affirm appellant's convictions on this issue. However, as in Lett, we certify the following question of great public importance:

> DOES THE DECISION IN CONEY V. STATE, 653 So.2d 1009 (Fla.), cert. denied, ___ U.S. ___, 116 S.Ct. 315, 133 L. Ed.2d 218 (1995), APPLY TO "PIPELINE CASES," THAT IS, THOSE OF SIMILARLY SITUATED DEFENDANTS WHOSE CASES WERE PENDING ON DIRECT REVIEW OR OTHERWISE NOT YET FINAL WHEN THE OPINION WAS RELEASED?
> (A. 2-3).

SUMMARY OF ARGUMENT

ISSUE I.

Because the principle of prospective application is well understood, and because this Court clearly stated in Coney v. State, infra, that its holding there was to applied only prospectively, this Court should decline to exercise its discretionary jurisdiction to address the certified question in this case concerning the application of Coney to so-called "pipeline" cases. Should this Court exercise its discretion to address the certified question, the Court should answer the certified question in the negative and clarify Coney by expressly holding that a defendant must object in the trial court to his or her absence from sidebar conferences at which the parties'

attorneys announce their jury challenges, and that a defendant may not raise the Coney issue for the first time on appeal.

ARGUMENT

ISSUE I

DOES THE DECISION IN CONEY V. STATE, 653 So. 2d 1009 (Fla.), cert. denied, ____ U.S. ____, 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995), APPLY TO "PIPELINE CASES," THAT IS, THOSE OF SIMILARLY SITUATED DEFENDANTS WHOSE CASES WERE PENDING ON DIRECT APPEAL OR OTHERWISE NOT YET FINAL WHEN THE OPINION WAS RELEASED? (Restated from Petitioner's Brief)

This Court has discretion to decide whether to address questions certified by the district courts to be of great public importance. Art. V, § 3(b)(3), Fla. Const.; State v. Burgess, 326 So. 2d 441 (Fla. 1976); Stein v. Darby, 134 So. 2d 232 (Fla. 1961). For the following reasons, the State respectfully asks this Court to decline to review the certified question in the case at bar.

In Jones v. State, 569 So. 2d 1234, 1237 (Fla. 1990), this Court held that the defendant's absence from sidebar conferences where peremptory strikes were announced was not error because the defendant was given the opportunity to confer with counsel at defense table prior to the conferences.[1] Coney v. State, 653 So.

[1] This is comparable to the situation presented in this case. The petitioner concedes that the stipulation entered into by the parties establishes that the petitioner "was afforded the opportunity to consult with counsel." (IB. 7; R. 160).

2d 1009 (Fla. 1995), which the Court decided some four years later, changed the law. It held that the defendant has a right under Fla. R. Crim. P. 3.180 to stand at the bench with counsel, and not merely sit at defense table, when peremptory challenges are announced. Indeed, Justice Overton expressly recognized Coney's departure from previous, well-established judicial practice:

> Judges have believed for nearly fifteen years that exercising challenges at the bench, outside the hearing of the jury while the defendant was at counsel table, was proper because the defendant was present in the courtroom.

Id. at 1016 (Overton, J., concurring in result only). Further, the fact that Coney constituted a change in the law, and a departure from the previous practice, is apparent from the sheer number of cases litigating the Coney issue.[2]

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[2]Petitioner nevertheless claims that Coney did **not** constitute a change in the law, but that it instead "clarified" this Court's previous decisions on the issue by requiring trial courts to "inquire and certify waivers and ratification of the actions of counsel on the record." Petitioner's initial brief at 12. Petitioner asserts that defendants always had the right to be present at the bench during jury selection, and that the only part of the Coney decision that is "new" and "prospective" is the aforementioned waiver certification requirement. Petitioner's initial brief at 12. However, in the two cases on which petitioner relies, the defendant was not even present **in the same room** with the judge and the lawyers when counsel announced their strikes. See Francis v. State, 413 So. 2d 1175 (Fla. 1982)

This Court held that the new rule it announced in Coney was "prospective only." Coney, 653 So. 2d at 1013. There is nothing ambiguous about this language, or about the prospectivity principle in general. As this Court has repeatedly held, prospective decisions do not apply to cases tried before the new decision was announced, regardless of whether such cases are still pending on appeal. See, e.g., Fenelon v. State, 594 So. 2d 292, 293 and 295 (Fla. 1992) ("We agree with the State that giving the flight instruction, even if erroneous, was harmless beyond a reasonable doubt . . .," and "we approve the result below although we direct that henceforth the jury instruction on flight shall not be given"); Taylor v. State, 630 So. 2d 1038, 1042 (Fla. 1994) ("This Court intended that the holding in Fenelon be applied prospectively only, and, since Taylor was tried before our decision in Fenelon was issued, the trial court did not err given the circumstances of this case."); Wuornos v.

(defendant was in the bathroom part of the time while prospective jurors were questioned in the courtroom, and when the judge and counsel retired to the jury room to exercise peremptory strikes, the defendant was left in the courtroom); and Turner v. State, 530 So. 2d 45, 47 (Fla. 1987) (defendant was not present in the judge's chambers when jurors were challenged). Francis and Turner therefore do **not** stand for the proposition that a defendant has a "right" to be present at the bench when the parties exercise their peremptory challenges, as petitioner suggests.

State, 644 So. 2d 1000, 1007 n.4 (Fla. 1994) (citations omitted) ("We recognize that this holding [that a prior decision is to have 'prospective effect only'] may seem contrary to a portion of Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992), which can be read to mean that any new rule of law announced by this Court always must be given retrospective application. However, such a reading would be inconsistent with a number of intervening cases. We read Smith 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."); and Domberg v. State, 661 So. 2d 285, 287 (Fla. 1995) (in Wuornos, Smith was "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"). Thus, this Court's statement in Coney that the decision in that case is to be applied only prospectively means, simply and clearly, that the decision is to be applied only to those cases tried after the decision in Coney was issued.

Petitioner now claims that even though he was tried and convicted **before** this Court issued its Coney decision, this Court should apply Coney to his case and grant him a new trial because he was not present at the bench when counsel announced their

peremptory challenges. To support this claim, petitioner asserts that equal protection demands that Petitioner be granted the same relief as was granted Coney. However, the critical fact petitioner overlooks is that the defendant in Coney was **not** given the benefit of the new rule the Court announced in that case. The simple truth is that Coney was not released from custody, he was not granted a new trial, and neither his conviction nor his sentence was reduced as a result of his absence from the sidebar conference when the parties exercised their peremptory challenges. Thus, because the new rule announced in Coney was not even applied to Coney, there clearly is no rational basis for applying that new rule to petitioner, thereby affording him greater relief than Coney himself received. In any event, because this Court's direction in Coney that the decision there is to be applied prospectively is unambiguous, there is no need for this Court to accept jurisdiction to answer the certified question in this case concerning that prospective application.

Should this Court exercise its discretion to address the certified question, the State asks that the Court answer the question in the negative and clarify the rule it announced in Coney. The law should be made clear that if a defendant wishes to stand at the bench with the lawyers when they announce their

peremptory strikes, the burden is on the defendant to make his or her request known to the judge. A defendant who remains silent waives the right to be present at bench conferences, and cannot be heard to complain for the first time on appeal about his or her absence from the sidebar conference.

This Court recently applied the contemporaneous objection rule to violations of Fla. R. Crim. P. 3.180. In Gibson v. State, 661 So. 2d 288 (Fla. 1995), decided after Coney, the defendant argued that the trial court violated his right to be present with counsel during a bench conference when the parties conducted their jury challenges, and that it further violated his right to the assistance of counsel when the court denied defense counsel's request to consult with the defendant before exercising peremptory challenges. However, this Court rejected Gibson's argument as follows:

> 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.

Id. at 290-291 (emphasis added, citation omitted). The Court in Gibson thus implied that a defendant must object to his or her absence from any bench conference at which the parties exercise their jury challenges in order to preserve the Coney issue for appellate review. See also Hardwick v. Dugger, 648 So. 2d 100, 105 (Fla. 1994) (defendant's failure to participate in bench conferences held during trial was not fundamental error); Shriner v. State, 452 So. 2d 929, 930 (Fla. 1984) (defendant's absence from "various bench conferences" not fundamental error). The State now asks this Court to clarify Coney by **expressly** stating that a defendant may not raise the Coney issue for the first time on appeal.

The requirement of a contemporaneous objection to preserve the Coney issue is compatible with the approach taken by the federal courts. Under Fed. R. Crim. P. 43, which is comparable to Rule 3.180, a defendant need not be warned of the right to be present, and the defendant waives that right unless he or she expressly invokes it. See Fed. R. Crim. P. 43(b)(1) and (3); and

United States v. Gagnon, 470 U.S. 522, 527-530, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985) (right waived where defendant did not ask to be present during in camera discussion among judge, juror, and one of the defense lawyers). Moreover, contrary to petitioner's argument here, a defendant's absence from sidebar conferences where the parties announce their peremptory challenges does **not** offend the constitution. See, e.g., United States v. Gayles, 1 F.3d 735, 738 (8th Cir. 1993) (defendant was absent from courtroom when attorney announced strikes over the lunch break, but he was present when clerk gave strikes effect by reading off list of selected jurors); United States v. McCoy, 8 F.3d 495, 496-497 (7th Cir. 1993) (defendant was not present at sidebar conference where "the attorneys discussed their peremptory challenges, only one of which raised any concern"); United States v. Bascaro, 742 F.2d 1335, 1349-1350 (11th Cir. 1984) (defendants in courtroom entire time but lawyers left courtroom briefly to confer collectively to decide on peremptory strikes). Again, this Court should clarify Coney to require a contemporaneous objection before a defendant may argue on appeal that he or she was improperly excluded from a sidebar conference during which the parties' lawyers announced their peremptory challenges; and because petitioner in the case at bar wholly failed to object to

his absence from the bench conference, his Coney claim was not cognizable on direct appeal before the First District, and it is not cognizable in this Court.

Finally, the petitioner asserts that the State is "estopped" from presenting any argument in this case on the Coney issue because the assistant attorney general who represented the State in Coney conceded that error occurred when Coney was absent from the bench conference where the parties exercised their jury challenges, the State nevertheless addressed the contention which has been argued in numerous other cases where the identical issue is presented. See Coney v. State, 653 So. 2d at 1013 ("The State concedes that this rule violation was error, but claims that it was harmless."). The State is **not** "estopped" from advancing inconsistent arguments on the law in different cases. There are three estoppel doctrines: mutual collateral, nonmutual collateral, and judicial. Judicial estoppel does not apply here because that doctrine is limited to a party's positions on the "facts." Rand G. Boyers, Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 NW. U. L. Rev. 1244, 1262 (1986). Further, mutual collateral estoppel does not apply here because that doctrine requires that the parties be the same; that is, the defendant must be the same in both

proceedings. Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). Moreover, nonmutual (different parties, as here) collateral estoppel does not extend to the government. United States v. Mendoza, 464 U.S. 154, 104 S. Ct. 568, 78 L. Ed. 2d 379 (1984); Standefer v. United States, 447 U.S. 10, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980); Nichols v. Scott, 69 F.3d 1255, 1268-1274 (5th Cir. 1995). Finally, pure questions of law, such as the one at issue here (i.e., what does a rule of procedure mean), arising in unrelated cases are excepted from the collateral estoppel doctrine. Mendoza, 464 U.S. at 162 n.7.

Petitioner relies on State v. Pitts, 249 So. 2d 47 (Fla. 1st DCA 1971), for the proposition that the Equal Protection Clause prohibits the State from taking different positions on a legal issue. However, petitioner misreads that case. A party's "confession of error," as occurred in Pitts and Coney, is nothing more than the party's opinion on the law. That opinion does not bind the Court, State v. Lozano, 616 So. 2d 73, 75 n.4 (Fla. 1st DCA 1993); L.S. v. State, 547 So. 2d 1032 (Fla. 3d DCA 1989), for the obvious reason that only the Court has the power to say what the law means. State v. Smith, 547 So. 2d 613, 616 (Fla. 1989). It is only when the Court adopts the opinion of a party as its own that it becomes the law, and it is at this point that it must

be applied equally to everyone. This is what was of concern to the Pitts court.

The Equal Protection Clause requires the government to apply the law, **not** the government's opinion on the law, equally to all similarly situated persons. The government's opinion on the law may be wrong, either to the defendant's detriment or his benefit. If it is to the defendant's detriment, the harm will be remedied. If it is to the defendant's benefit, the windfall stands. Although windfalls cannot be undone, the government can prevent others from unjustly reaping the benefit of the error. Mendoza, 464 U.S. at 161-162.[3] Petitioner therefore is incorrect in his assertion that the State may not present a different

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[3] The contemporaneous objection rule limits the arguments that the losing party can advance on appeal. State v. Applegate, 591 P. 2d 371, 373 (Ore. App. 1979), sets out the many policy reasons for this rule. The prevailing party, however, is not limited by what it argued in the lower court. This is so because of the procedural rule which requires appellate courts to affirm the decisions of lower courts if correct, even though based on faulty reasoning. Stuart v. State, 360 So. 2d 406, 408 (Fla. 1978). The primary purpose for this rule is obvious: "It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate." Securities and Exchange Comm'n v. Chenery Corp., 318 U.S. 80, 88, 63 S. Ct. 454, 87 L. Ed. 626 (1943).

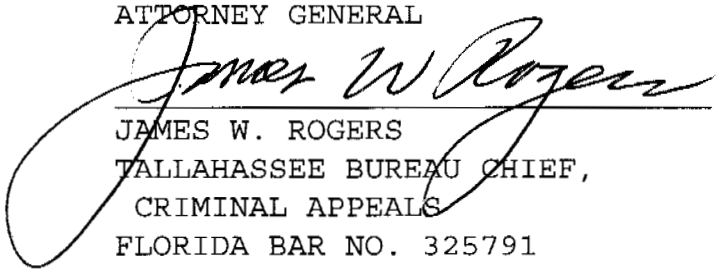
argument in the case at bar than it did in its brief in Coney, and this Court should reject that claim.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the decision of the First District Court of Appeal should be approved.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Michael A. Wasserman, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401, North; 301 South Monroe Street; Tallahassee, Florida 32301, this 12th day of November, 1996.

Giselle Lylen Rivera
Giselle Lylen Rivera
Assistant Attorney General

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Appendix

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

RAUL ZAPANTA RAFAEL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

CASE NO. 94-3887

Opinion filed August 20, 1996.

An appeal from the Circuit Court for Bay County.
Clinton E. Foster, Judge.

Nancy A. Daniels, Public Defender; Terry Carley, Assistant Public Defender, Tallahassee, for Appellant.

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

MICKLE, J.

Raul Zapanta Rafael appeals from a judgment and sentence entered after being found guilty of escape and disorderly conduct. He raises five points on appeal: (1) whether his absence from the bench during the exercise of jury challenges constitutes reversible error; (2) whether the trial court erred in limiting the cross-examination of a prosecution witness; (3) whether the sentence

imposed for disorderly conduct exceeds the maximum sentence provided by statute; (4) whether the trial court erred in imposing conditions of probation not orally pronounced at sentencing; and (5) whether the charges, costs and fees were improperly assessed on a per count, rather than on a per case, basis, and included costs for which no statutory authority was cited. We affirm in part, and reverse and remand in part.

By his first issue, appellant asserts that he is entitled to a new trial because he was not physically present at a bench conference during which jury challenges were exercised. Appellant's trial took place before release of the opinion in Coney v. State, 653 So. 2d 1009 (Fla.), cert. denied, ___ U.S. ___, 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995). Accordingly, we conclude that Coney is inapplicable. Lett v. State, 668 So. 2d 1094 (Fla. 1st DCA 1996). Appellant has failed to demonstrate that his rights were violated pursuant to the rule which preceded that announced in Coney. Francis v. State, 413 So. 2d 1175 (Fla. 1982). We therefore affirm appellant's convictions on this issue. However, as in Lett, we certify the following question of great public importance:

> DOES THE DECISION IN CONEY V. STATE, 653 So.2d 1009 (Fla.), cert. denied, ___ U.S. ___, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995), APPLY TO "PIPELINE CASES," THAT IS, THOSE OF SIMILARLY SITUATED DEFENDANTS WHOSE CASES WERE PENDING ON DIRECT REVIEW OR OTHERWISE NOT YET FINAL WHEN THE OPINION WAS RELEASED?

We find no merit as to issues two and four and affirm without further discussion. As to issue three, although the sentence imposed of 216 days' time served on the disorderly conduct conviction does not extend appellant's actual incarceration, it is an improper sentence insofar as it exceeds the maximum statutory term of 60 days' incarceration for a second-degree misdemeanor offense. See sections 877.03, 775.082(4)(b), Florida Statutes (1993). We therefore remand for correction of the judgment and sentence to reflect a sentence imposed within the statutory maximum for this offense.

Finally, the record contains two written "Charges/Costs/Fees" documents assessing costs separately for each count. Costs levied under sections 960.20, 943.25, and 27.3455, and costs assessed for the Law Library and for Gulf Coast Criminal Justice Assessment, are to be imposed on a per case, rather than a per count, basis. See Hunter v. State, 651 So. 2d 1258 (Fla. 1st DCA 1995); Rocker v. State, 640 So. 2d 163 (Fla. 5th DCA 1994); Hollingsworth v. State, 632 So. 2d 176 (Fla. 5th DCA 1994). Accordingly, we reverse and remand the sentence for Count II with directions to strike these duplicative costs imposed as a part of that sentence. Also, upon remand, the court shall cite the statutory authority relied upon as support for the assessment of the amounts imposed for Law Library and Gulf Coast Criminal Justice Assessment. See Nguyen v. State, 655 So. 2d 1249 (Fla. 1st DCA 1995). In addition, the $25.00 assessed as "Additional Court Cost" in Count II must be stricken

because no statutory authority was cited to support this cost. See Watson v. State, 667 So. 2d 955 (Fla. 1st DCA 1996). On remand, the court may reimpose this cost if it cites the statutory authority for that assessment. See Stephens v. State, 667 So. 2d 312 (Fla. 1st DCA 1995); Bradshaw v. State, 638 So. 2d 1024 (Fla. 1st DCA 1994).

In all other respects, the judgments and sentences are affirmed.

AFFIRMED IN PART; REVERSED and REMANDED with directions.

MINER and WEBSTER, JJ., CONCUR.