In The Supreme Court of Florida

NO. 88,828

RAUL ZAPANTA RAFAEL,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

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

PETITIONER'S MERIT BRIEF

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_____/

PRELIMINARY STATEMENT

Citations in this brief to designate record references are as follows:

"R._" Record on Direct Appeal to this Court

"T._" Transcript of Proceedings

All cited references will be followed by the relevant page number(s). All other citations will be self-explanatory or will otherwise be explained. Respondent, State of Florida, was the plaintiff in the trial court and the appellee in the district court, and will be referred to as the "state." Petitioner was the defendant in the trial court and the appellant in the district court, and will be referred to as "petitioner" or as the "defendant" or by name.

STATEMENT OF THE CASE AND THE FACTS

1. Introduction

The district court certified the following question to this Court regarding the application of this Court's decision in *Coney v. State*, 653 So. 2d 1009 (Fla. 1995):

> 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 APPEAL OR OTHERWISE NOT YET FINAL WHEN THE OPINION WAS RELEASED?

A notice to invoke discretionary jurisdiction of this Court under Article V, Section 3(b)(4), Fla. Const., was filed August 23, 1996.

2. History of Proceedings

The state charged Raul Zapanta Rafael with disorderly conduct and escape (R-13). Mr. Rafael's trial was held September 27, 1994 (T-1). Jury selection was held September 26, 1994 (T-28). A Bay County jury found Mr. Rafael guilty as charged (R-33; T-107). The trial court placed Mr. Rafael on 2 years community control, to be followed by 5 years probation (R-86-93; T-110). Mr. Rafael then filed a timely notice of appeal to the district court (T-75-76).

SUMMARY OF ARGUMENT

ISSUE I – This is the issue which is before this Court as a certified question. Petitioner was not present at the site of selection when the jury was chosen and therefore was unable to participate in the selection of his jury. Petitioner's case is one of the so-called "pipeline cases," falling between the time of Coney's trial, yet before the decision was rendered in *Coney v State*, 653 So. 2d 1009 (Fla. 1995).

Equal protection under the law, as well as decisions of this and other courts, demands that Petitioner be granted the same relief as was granted Coney. This is true whether *Coney* is considered to be "new law" or not. At the very least, the law which preceded *Coney*, and upon which *Coney* was decided, mandates that Petitioner be granted the same relief.

In *Coney*, the state conceded that Coney's absence during for-cause challenging of the jury was error under *Francis v. State*, but the error was held harmless. Here, the state is estopped from arguing that what occurred here – the same factual scenario – is not error.

Error has occurred, and it is not harmless, whether peremptory challenges were made or not. If they were made, they may not have been the ones Petitioner wanted. If they were not made, he may have wanted them to have been – including possible backstrikes. This Court has no way to access the damage done to

the Petitioner.

There is error, it is harmful, and as it is impossible to access the consequences, the harmful error is prejudicial. Thus, the answer to the certified question must be in the affirmative, and Petitioner should be granted a new trial.

ARGUMENT

ISSUE I

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

The district court certified the following question to this Court:

> 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 APPEAL OR OTHERWISE NOT YET FINAL WHEN THE OPINION WAS RELEASED?

The First District Court of Appeal concluded that the holding of this Court in *Coney v. State*, 653 So. 2d 1009 (Fla. 1995), that a "defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised" does not apply retrospectively to pipeline cases. The district court did not reach or discuss the issue raised by petitioner that, notwithstanding the question of whether *Coney* applied in his case, a new trial is necessary under this Court's decisions in *Francis v. State*, 413 So. 2d 1175 (Fla. 1982), and *Turner v.*

State, 530 So. 2d 45 (Fla. 1987).

In addition to the question certified, Petitioner respectfully urges this Court to also unambiguously clarify whether it intended its holding in *Coney* that a "defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised" to be prospective only, or whether the Court's statement that its "ruling today clarifying this issue is prospective only" was meant to apply only to the remainder of the paragraph which follows the first sentence. In *Coney*, this Court said:

> We conclude that 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. *See Francis v. State*, 413 So.2d 1175 (Fla. 1982). 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. Our ruling today clarifying this issue is prospective only.

Id. at 1013.

Petitioner contends that whether or not *Coney* is a clarification of existing law or new law, it nonetheless must be applied to pipeline cases.[1] Even were *Coney* not applied in this

[1]This Court should also be aware that this issue has been raised and briefed in depth in *(Lazaro) Martinez v. State*, Case

case, the rule of procedure and case law preceding *Coney* must be applied in the same manner as they were in *Coney* in the instant case.

A. Facts of the Case.

Jury selection was held September 26, 1994 (R-28). The record shows that the actual selection of the jury occurred at an unrecorded bench conference. Immediately after this, the judge announced the selected members of the jury (R-152).

At the bench conference, the defense exercised three peremptory challenges. The state used one peremptory challenge (R-160).

Nowhere on the record does it indicate that inquiries were made of Mr. Rafael regarding his acceptance of the jury or the strikes made by the defense counsel. The stipulation entered into by the parties shows that Mr. Rafael did not expressly waive his right to be present (R-160).

The record fails to show that counsel left the bench to consult with Mr. Rafael during the actual striking of the jurors, even though the stipulation states that he "was afforded the opportunity to consult with counsel." (R-160) The stipulation stops short of saying that his counsel did consult with him. Mr. Rafael was not physically present at the bench during the

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No. 85,450, and addressed at oral argument in *Boyett v. State*, Case No. 81,971.

selection process (R-160). Mr. Rafael was physically present in the courtroom and located at counsel table during the bench conference.

- Nowhere is it reflected the petitioner was informed of his right to be present at the bench.
- Petitioner was **not** present at the bench.
- Nowhere does the trial court **inquire** if the petitioner's absence from the bench is voluntary.
- Nowhere in the record does petitioner state he is waiving his right to be present.
- Nowhere does the trial court **certify** that the petitioner's absence from the bench is voluntary or that petitioner waived his right to be present after a proper inquiry by the court.
- Nowhere does the trial court ask the petitioner to **ratify** the choice of jurors made by counsel, nor does petitioner ratify the peremptory challenges made by counsel on the record; nor does the trial court **certify** the petitioner's ratification of counsel's exercise of peremptory challenges.

B. *Coney* and Pre-*Coney* Law

The specific holding in *Coney* – "The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised" – was based upon both an existing Florida rule of criminal procedure and prior case law, both of which in turn were based on both the Florida and U.S. Constitutions. Rule 3.180(a)(4), Fla. R. Crim. P., requires that a defendant in a criminal case be present "at the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury" and this Court ruled that this provision

means exactly what it says. *Coney*, at 1013. This rule is to be strictly construed and applied, as *Coney* makes unequivocally clear. An accused is not present during the challenging of jurors if he or she is not at the location where the process is taking place. *Francis v. State*, 413 So. 2d 1175 (Fla. 1982); *Turner v. State*, 530 So. 2d 45 (Fla. 1987). Thus, it is not enough that an accused be present somewhere else in the courtroom or in the courthouse when peremptory challenging of the jury is occurring. The accused must be able to hear the proceedings and to able to meaningfully participate in the process. If the accused is seated at the defense table while a whispered selection conference is being conducted at the judge's bench, he or she cannot be said to be present and meaningfully able to participate.

"The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised." *Coney* at 1013. Moreover, the Court went on to state that a waiver of the right to be present must be certified by the court to be knowing, intelligent, and voluntary after a proper inquiry. The judge in Mr. Rafael's case made no inquiry or certification whatsoever. None of the requirements established by the Court in *Coney*, set forth at p. 3, were met in the lower court.

In addition to violating Rule 3.180(a)(4), the absence of the accused at this critical stage of trial also constituted a

denial of due process under the state and federal constitutions because fundamental fairness might have been thwarted by his absence. *Francis v. State*, 413 So. 2d 1175, 1177 (Fla. 1982); *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934); *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Rule 3.180 is specifically designed to safeguard those constitutional rights. Thus, when the plain mandate of the rule is so clearly violated, as it was here, the constitutional rights the rule safeguards are also violated.

(1) Only Part of *Coney* Appears to Be "Prospective," and Such Language Has No Effect on "Pipeline Cases" Such as This.

As argued below, the entire *Coney* decision should apply to Petitioner since his case was on appeal at the time *Coney* was decided. A fair reading of this Court's opinion in *Coney* indicates that the only prospective parts of *Coney*'s holding are the requirements that the trial judge **certify** on the record **a waiver** of a defendant's right to be present at the bench and/or a **ratification** of counsel's action (or inaction) in the defendant's absence. However, the state and the First District Court of Appeal apparently believe that the defendant's right to be present at bench conferences where peremptory challenges are exercised is also a prospective rule. This is not so, and is refuted by this Court's reasoning unpinning its holding in *Coney*.

This Court said Fla. R. Crim. P. 3.180(a) meant what it

says, and has always said, that a defendant has the right to be present at the immediate location where juror challenges are being made. The court cited the rule and its previous holding in *Francis v. State*, 413 So. 2d 1175 (Fla. 1982), as authority for that proposition. Moreover, the state conceded in *Coney* that it was error under *Francis* because Coney not present at a bench conference where juror challenges were made and the record was silent as to waiver or ratification. *See Coney*, at 1013. Surely, the state would not concede error based on a rule yet to be announced. The **right** to be present at the bench during the actual selection process pre-existed *Coney* under the rule and under *Francis* and *Turner*, and the only "prospective" part must have been the requirements now placed on the trial courts that they inquire and certify waivers and ratification of the actions of counsel on the record.

(2) State Is Estopped from Arguing Absence of Error.

Initially, the State of Florida is estopped from arguing that Petitioner's absence from the bench conference where peremptory challenges to prospective jurors were made was not error. In *Coney*, when faced with the same facts, the state conceded error. *Id.*, at 1013. The state cannot now assert otherwise in this case without violating Petitioner's right to equal protection of the law. *See State v. Pitts*, 249 So. 2d 47, 48-50 (Fla. 1st DCA 1971)(violation of equal protection for the

state to take contrary positions on the same issue in different cases). This Court clearly pointed out the state's concession of error in its opinion.[2] The case was then decided adversely to Coney on the sole basis of harmless error because only challenges for cause were made in Coney's absence. *Ibid.* Petitioner is asking this Court to apply the same law in his case that was applied *Coney*'s case. Equal protection under the law requires no less.

C. ***Coney* and the Principles of Law Underlying *Coney* Must Be Applied to This "Pipeline Case"**

Whether or not *Coney* is a clarification of existing law or new law, it must be applied to this case. Furthermore, whether or not *Coney* itself is applied to this case, the prior law upon which the decision in *Coney* rests must be applied to this case. To do less violates state and federal constitutional principles

(1) ***Coney* as a Clarification of Existing Law**

Both a Florida Rule of Criminal Procedure and the due process clauses of the state and federal constitutions provide that a criminal defendant has the right to be present during any "critical" or "essential" stage of trial. *See* Fla. R. Crim. P.

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[2] Coney was not present at the sidebar where the initial challenges were made, and the record fails to show that he waived his presence or ratified the strikes. **The State concedes this rule violation was error**, but claims that it was harmless.

Coney, at 1013 (**bold** emphasis added).

3.180; *Faretta v. California*, 422 U.S. 806, 819 n.5, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *Francis v. State*, 413 So.2d 1175, 1177 (Fla. 1982).

Although petitioner was present in the courtroom, as was Coney, he was not physically present at the sidebar. Inferentially, the accused could no more hear what was happening at the bench than the jury could, and the jury was also present in the court-room. Thus, the accused was as effectively excluded from this critical stage of the trial as was the jury. The exclusion of the jury was proper, of course; the absence of the accused was not.

(a) Florida Rule of Criminal Procedure 3.180(a)(4)

Rule 3.180(a)(4), Fla. R. Crim. P., expressly provides:

> (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; . . .

(b) Prior Case Law

In *Turner v. State*, 530 So. 2d 45, 47-48, 49 (Fla. 1987), this Court stated:

> We recognized in *Francis v. State*, 413 So. 2d 1175, 1177 (Fla. 1982), that the defendant has the constitutional right to be present at the stages of his trial where fundamental fairness **might be** thwarted by his absence. *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed.674 (1934). *See also, Faretta v.*

> *California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).
>
> Florida Rule of Criminal Procedure 3.180(a)(4) recognizes the challenging of jurors as one of the essential stages of a criminal trial where a defendant's presence is mandated.
>
> * * *
>
> A defendant's waiver of the right to be present at essential stages of trial must be knowing, intelligent and voluntary. *Amazon v. State*, 487 So. 2d 8 (Fla.), *cert. denied*, 479 U.S. 914, 107 S. Ct. 314, 93 L. Ed. 2d 288 (1986); *Peede v. State*, 474 So. 2d 808 (Fla. 1985), *cert. denied*, 477 U.S. 909, 106 S.Ct. 3286, 91 L.Ed.2d 575 (1986).

Id. Nothing in the record demonstrates that Petitioner knew that he had the right to be physically present and to **meaningfully participate** in this critical function during his trial. Petitioner's involuntary absence thwarted the fundamental fairness of the proceedings. It was, in any event, a clear violation of Rule 3.180(a)(4)'s unambiguous language mandating his presence.

This Court most recently addressed the issue of the accused's presence during challenging of the jury in *Coney v. State*, 653 So. 2d 1009 (Fla. 1995), holding:

> As to Coney's absence from the bench conference, this Court has ruled:
>
> > [The defendant] has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence. Florida Rule of Criminal Procedure 3.180(a)(4) recognizes the challenging of jurors as one of the essential stages of a criminal trial where a def-

endant's presence is mandated.

Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982)

* * *

> **We conclude that the rule means just what it says: The defendant has a right to by physically present at the immediate site where pretrial juror challenges are exercised.** *See Francis.*

Coney, 653 So. 2d at 1013 (**Bold** added). Previously, this Court has repeatedly recognized that jury selection – at least that portion of voir dire when counsel exercises peremptory challenges – is a "critical" stage of the trial, at which time a criminal defendant's fundamental right to be present has fully attached. *See e.g., Francis*, 413 So.2d at 1177-78; *Chandler v. State*, 534 So.2d 701, 704 (Fla. 1988). Numerous decisions of both this Court and the U.S. Supreme Court have also recognized that the right to be present is one of the most "fundamental" rights accorded to criminal defendants. "The right to be present has been called a right scarcely less important to the accused than the right to trial itself." 14A Fla. Jur. 2d, *Criminal Law*, §1253, at 298 (1993)(citing state and federal cases); *see also Mack v. State*, 537 So.2d 109, 110 (Fla. 1989)(Grimes, J., concurring)(characterizing a criminal defendant's right to be present, along with right to counsel and right to a jury trial, as one of "those rights which go to the very heart of the adjudicatory process").

(c) Plain Language in Coney Indicates That it Is Not New Law

In *Coney*, this Court indicated that it relied on the plain, unequivocal language of Rule 3.180 in reaching its result. Thus, if the rule already existed, it is NOT, and cannot be, a "new rule."

> We conclude that **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.

Id. at 1013 (**bold** emphasis added).

Where, as here, an appellate court's decision is based on the plain language of a statute or rule, the court does not announce a new rule. *See Murray v. State*, 803 P.2d 225, 227 (Nev. 1990). Furthermore, where, as here, a judicial decision is "merely interpreting the plain language of the relevant statute," the "rule" is not "new" and should be applied retroactively. *John Deere Harvester Works v. Indust. Comm'n*, 629 N.E. 834, 836 (Ill. App. 1994). This Court's specific holding in *Coney*, quoted above, was not only based on Fla. R. Crim. P. 3.180, but on its previous decision in *Francis*. *Coney*'s holding was not "new law," but simply explained that the Rule meant what it said. But what is "new law"?

(d) "New" Rule or Law Defined

The underlying legal norm – the right to be present at all critical stages of trial – precludes being absent from sidebar

for jury selection as much as it does being totally absent from the courtroom during jury selection.

> To determine what counts as a new rule, . . . courts [must] ask whether the rule [that a defendant] seeks can be meaningfully distinguished from that established by [prior] precedent. . . . If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful, and [the rule in the latter case is not "new"].

Wright v. West, 505 U.S. 277, 112 S.Ct. 2482, 2497, 120 L.Ed.2d 225 (1992)(O'Connor, J., concurring, joined by Blackmun & Stevens, JJ.). A rule of law is deemed "new" if it "breaks new ground or imposes a new obligation on the States or the Federal Government. . . . To put it differently, a case announces a new rule if the result was not dictated by [prior] precedent. . . ." *Teague v. Lane*, 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *Johnson v. United States*, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982), referred to "breaking of new ground" as being a "clear break" with the past. *Johnson* was overruled by *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), but the *Griffith* Court continued to refer to a new rule as a "clear break" with prior precedent. The result in *Coney* was clearly dictated by prior precedent, namely *Francis* and *Turner*.

(e) *Coney* Is Not a Clear Break with Prior Precedent

The "clarification" of the law announced in *Coney* was not a "new rule" of law under the definition in *Teague*: No part of

Coney's procedural requirements was a "clear break" with the past or prior precedent. *Johnson*; *Griffith*. Florida courts had previously applied the right to be present in the context of bench conferences at which jury selection occurred. *See Jones v. State*, 569 So. 2d 1234, 1237 (Fla. 1990); *Smith v. State*, 476 So. 2d 748 (Fla. 3rd DCA 1985); *cf. Lane v. State*, 459 So. 2d 1145, 1146 (Fla. 3rd DCA 1984)(defendant present in court room, but excluded from proceedings where peremptories were exercised in hallway "due to the small size of the courtroom"). *See also Mack v. State*, 537 So. 2d 109, 110 (Fla. 1989); *Rose v. State*, 617 So. 2d 291 (Fla. 1993); *Salcedo v. State*, 497 So. 2d 1294 (Fla. 1st DCA 1986); *Alen v. State*, 596 So. 2d 1083, 1095-1096 (Fla. 3d DCA 1992); *Summerall v. State*, 588 So. 2d 31, 32 (Fla. 3d DCA 1991), all relying on *Francis*. In *Coney* itself, the state conceded that Coney's right to be present was violated by his absence from the bench conference. *Id.* at 1013.

(f) "On-the-record" Procedural Requirements Announced in *Coney* Was Not New Law; and Waiver by Silence or Acquiescence Is Not Allowed Where Fundamental Rights Are Involved

This Court has repeatedly held that a defendant's waiver of the small class of "fundamental" rights can only be accomplished by a personal, affirmative, on-the-record waiver. *See e.g.*, *Torres-Arboledo v. State*, 524 So. 2d 403, 410-411 (Fla. 1982);

Armstrong v. State, 579 So. 2d 734, 735 n.1 (Fla. 1991).[3] Courts in other jurisdictions also require affirmative, on-the-record waivers of fundamental rights. *See e.g., Larson v. Tansy*, 911 F.2d 392, 396 (10th Cir. 1990)("Several circuits have held that defense counsel cannot waive a defendant's right of presence at trial"); *United States v. Gordon*, 829 F.2d 119, 124-26 (D.C. Cir. 1987). An on-the-record waiver is subject to the constitutional axiom that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that [courts] do not presume acquiescence in the loss of fundamental rights." *Carnley v. Cochran*, 369 U.S. 506, 514, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962), citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938).

(2) If *Coney* is Considered "New Law"

If it is assumed *arguendo* that *Coney* did announce a "new rule," nonetheless, state and federal constitutional cases

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[3]Additionally, this Court has "strongly recommend[ed]that the trial judge personally inquire of the defendant when a waiver [of the right to be present] is required." *Ferry v. State*, 507 So.2d 1373, 1375-76 (Fla. 1987). *See also, Amazon v. State*, 487 So.2d 8, 11 n.1 (Fla. 1986)("experience teaches that it is the better procedure for the trial court to make an inquiry of the defendant and to have such waiver [of the right to be present] appear [on the] record"). *See also, Mack v. State*, 537 So. 2d 109, 110 (Fla. 1989)(GRIMES, J., concurring)("It is impractical and unnecessary to require an on-the-record waiver by the defendant to anything but those **rights which go to the very heart of the adversary process**, such as the **right to a lawyer**, . . ., the right to a jury trial, . . ., or the **right to be present at a critical stage in the proceeding**").

require that Petitioner be permitted to benefit from the Court's holding in *Coney*. In *Griffith v. Kentucky*, 479 U.S. 314 (1987), the Supreme Court abandoned its former retroactivity doctrine[4] and held that all new rules of criminal procedure rooted in the federal Constitution must be applied to all applicable criminal cases pending at trial or on direct appeal at the time that the new rule was announced. The Supreme Court's bright-line retroactivity rule in *Griffith* is rooted in the U.S. Constitution. Consequently, state appellate courts **must** apply the *Griffith* retroactivity standard when announcing a new rule that implicates or is intertwined with federal constitutional guarantees.[5] The Supreme Court ruled:

> The Supremacy Clause . . . does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law . . . cannot extend to interpretations of federal law.

Harper v. Virginia Department of Taxation, ___ U.S. ____, 113 S.Ct. 2510, 2518, 125 L.Ed.2d 74 (1993). *See also, James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S.Ct. 2439, 2443, 115 L.Ed.2d 481 (1991)("where the [new] rule at issue itself

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[4]*Stovall v. Denno*, 388 U.S. 293, 297 (1967).

[5]It must be noted that the holding in *Coney*, just as it was in *Francis*, is rooted in the federal and state constitutional rights to due process and to assistance of (and to assist) counsel. *Johnson v. Wainwright*, 463 So. 2d 207, 210-211 (Fla. 1985).

derives from federal law, constitutional or otherwise," state courts *must* apply the new rule to all litigants whose cases were pending at the time that the new rule was decided). Other state appellate courts have also held that when a state's "new rule" is not *solely* based on state law, or if it *implicates* or is interwoven with the federal constitution, the rule must be applied to all cases pending on direct appeal at the time the new rule is announced. *See, e.g., People v. Mitchell*, 606 N.E.2d 1381, 1383-1384, (N.Y. 1992); *People v. Murtishaw*, 773 P.2d 172, 178-179 (Cal. 1989)(federal retroactivity doctrine applies where new rule of criminal procedure announced by state court is not based **solely** on state law).

Clearly, *Coney* is based in part on the U.S. Constitution, primarily the right to counsel, in addition to the direct mandate of Fla. R. Crim. P. 3.180. Consider the plain language in *Coney*, and in *Turner* and *Francis* which *Coney* follows, and the citations to the federal constitution and to federal cases. In *Coney*, this Court ruled:

> [The defendant] has the **constitutional right** to be present at the stages of his trial where **fundamental fairness** might be thwarted by his absence. Florida Rule of Criminal Procedure 3.180(a)(4) recognizes the challenging of jurors as one of the **essential stages** of a criminal trial where a defendant's presence is mandated. (citing *Francis*, at 1177)

Coney, 653 So. 2d at 1013 (**Bold** added). In turn, this Court stated in *Turner*:

> We recognized in *Francis v. State*, 413 So. 2d 1175, 1177 (Fla. 1982), that the defendant has the **constitutional right** to be present at the stages of his trial where **fundamental fairness** might be thwarted by his absence. *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed.674 (1934). *See also, Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).
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> * * *
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> A defendant's waiver of the right to be present at **essential stages of trial** must be knowing, intelligent and voluntary. *Amazon v. State*, 487 So. 2d 8 (Fla.), *cert. denied*, 479 U.S. 914, 107 S. Ct. 314, 93 L. Ed. 2d 288 (1986); *Peede v. State*, 474 So. 2d 808 (Fla. 1985), *cert. denied*, 477 U.S. 909, 106 S.Ct. 3286, 91 L.Ed.2d 575 (1986).

Turner, 47-48, 49 [**Bold** added].

Furthermore, the procedural requirement of a personal, affirmative waiver on the record by a defendant also implicates the U.S. Constitution. As noted in section E, *infra* at p.30, such a waiver of the fundamental constitutional right to be present at a critical stage of the trial is itself constitutionally mandated. Thus, the rule in *Coney* does not "rest [] on adequate and independent state grounds [because] the state court decision fairly appears to . . . be interwoven with federal law." *Caldwell v. Mississippi*, 472 U.S. 320, 327, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Under such circumstances, the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution, as well as the parallel provisions of the Florida Constitution, require this

Court to give *Coney* retroactive application to Petitioner's direct appeal.

Even if *Coney* were based solely on state law (which it clearly is not), the Equal Protection and Due Process Clauses of the Florida Constitution, Art. I, Section 2 and 9, would require that this Court to apply the decision retroactively to Petitioner's appeal. *Griffith v. Kentucky*, 479 U.S. 314 (1987). This Court has adopted and applied the reasoning in *Griffith* to new state-law based rules as well as new federal-law based rules. In *Smith v. State*, 598 So. 2d 1063 (Fla. 1992), this Court agreed with "the principles of fairness and equal treatment underlying *Griffith*," and adopted the same bright line rule in *Griffith*.[6] Then, in several subsequent cases, those principles of fairness and equal treatment seemed to be forgotten, culminating in the decision in *Wuornos v. State*, 644 So. 2d 1000 (Fla. 1994), where this Court refused to apply a "new [state] law" announced in *Castro v. State*, 597 So. 2d 259 (1992), to a pipeline case. *See Wuornos*, at 1007-1008.

However, later, in *State v. Brown*, 655 So. 2d 82 (Fla. 1995), this Court appears to have re-embraced the principles of fairness and equal treatment in *Griffith*, holding that *Smith*

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[6]It is critical to note that *Smith* itself, therefore, implicates federal law by agreeing with and adopting the "principles" of *Griffith*, a case based upon the federal constitution.

"established a blanket rule of retrospective application to all non-final cases for new rules of law announced by this Court." *Id.* at 83. Then, shortly after *Brown*, in *Davis v. State*, 661 So. 2d 1193 (Fla. 1995), this Court noted that *Smith* was limited by *Wuornos* and refused to apply a "new rule" to a collateral appeal. Despite denial of relief, this Court stated:

> Had Davis's appeal been pending at the time we issued *Smith*, and had he raised the sentencing error on direct appeal, he could have sought relief under *Smith*.

Id. at 1195.

The integrity of judicial review requires this Court, once and for all, to abandon its bewildering on-again-off-again *ad hoc* approach to retroactivity and adopt and adhere to the bright-line standard set forth in *Smith* and *Griffith* for all significant "new rules," whether based on state or federal law. *See Taylor v. State*, 422 S.E. 2d 430, 432 (Ga. 1992)(adopting *Griffith*'s approach to retroactivity); *State v. Mendoza*, 823 P.2d 63, 66 (Ariz. App. 1990)("The reasoning of *Griffith* applies to a case . . . even if the new rule is not of constitutional dimension"). New law or not, Petitioner's appeal was pending at the time *Coney* was decided. He sought relief based on *Coney* (as well as on *Francis* and *Turner* as independent grounds), and relief should therefore be granted by this Court. Failure to do so will violate Petitioner's rights under the U.S. and Florida Constitutions.

(3) Relief Is Mandated by Law in Existence Before *Coney*

Even in the absence of the application of the rules in Coney's case, *Turner v. State*, 530 So. 2d 45 (Fla. 1987) and *Francis v. State*, 413 So. 2d 1175, 1177 (Fla. 1982) require reversal and the granting of a new trial. "[T]he 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," this Court said in *Coney*, citing *Francis* for support of that proposition. Clearly, the rule has always meant what it said long prior to *Coney* saying it means what it says. It was clearly Petitioner's right to be present at this critical stage of the trial under Rule 3.180(a)(4), and that right was violated. The rule is specifically designed to protect constitutional rights: in part, rights to due process; in some instances, to rights of confrontation; and most significantly, the right to assistance of counsel, *Johnson v. Wainwright*, 463 So. 2d 207, 210-211 (Fla. 1985). *Turner* and *Francis* mandate reversal independent of the decision in *Coney*.[7]

It is not known, and it is impossible to now determine, what input petitioner might have provided to counsel regarding the exercise of his peremptory challenges at the sidebar as the

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[7]This issue was specifically raised in the district court, but the decision of the district court did not address this basis for reversal, but focused solely upon whether *Coney* applied to pipeline cases.

process proceeded. However, petitioner's absence was clearly error given the very strict construction required of Rule 3.180(a)(4).

Prior to *Coney*, a defendant could personally waive his right to be present before leaving the courtroom; such waiver being accomplished through personal questioning by the trial Court. *See*, e.g., *Chandler v. State*, 534 So. 2d 701, 704 (Fla. 1988). The defendant's presence could also be waived by counsel – provided that the defendant subsequently ratified or acquiesced in counsel's waiver on the record – if said waiver were shown to have been made knowingly, voluntarily, and intelligently. *State v. Melendez*, 244 So. 2d 137, 139 (Fla. 1971). Furthermore, a defendant could effectively waive his right to be present though misconduct, such as disrupting the trial. *Capuzzo v. State*, 596 So.2d 438, 440 (Fla. 1992). In this case, Petitioner neither absented himself from the courtroom, nor acquiesced to or ratified any waiver by counsel, nor did he engage in any misconduct which could have been considered waiver. Thus, under the law as it existed prior to *Coney*, there was no waiver, and Petitioner had the right to be present at the bench during jury selection.[8] *Francis*; *Turner*.

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[8]Again, the state is estopped from arguing that his absence was not error under *Francis*, a point which it conceded in *Coney*. *See supra* at p. 6.

D. *Coney* or Pre-*Coney*, the Law must Be Applied to this Case Because Peremptory Challenges Were Made.

Common sense dictates that the right to be present would be meaningless if it were not applied to the absence of a defendant at sidebar conferences during which peremptory and cause challenges are or should be exercised. Challenges for cause are a matter of law; however, peremptory challenges are based on many factors and can be exercised in an arbitrary manner. While a defendant may not be qualified to exercise cause challenges due to his lack of knowledge of the law, this is clearly not true of peremptory challenges. Peremptory challenges can be exercised simply because one's personal preference, or even instinct, dictates such a result. These challenges are clearly within the abilities of the defendant and denying him the opportunity to participate deprives him of an important right. The problem here occurs not only where defense counsel exercises peremptory challenges. It is even more problematic where counsel **fails** to exercise peremptory challenges.

Petitioner may have had contemporaneous input to make to counsel as to the exercise of his peremptory challenges – because they are often exercised arbitrarily and capriciously, for real or imagined partiality, often on sudden impressions and unaccountable prejudices based only on bare looks or gestures. *Francis*, 413 So. 2d at 1176. The exercise of peremptory challenges "is not a mere 'mechanical function' but may involve

the formulation of on-the-spot strategy decisions which may be influenced by the acts of the state at the time. The exercise of peremptory challenges is essential to the fairness of a trial by jury." *Walker v. State*, 438 So. 2d 969, 970 (Fla. 2d DCA 1983), citing *Francis* at 1179; *Salcedo v. State*, 497 So. 2d 1294, 1295 (Fla. 1st DCA 1986). Thus, the very concept of peremptory challenges necessitates constant and contemporaneous input from the accused to counsel when peremptory challenges are being made. *See Johnson v. Wainwright*, 463 So. 2d 207, 210-211 (Fla. 1985).

The process of the exercise of peremptory challenges by both sides is a dynamic process, and results in a rapidly and ever-changing face of the jury. This depends upon which individuals have been struck and which party has exercised the strikes. It is highly fluid situation, requiring constant evaluation and reevaluation about who should or should not be struck as the dynamic situation unfolds. When, as here, the accused is absent, he or she is denied the opportunity to contemporaneously consult with counsel and to provide contemporaneous input into the decision-making process as to the exercise of the precious few strikes available to the accused. In certain situations which cannot be foreseen, as a strategy the accused might prefer not striking an objectionable juror, leaving that person on the jury, rather than exercising the final challenge which would result in the seating another against whom the defendant has more vehement

objections. In short, the defendant may prefer to elect the lesser of two evils, as he might see it.

Even though counsel may have consulted with the client prior to the sidebar, and perhaps even again during the process, that itself is not sufficient. If the defendant were present and contemporaneously aware of how the situation was developing, he may have express additional or other preferences. He may wish to strike others on the jury who had not been previously discussed with counsel. The accused also may have suggestions to strike or back strike jurors already seated, even though he had not earlier expressed any particular dislike for them, simply in order to force the seating of a juror the defendant would much more prefer. Again, peremptory challenges are often made on the sudden impressions and unaccountable prejudices. *Francis*, 413 So. 2d at 1176, and may be exercised based upon the formulation of on-the-spot strategy decisions, *Walker v. State*, at 970, and *Salcedo* at 1295. The entire selection process is like a game of checkers or chess in that regard. Not uncommonly a player will intentionally sacrifice a man (exercise a strike or backstrike) simply in order to force a move which is advantageous to him or disadvantageous to the opponent. That strategy decision cannot be made until the situation actively develops during the dynamic course of the challenging process. Thus, an accused may have very valuable input as to the exercise of his peremptory

challenges, input which is only meaningful where it can be made contemporaneously with the developments during the on-going challenging process. *Walker; Salcedo*. However, the accused was excluded from this critical stage of the trial and prevented from contemporaneously assisting counsel in the process.

E. Petitioner Did Not Waive His Right

Nothing petitioner did or did not do, waived his right to be present. The record fails to show that he even knew of his right such that a voluntary waiver can be found – and **a waiver cannot be inferred from his silence or from his failure to object** to the procedure or his absence from the sidebar. *See State v. Melendez*, 244 So. 2d 137 (Fla. 1971). A waiver by inaction of a fundamental constitutional right – or presuming a waiver by acquiescence on a silent record – flies directly in the face of opinions of the United States Supreme Court to the contrary. In addressing a similar waiver (of speedy trial) the Supreme Court held:

> Such an approach, by presuming waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights. The Court has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." [Citation omitted]. Courts should "indulge every reasonable presumption against waiver," [Citation omitted]) and they should not presume acquiescence in the loss of fundamental rights." [Citation omitted]. In *Carnley v. Cochran*, 369 US 506, 8 L Ed 2d 70, 82 S Ct 884 (1962), we held:
>
> "presuming waiver from a silent record is impermissi-

> ble. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not waiver. *Id.*, at 516, 8 L Ed 2d at 77.
>
> The Court has ruled similarly with respect to waiver of other rights designed to protect the accused. [Citations omitted].

Barker v. Wingo, 407 U.S. 514, 525, 92 S.Ct. 2182, 33 L.Ed.2d 101, 114 (1972).

The challenging of the jury is a critical and essential stage of trial. *Francis*. Petitioner's right to be physically present such that he can meaningfully participate through contemporaneous consultation with his attorney is absolute – in the absence of a knowing, intelligent and voluntary waiver. There was no such waiver here.

This Court said in *Coney* that Rule 3.180 means just what it says. This record does not establish, "with the certainty and clarity necessary to support the waiver of constitutional rights Rule 3.180 is designed to safeguard,"[9] that petitioner's absence at this critical state of his trial was voluntary. Rule 3.180 was clearly designed to safeguard his constitutional right to be present at this critical stage. The violation of the rule was also a violation of the constitutional right it was designed to protect. His absence was clear error. *Coney*, *Turner*, and *Francis* mandate reversal.

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[9]*Jarrett v. State, 654 So. 2d 973, 975 (1st DCA 1995).*

F. No Objection Need Be Made to Preserve this Issue

There was no waiver, and no contemporaneous objection should be required to preserve this issue in the absence of a showing on the record that the accused knew he had the right to be present – such that he knew he might be required to object to the procedure employed or to his absence.

What is critical to understand is that the right to be physically present at critical stages of the trial is one which exists without the necessity of an affirmative assertion of the right, just as the right to counsel or to a jury trial, for example, exists without a specific assertion of the right at trial. This right, which is primarily founded upon the right to counsel, exists by virtue of, and is protected by, the Sixth and Fourteenth Amendments to the federal constitution and independently by the Counsel Clause of the Florida Constitution, Art. I, Section 16 – all guarantees further implemented and protected by Rule 3.180. The right to be present also exists without a specific assertion as a matter of right established directly by Rule 3.180. No accused must stand up and insist that he be present at trial or at any critical stage thereof. *Compare*, e.g., *Brown v. Wainwright*, 665 F.2d 607 (5th Cir. 1982)(right to counsel in force until waived, right to self-representation does not attach until asserted). The right to be present is specifically rooted in the guarantee to the assistance of

counsel. *Johnson v. Wainwright*, 463 So. 2d 207, 210-211 (Fla. 1985). This Court summarized the principles underlying the accused's right to be present during peremptory challenging in *Rose v. State*, 617 So.2d 291, 296 (Fla. 1993), in which it said:

> The constitutional right to be present is rooted to a large extent in the Confrontation Clause of the Sixth Amendment. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985). However, the right of presence is protected to some extent by the Due Process Clause where the defendant is not actually confronting witnesses or the evidence against him. *Id.* A defendant has a due process right to be present at any stage of the proceeding that is critical to its outcome, if his presence would contribute to the fairness of the proceedings. *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987); *Francis v. State*, 413 So.2d 1175, 1177 (Fla.1982). A defendant has no right to be present when his presence would be useless or the benefit a shadow. *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934). The exclusion of a defendant from a trial proceeding should be considered in light of the whole record. *Id.* at 115, 54 S.Ct. at 335.

This Court earlier stated regarding the right to be present during peremptory challenging of the jury that:

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

> **his counsel in conducting the defense.** *See Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934); *See also Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Thus in *Francis* **the defendant's presence during the exercise of peremptories was deemed important because of the aid the accused could have given to his counsel.**

Johnson v. Wainwright, 463 So. 2d 207, 210-211 (Fla. 1985)(**bold** added).

If the accused is not present when mandated, particularly when required under the rule, a waiver of the right – one which is voluntarily, freely and intelligently given after a proper advisement of the right and inquiry – must be spread upon the record. In the absence of a waiver, or evidence thereof, appearing on the record, there is no waiver of the right. The right is not waived by inference or by silence of the accused (particularly where there is no affirmative showing that the accused was ever advised by the court of the existence of the right). *See, State v. Melendez*, 244 So. 2d 137 (Fla. 1971).

Florida Rule of Criminal Procedure 3.180(a)(4) recognizes the challenging of jurors as one of the essential stages of a criminal trial where a defendant's presence is mandated; it is a simple matter of due process as well as for the protection of the right to counsel. *Rose; Johnson v. Wainwright*. The notion that this right exists without the requirement of a specific assertion of the right is further confirmed by *Coney*'s specific holding that where the accused is absent, the trial court in such a cases

must certify through proper inquiry that there was a knowing, intelligent, and voluntary waiver. *Coney*, 653 So. 2d at 1013. *See also, State v. Melendez; Johnson v. Zerbst*, 304 U.S. 458 (1938); *Brewer v. Williams*, 430 U.S. 387 (1977)(every presumption against waiver); *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), quoted *supra* at p.30-31.

The notion that this due process and counsel-based right must be affirmative waived on the record (as opposed to specifically asserted by an objection to the procedure) was similarly expressed by this Court in *Turner v. State*, 530 So. 2d 45, 49 (Fla. 1987), where the issue of the defendant's absence during challenging of the jury was addressed on appeal. The opinion in *Turner* evidences no indication that an objection to Turner's absence was ever lodged with the trial court. The Court held:

> *We cannot agree that Turner waived his right to be present during the exercise of challenges* or that he constructively ratified or affirmed counsel's actions. *A defendant's waiver of the right to be present at essential stages of trial must be knowing, intelligent and voluntary*. . . . The record does not indicate that the trial court informed Turner of his right or questioned him as to any ratification of counsel's exercise of challenges in his absence. *A defendant cannot knowingly and intelligently waive a right of which he is unaware. Silence is insufficient to show acquiescence. Francis*.

Turner, 530 So. 2d at 49(emphasis added).

Since this counsel-based right is not waived, and cannot be waived, by silence (any more than the right to counsel can be so

waived), no contemporaneous objection should be required to preserve the issue for review. To require a specific, contemporaneous objection to preserve the right – one which already exists as a matter of law – would be tantamount to imposing a waiver by silence or acquiescence, rather than requiring evidence of an affirmative, intentional relinquishment or abandonment of a known right or privilege on the record, as this Court has mandated in *Turner* and *Francis*, and indeed again in *Coney*, and as the United Supreme Court also requires. *Barker v. Wingo*.

Equally significant is that in the opinions in *Coney*, *Francis*, and *Turner* is it not recorded that there were contemporaneous objections made to the defendants' absence. It is particularly clear that this was so in both *Turner*'s and *Coney*'s case. The initial opinion in *Coney*, issued January 13, 1995 (found at 20 Fla. L. Weekly S16), contained a sentence which said: "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." At S67-17.[10] Although struck from the final opinion issued in April 1995, this sentence clearly shows that no contemporaneous objection was made by Coney to his

[10]Opinions in *Coney* were actually published in the Florida Law Weekly three times: 20 Fla. L. Weekly S16, 20 Fla. L. Weekly S204, 20 Fla. L. Weekly S255.

physical absence at the site of the challenging of the jury at trial. Likewise, there is nothing in the opinions in *Francis* to suggest that he made contemporaneous objections to his absence or to the procedure. Nevertheless, this Court in each case fully addressed the issue on its merits without discussing or imposing a procedural bar. Further, we note that in *Salcedo v. State*, 497 So. 2d 1294 (Fla. 1st DCA 1986), the First District found the error under *Francis* to be fundamental. That court reasoned:

> The trial court denied Salcedo's motion on the ground that his counsel failed to object to his absence at the time the peremptory challenges were being exercised. While it is the general rule that a point argued on appeal must be preserved by appropriate objection at trial, it is well settled that fundamental error can be considered on appeal without objection in the lower court. *Sanford v. Rubin*, 237 So.2d 134, 137 (Fla.1970); *Cato v. West Florida Hospital, Inc.*, 471 So.2d 598 (Fla. 1st DCA 1985). *We see no reason why this principle should not govern motions for new trial as well as direct appeals and hold that, if the error alleged by a criminal defendant in a motion for new trial is fundamental, any failure to object with regard to that error does not require that the motion be denied.*
>
> The United States Constitution guarantees a criminal defendant the right to be present during crucial stages of his trial or at the stages of his trial where fundamental fairness might be thwarted by his absence. *Smith v. State*, 453 So.2d 505, 506 (Fla. 4th DCA 1984), *p.f.r.d.* 462 So.2d 1107 (Fla.1985), citing *Francis v. State*, 413 So.2d 1175, 1177 (Fla.1982).
>
> The challenge of jurors is one of the essential stages of a criminal trial where the defendant's presence is required. *Lane v. State*, 459 So.2d 1145, 1146 (Fla. 3d DCA 1984). It is not a mere "mechanical function" but may involve the formulation of

> on-the-spot strategy decisions which may be influenced by the acts of the state at the time. The exercise of peremptory challenges is essential to the fairness of a trial by jury. *Walker v. State*, 438 So.2d 969, 970 (Fla. 2d DCA 1983) citing *Francis* at 1179. *Based on these authorities, we find that Salcedo's motion for new trial alleged fundamental error which no objection was necessary to preserve.*

Id., at 1295 (emphasis added).

G. The State's Burden to Prove the Error Harmless

Petitioner's absence from the bench where, as here, he could have influenced the process, should be considered harmful ***per se*** as a structural defect in the trial. *See Hegler v. Borg*, 50 F.3d 1472, 1476 (9th Cir. 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, 310 (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.* at 307-308, 111 S.Ct. at 1263-64. The accuse's absence from the challenging of the jury through peremptory challenges is a structural error. *See* e.g., *Hays v. Arave*, 977 F.2d 475 (9th Cir. 1992)(*in absentia* sentencing is structural error requiring automatic reversal); *Rice v. Wood*, 44 F.3d 1396 (9th Cir. 1995)(defendant's absence at return of verdict fundamental and a structural error; but where defendant has no role to play, absence is not structural error). Being a structural defect, it is fundamental error reaching the very heart of the trial process itself. Harmless error does not apply. *Fulminante*.

H. Analysis of Prejudice

While it is contended that the absence of the accused constitutes a structural error not subject to harmless error analysis under *Fulminante*, clearly this Court previously has applied a harmless error analysis to the error, finding a clear distinction regarding harmfulness where the matters discussed in the accused's absence were strictly legal ones. *See Coney* and *Turner*. It is only in that context that harmless error has been

found. Thus, prejudice needs to be discussed here.

Just as was conceded by the state in *Coney*, it was error under *Francis* for the Petitioner not to have been present at the bench, plain and simple. Because there was error, the burden lies upon the state to show beyond a reasonable doubt that the error could not in any way have affected the fairness of the trial process. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986); *Garcia v. State*, 492 So. 2d 360, 364 (Fla. 1986)(citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). As noted previously, the absence of the accused at this critical stage of trial constitutes a denial of due process under the state and federal constitutions. *Francis*, at 1177; *Snyder*; *Faretta*. Since the trial court also failed to ask Petitioner to ratify the choices of trial counsel, this Court has no way to know what damage was done or what prejudice ensued.

This Court's analysis in *Francis v. State*, 413 So. 2d 1176-1179, is important on the question of the prejudice flowing from the involuntary absence of the defendant during the challenging of the jury:

> 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).

* * *

> 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.

Francis, 1176-1179.

There was error. Presumptively, it was prejudicial. Moreover, the error was structural because the right violated is based upon the right to counsel; the right to be present at this critical stage of the proceedings was fundamental for that reason. Thus, the Petitioner is entitled to a new trial because the Court cannot say beyond a reasonable doubt that this error did not affect the fairness of the trial. If this Court is unable to assess the extent of prejudice sustained by Mr. Bell's absence, his involuntary absence was reversible error and the error was by definition harmful. *State v. Lee*, 531 So. 2d 133 (Fla. 1988); *Francis*, at 1179. Moreover, the absence of the accused at a critical stage of trial must be presumed harmful because it is structural error, unless the state can show beyond a reasonable doubt that the defendant had not role whatsoever to play in the exercise of his peremptory challenges or that his presence could not have "influenced the process" of that critical stage of the trial. *Hegler v. Borg*; *Arizona v. Fulminante*. The state can make no such showing.

I. Conclusions

Accordingly, the Court is requested to answer the certified question in the affirmative, reverse petitioner's conviction and remand for a new trial.

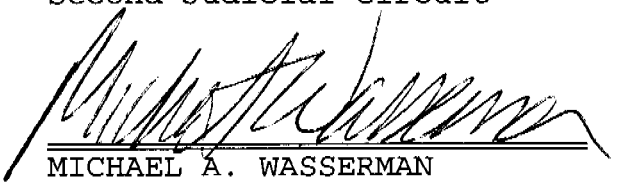
However, should the question be answered in the negative, and should *Coney* be deemed not apply in this case, Petitioner nonetheless requests the Court to reverse his conviction and remand for a new trial because his absence from the bench during peremptory challenging of the jury was a clear violation of Rule 3.180(a)(4) and relief is required under *Francis* and *Turner*. Because the error in this case is not harmless beyond a reasonable doubt, based upon the trilogy of cases – *Francis*, *Turner* and *Coney* – this Court must reverse and remand for a new trial.

CONCLUSION

Petitioner, Raul Zapanta Rafael, based on all of the foregoing, respectfully urges the Court to vacate his conviction and sentence, to remand the case for a new trial, and to grant all other relief which the Court deems just and equitable.

Respectfully submitted,

NANCY A. DANIELS
Public Defender
Second Judicial Circuit



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by delivery to: Jean-Jaques A. Darius, Esq., Assistant Attorney General, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to the Petitioner by U.S. Mail, first-class postage prepaid, on October 21, 1996.

Michael A. Wasserman
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

RAUL ZAPANTA RAFAEL,	:	
Petitioner,	:	
v.	:	**CASE NO. 88,828**
STATE OF FLORIDA,	:	
Respondent.	:	

APPENDIX

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ATTORNEY FOR PETITIONER

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

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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.