IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,178

**DARRYL HENDERSON,**

Petitioner,

-VS-

**THE STATE OF FLORIDA,**

Respondent.



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**ON PETITION FOR DISCRETIONARY REVIEW**

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# BRIEF OF PETITIONER ON THE MERITS

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## INTRODUCTION

The Petitioner, DARRYL HENDERSON, was the defendant in the trial court and the Appellant in the lower court, Third District Court of Appeal. The Respondent, the State, was the prosecution in the trial court and the Appellee in the lower court. The parties will be referred to as they stood before the trial court. The designation "R. __" will refer to the record on appeal, and the designation "T. __" will refer to the separately bound transcript of proceedings. The decision of the lower court, in both published and slip form, comprises the appendix to this brief.

## STATEMENT OF THE CASE

On February 13, 1995, the defendant proceeded to trial by jury[1] on an amended information charge of robbery with a firearm of Gloria Perla (Count I) and Edith Perla (Count II) on September 4, 1994. (R. 1-2; T. 1 et seq.) (Circuit Court Case No. 94-30300.) The record reflects that exercise of challenges was conducted at sidebar outside of the defendant's presence (T. 46-49), which will constitute the second issue herein.

At the conclusion of the State's case, which was also the conclusion of all the evidence, the trial court denied the defendant's motion for judgment of acquittal made on the basis that the evidence showed the defendant only to have been the driver of the car in which the perpetrators of the robbery left (T. 198-99, 203), which ruling (and affirmance thereof) will constitute the first issue herein

The defendant was found guilty on both counts as charged (T. 306-07; R. 22, 23); was adjudicated guilty (T. 308; R. 24), and was given an enhanced sentence of thirty years imprisonment, with a fifteen-year mandatory minimum. (T. 339; R. 30-31.)

On direct appeal, the Third District Court of Appeal affirmed the conviction, finding the evidence sufficient and ruling that, "[a]ssuming . . . that [the defendant] was absent [from sidebar during exercise of peremptory challenges] . . . *Coney [v. State, 653 So.* 2d

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[1] Voir dire was conducted by Circuit Judge Arthur Snyder; the balance of trial was conducted by Circuit Judge Alex E. Ferrer.

1009 (Fla. [1995]) is inapplicable as its application is prospective only . . . and [the defendant's] trial took place [after the issuance of the Coney opinion but prior to the time the motion for rehearing therein was disposed of]." Henderson *v. State*, 679 So. 2d 805, 808 (Fla. 3d DCA 1996). On motion of the defendant, the court certified, as one of great public importance, the following question:

> DOES THE DECISION IN *CONEY v. STATE, 653 So.* 2d 1009 (Fla.), cert. denied, ___ U.S. ___, *116* S. Ct. 315, 133 L. Ed, 2d 218 (1995) APPLY TO CASES IN WHICH THE JURY SELECTION PROCESS TOOK PLACE AND THE ENTIRE TRIAL CONCLUDED DURING THE PERIOD OF TIME AFTER THE ISSUANCE OF THE *CONEY* OPINION BUT PRIOR TO THE TIME THAT CONEY BECAME FINAL BY THE DISPOSITION OF ALL MOTIONS FOR REHEARING DIRECTED TO THAT OPINION?

*Id.* at 808.

Notice to invoke the discretionary review jurisdiction of this Court was timely filed on October 16, 1996.

## STATEMENT OF THE FACTS

If the actual facts adduced at trial were as described by the lower court in its opinion, there would be no sufficiency argument; however, the evidence described by the lower court was not the evidence. In particular, contrary to that which was stated below, there was no direct evidence that the defendant drove the car to the scene as distinct from away the scene after the robbery; no evidence that the defendant's car arrived "almost simultaneously" with the victim's car or that the defendant's car had been "following the victims;" no evidence that the defendant "deliberately [made] it possible for the robberies to be committed[;]" and no evidence that the defendant "knew exactly what was occurring and that he was an active participant in the robberies[.]" *Henderson v. State,* 679 So. 2d 805, 807-08 (Fla. 3d DCA 1996). The following is the evidence actually adduced at trial:

On September 4, 1994, Augusto Perla, 54 years of age, accompanied by his wife, drove his sister to her residence at 10725 Southwest 74th Avenue. (T. 104, 120.) Perla's wife, Gloria, was in the back seat, and his sister, Edith, was in the front passenger seat. (T. 105-06, 120-121.) They arrived at Edith Perla's residence at about 5:00 p.m.; as Gloria Perla began to exit the car, they were robbed by two black males, neither of whom was the defendant. (T. 105, 106-09, 121-23, 127-28.) The robbery occurred at the entrance of Edith Perla's residence, which Gloria Perla described as "far away" from the street -- past a driveway to the parking garage. (T. 116.) Augusto Perla described his sister's residence as located "far off" from the street; he estimated the distance from the street to where the Perlas' car was as about

forty to fifty feet. (T. 130.)

As Gloria Perla opened the car door, her purse was grabbed by a black male; another man was holding a gun, pointing it at Mr. Perla. (T. 106-07, 121.) Mr. Perla had seen the two men approach quickly; they had not been running. (T. 131.) Mr. Perla thought they were coming to ask for an address, and didn't imagine they were going to hold them up. (T. 131.) The man who took Gloria Perla's purse elbowed Edith Perla in the shoulder, taking her purse as well. (T. 107, 122.) The incident happened very quickly. (T. 1 16, 132-33.)

After the purses were taken, the two men left running quickly, past an area of parked cars, to the street, with Augusto Perla running after them. (T. 108, 1 10, 121-22, 133.) Mr. Perla was right behind when the two men ran to a white Cadillac which was on the street, and got in; the defendant had been sitting in the car in the driver's seat. (T. 122, 134.) Throughout the incident the car had remained on the street; Gloria Perla testified that the car had not been parked when they arrived. (T. 116-17.) After the men got in the car, and before it drove away, Mr. Perla had enough time to go around and see a portion of the tag. (T. 135.) Before doing so he approached to within approximately three feet of the defendant in the driver's seat. (T. 137-38, 148-49.) The defendant had remained seated inside the car during the entire incident. (T. 141.) When Mr. Perla got to the car, the defendant turned around and appeared surprised. (T. 141 , 150.) After Mr. Perla observed the tag, the car, which was apparently already started or running, then drove off. (T. 124, 134-35.)

Police responded, and within about ten minutes the Cadillac was stopped at

87th Avenue and Southwest 128th Street. (T. 160.) The Perlas were brought to the scene. (T. 111, 127-28.) Gloria and Edith Perla were unable to make any identification. (T. 112-14, 191-92.) Neither had seen the driver of the Cadillac. (T. 191-92.)

Mr. Perla made an identification of the defendant as the driver. (T. 122-23, 128-29, 162-64.)

After arrest and advice of Miranda rights at the station, the defendant spoke with Detective William Ryan, denying any involvement in or knowledge of the robbery. (T. 174-76.) He said he was just giving friends a ride to the Dadeland Metrorail station when he was stopped by police. (T. 176.) Detective Ryan testified that the Cadillac was stopped three to four miles away from a Metrorail station. (T. 187.)

## SUMMARY OF ARGUMENT

### I.

**Where an individual does not actually commit the charged offense he can be convicted as an aider and abetter only upon, as pertinent herein, proof beyond a reasonable doubt of intent to participate in the perpetration of the crime. See, e.g., *A. Y.G. v. State,* 414 So. 2d 1159 (Fla. 3d DCA 1982). In the absence of evidence of any communications or advance planning, presence near the scene of a crime (robbery) committed by two other individuals, and driving them away, is insufficient to convict the defendant as an aider and abetter. Such involvement is, at most, suggestive of guilt of accessory after the fact, which is an uncharged offense in this case.**

### II.

**Florida Rule of Criminal Procedure 3.180(a)(4) mandates the presence of the defendant at the exercise of jury challenges. Because the trial in this case was held after the issuance of decision in *Coney v. State,* 653 So. 2d 1009 (Fla. 1995), which requires either that a defendant be physically present at the immediate site of exercise of challenges, or, alternatively, that there be a ratification otherwise of selection or a knowing, intelligent and involuntary waiver of the right to be present, none of which occurred in this case, reversal is required.**

## ARGUMENT

### I.

WHERE THE DEFENDANT WAS NOT SHOWN TO HAVE COMMITTED THE ROBBERY OR TO HAVE AIDED AND ABETTED THE PERPETRATORS OF THE ROBBERY BUT WAS ONLY THE DRIVER OF THE VEHICLE IN WHICH THEY LEFT THE SCENE, THE LOWER COURT ERRED IN DENYING THE DEFENDANT ENTITLEMENT TO A JUDGMENT OF ACQUITTAL.[2]

The conviction, as well as the lower court's recitation of the evidence, rests only upon assumption, inference, and pyramiding of inferences, and therefore is improper. The actual evidence, as distinct from the lower court's unsupported description of it, was that the defendant was the driver of the vehicle into which the two perpetrators of the robbery, after the fact, entered, that the car was driven away at a sufficiently slow pace that the husband of the victim had time both to observe the defendant and to walk around to the back of the car and observe the license plate, and that, upon apprehension by police, the defendant said that he was driving his passengers to a Metrorail station, when the nearest Metrorail station was three or four miles away. That the two perpetrators emerged from

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[2] Although the lower court certified only the Coneyquestion, when this Court acquires jurisdiction it acquires jurisdiction over the entire cause, e.g., *Ocean Trail Unit Owners Ass'n Inc. v. Mead,* 650 So. 2d 4, 5 (Fla. 1995), and "proceed[s] to consider the entire cause on the merits." *Dania Jai-Alai* Palace, *Inc. v.* Sykes, 450 So. 2d 1114, 1122 (Fla. 1984), *quoting Bould* v. *Touchette*, 349 So. 2d 1181, 1183 (Fla. 1977). As a constitutional matter, this sufficiency argument should be considered first, because if the Petitioner is correct that the evidence was not sufficient, then double jeopardy would bar a retrial, *Greene v. Massey, 437* U.S. 19, *98 S.* Ct. 2151, *57* L. Ed. 2d 15 (1978), *Burks v. United* States, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978), the latter being the relief from an affirmative answer to the certified question.

the defendant's car before the robbery was not shown by direct evidence, but was only an inference drawn by the lower court; similarly, there was no evidence that, as the lower court described, the defendant's car was parked at the end of the driveway or that the perpetrators ran up the driveway and back down the driveway, the evidence being only that the car was parked somewhere on the street, and that the perpetrators of the robbery were first noticed by the victims as the robbery was about to occur. (T. 106-08, 110, 116-17, *121-22,* 133-34.)

Moreover, there is no record support for the lower court's conclusion that the event took "nanoseconds";[3] rather it took, as the victim testified, "two minutes," and there was no evidence that the event, that is, the robbery in front of the victim's house, was visible from the vehicle parked on the street.

Where, as here, an individual does not actually commit a robbery, he can be convicted as an aider and abettor only upon proof beyond and to the exclusion of a reasonable doubt, and inconsistent with any reasonable hypothesis of innocence, of intent to participate in the perpetration of the crime. See, e.g., *Stuckey* v. *State*, 414 So. 2d 1160 (Fla. 3d DCA 1982); *A. Y.G.* v. *State*, 414 So. 2d 1158 (Fla. 3d DCA 1982); *J.H.* v. *State*, 370 So. 2d 1219 (Fla. 3d DCA 1979), *cert.* denied, 379 So. 2d 209 (Fla. 1980); *Douglas v. Sfafe,* 214 So. 2d 653 (Fla. 3d DCA 1968).

It was not shown that the defendant herein had any knowledge of the robbery before, during the robbery, or when the perpetrators got into the vehicle.

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[3] The prefix nano denotes billionths, hence nanoseconds are billionths of a second.

Moreover, even had contemporaneous knowledge been shown, that would be insufficient. The fully controlling principle is, as stated by this Court, that "[m]ere knowledge that an offense is being committed is not the same as participation with criminal intent, and mere presence at the scene, including driving the perpetrator to and from the scene or a display of questionable behavior after the fact, is not sufficient to establish participation." *Staten v. State*, 519 So. 2d 622, 624 (Fla. 1988).

Unlike in Staten, id., there was no testimony, direct or otherwise, that the defendant engaged in any discussion of plans for a robbery with the perpetrators, or drove to the scene in execution of such a plan. On the proof adduced, the case is indistinguishable from numerous cases which hold that driving (assuming, arguendo, that occurred herein) the perpetrator to a scene, without proof of knowledge of or intent to participate in the commission of an offense, and driving the perpetrator away, is insufficient to sustain conviction.

See, e.g., *Valdez v. State*, 504 So. 2d 9 (Fla. 2d DCA 1986); Fox v. *State, 469 So.* 2d 800 (Fla. 1st DCA), review denied, 480 So. 2d 1296 (Fla. *1985); McBride v. State*, *338* So. 2d 567 (Fla. 1st DCA 1976). Indeed, and ironically, the lower court itself has correctly held evidence stronger than that in the instant case even insufficient to establish a probation violation, which entails a cognizably lower burden of proof. *Smith v. State*, *502* So. 2d 77 (Fla. 3d DCA 1987):

> Marie Buffone, the victim, testified that as she returned home from a shopping trip she noticed a car behind her; and that she parked in her yard but remained in the car until the vehicle behind passed. The suspicious vehicle, driven by the defendant,

> continued to the corner and made a left turn out of her sight. It was only then that she got out of her car and started up the walkway to enter the house. As she walked up her driveway the man who was a passenger in the passing automobile ran up behind her and, after a brief struggle, took her purse and absconded. Both suspects were apprehended after a chase by police officers. The defendant was positively identified as the driver.
>
> The defendant contends in this appeal that the evidence was legally insufficient to prove that he was an aider and abettor to the crime of burglary or robbery, relying mainly on *A. Y.G. v.* State, 414 So. 2d 1158 (Fla. 3d DCA 1982), where we held that evidence that the defendant drove the getaway car from the scene of the burglary at the burglary's request, without more, was insufficient to convict as an aider and abettor. We agree.
>
> A defendant cannot be convicted of a charged substantive offense based on evidence which proves involvement only as an accessory after the fact, Jackson *v. State*, 436 So. 2d 1085 (Fla. 3d DCA 1983); *A.Y.G. v.* State. Likewise probation cannot be revoked where the proof supports only an offense other than the one charged. Brown *v.* State, 468 So. 2d 439 (Fla. 2d DCA 1985). Nothing in the record excludes the reasonable inference that the defendant had no knowledge of the robbery until after it occurred. [Footnote omitted.]

Id. at 78.

Assuming, arguendo, that it was the defendant who drove the perpetrators of the robbery to the scene and was present on the street when the robbery was committed far off the street, some fifty feet away past the entrance and parking area of the residence, there is nothing to establish any advance knowledge or intent to participate on the part of the defendant. When the two perpetrators approached the Perlas' car, Mr. Perla thought

that they were coming to ask for directions. (T. 131.) When Mr. Perla chased the two perpetrators to the Cadillac, there was no communication between or from the two perpetrators and indeed, the defendant appeared surprised by Mr. Perla. (T. 140-41.) There was no evidence of furtiveness, concealment, or identifiable action by the defendant other than simply driving the car away. There was sufficient time even at this point for Mr. Perla to go around to the back of the car and see the tag, before the car pulled away. (T. 141.)

There was no evidence of communication between the two perpetrators prior to the robbery, and no evidence of communication between the two perpetrators and the defendant either prior to, during, or subsequent to the robbery. There were no statements by the defendant other than that he was driving his two passengers to a Metrorail station. For all that appears from the evidence adduced at trial, the defendant could have merely let the two companions out of the vehicle to go ask for directions, and the two companions, acting upon a spontaneously formed plan to rob, effected a robbery and returned to the car without the defendant then knowing when they entered the car that a robbery had occurred .

Thus, at most, as to the defendant the case involved presence, flight, and equivocal after-the-fact behavior, i.e., an arguably questionable or inconsistent denial, that he had been driving his companions to the Metrorail station although it was a few miles away from where the car was stopped. (T. 176-187.) However, all such evidence would tend to show would be, assuming that after entering the car the companions had at some point told the defendant that they had committed a robbery, involvement as an accessory after the fact,

which the State did not charge and which cannot in any event support conviction for the substantive offense of robbery. See, e.g., *Jackson v. State*, *436 So.* 2d 1085 (Fla. 3d DCA *1983); A. Y.G. v. Sfafe, id.; Perez v. State*, *390 So.* 2d 85 (Fla. 3d DCA 1980); Douglas *v. Sfafe, id.*

On the evidence adduced, the defendant was entitled to a judgment of acquittal for insufficiency, and the trial court therefore erred in denying the motion for judgment of acquittal made on this ground, (T. 198-99, 203),[4] which error was compounded by the lower court reinterpreting the evidence by impermissibly pyramiding inference upon inference to sustain a conviction. Such pyramiding is patently improper. *Gustine v. State*, 86 Fla. *24, 27-28, 97 So. 207, 208 (1923); Davis v. State*, 436 So. 2d 196 (Fla. 4th DCA 1983), *review denied, 444 So.* 2d 418 (Fla. *1984); Horton v. State*, *442* So. 2d 1064 (Fla. 1st DCA 1983).

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[4] The trial court's alternative basis for denial of the motion for judgment of acquittal, that it was "[a] question of the weight of the evidence . . . whether or not [the defendant] is the person who was the driver of the vehicle[,]" (T. 203) thereby implying that it thought the defendant was one of the two perpetrators of the robbery, was absolutely unsupportable and utterly a mistaken view of the evidence. The only identification of the defendant as in any way involved came from the testimony of Augusto Perla, who unequivocally placed the defendant in the driver's seat, and only in the driver's seat, of the vehicle which remained parked on the street throughout the time of the offense, and from which vehicle the defendant never exited. (T. 116-17, 122-23, 128-29, 134, 141.)

II.

**THE TRIAL COURT ERRED IN CONDUCTING SELECTION OF JURORS OUTSIDE THE IMMEDIATE PRESENCE OF THE DEFENDANT, AND THE LOWER COURT ERRED IN DENYING APPLICATION OF *CONEY v. STATE,* 653 So. 2d 1009 (Fla. 1995) WHERE THE TRIAL OCCURRED AFTER ISSUANCE OF THE DECISION IN THAT CASE.**

**The defendant, although present in the courtroom, was excluded from presence at or participation in voir dire. At the conclusion of questioning of jurors, the trial court conducted selection, i.e., exercise of all peremptory challenges, at sidebar with only the attorneys. (T. 46-49.) Immediately upon the conclusion of sidebar, the jury was empaneled. (T. 49.) The record reflects neither participation by the defendant; opportunity for consultation with counsel; approval of selection, nor waiver of presence by the defendant.[5] This was error, which is presumed harmful.**

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[5] The State argued before the lower court that there was "nothing in the record . . . which demonstrates that the Defendant was not at sidebar[,]" and the lower court, before proceeding to find Coney temporally inapplicable, stated that "we are not certain that the record sufficiently reflects [the defendant's] absence from the sidebar" but assumed the fact of absence. Henderson *v.* State, 679 So. 2d at 808. There can, however, be no serious dispute that the defendant was not present at sidebar, nor does the record reflect any ratification of selection by the defendant or waiver of presence by him. At the conclusion of voir dire questioning, the record establishes that the trial court (Circuit Judge Arthur Snyder) directed: "Can I see the attorneys sidebar, please?" (T. 46.) The record then reflects: "Thereupon, the sidebar conference was had and the following procedings [sic] were had[;]" peremptories were immediately exercised and there was no reference to the defendant nor any input from or participation by him. (T. 46-49.) At the conclusion of sidebar, the jury was simply announced by the court and sworn. (T. 49.) A statement of a trial court requesting to "see the attorneys sidebar" is not an invitation to a ***party to*** come sidebar, and any party doing so would be risking contempt; this is underscored by the fact that the defendant was in custody before and throughout trial in this cause. (R. 3-5.)

Florida Rule of Criminal Procedure 3.180(a)(4) provides that "the defendant shall be present . . . at the beginning of the trial during the . . . challenging . , . of the jury."

In *Francis v. State,* 413 So. 2d 1 175 (Fla. 1982), 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.

*Id.* at 1 177 (citations omitted).

Trial commenced and jury selection occurred in this case on February 13, 1995 (T. 1, *46-49.)* In *Coney v. State,* 653 So. 2d 1009 (Fla. 1995), which decision was issued on January 5, 1995, over a month before the commencement of trial in this cause,[6] this Court held:

> We conclude that [Rule 3.180(a)(4)] means just what it says: The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised. *See Francis.* Where this is impractical, such as where a bench conference is required, the defendant can waive his 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. Menender,* 244 So. 2d 137 (Fla. 1971). Again, the court must certify the defendant's

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[6] Rehearing in *Coney* was denied on April 27, 1995.

> **approval of the strikes through proper inquiry. Our ruling today clarifying this issue is prospective only.**

***Id.*** **at 1013.**

**Trial occurred in this cause after the issuance of *Coney,* therefore, its holding applies. That is the precise holding of this Court in the recent series of decisions issued to clarify the meaning of the "prospectivity" of *Coney.* In each of those cases, this Court noted that trial had occurred before *Coney issued,* and therefore *Coney* did not apply. *Branch v. State,* 21 Fla. L. Weekly ___, No. 87,717 (Fla. Dec. 12, 1996); *Bowick v. State,* 21 Fla. L. Weekly ___, No. 87,826 (Fla. Dec. *12, 1996); Howard v. State,* 21 Fla. L. Weekly ___, No. 87,856 (Fla. Dec. *12, 1996); Gainer v. State,* Fla. L. Weekly ___, No. 87,720 (Fla. Dec. *12, 1996); Bell v. State,* 21 Fla. L. Weekly ___, *No. 87,716* (Fla. Dec. 12, 1996); *Boyett v. State,* 21 Fla. L. Weekly S535 (Fla. Dec. 5, *1996); State v. Horn,* 21 Fla. L. Weekly S536 (Fla. Dec. 5, 1996); *Lett v. State,* 21 Fla. L. Weekly S536 (Fla. Dec. 5, 1996). "Issuance" clearly refers to the initial release of *Coney,* and properly so.[7]**

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[7] Trial in this case occurred over a month after this Court announced in ***Coney*** that a defendant has the right to be "physically present at the immediate site where pretrial juror challenges are exercised." 653 So. 2d at 1013. Neither a circuit court nor other lower **court was at liberty to disregard this ruling, and it would be a nullification of this Court's** authority to conclude that where a decision is announced, and not materially changed on rehearing (but only indicated to apply after issuance) the lower courts were free to disregard it or were not bound by it in the time between issuance and final rendition, i.e., disposition of a motion for rehearing. That a party has a right to file a motion for rehearing does not (nor should it) confer power upon that party, to actually control, by delaying ultimate rendition, the functional implementation of this Court's decision or the required action to be taken by trial judges in then pending matters. That the fact a party had a right to seek rehearing and exercised such right does not alter the effective date of

While, in ***Coney,*** the error was held harmless because the sidebar therein involved only challenges for cause held to invoke legal issues and did not involve any peremptory challenges, ***id.*** at 1013, that is not the case herein. All peremptory challenges were exercised at sidebar, without the defendant present, participating, agreeing, or knowingly and voluntarily waiving presence or ratifying strikes. (T. 46-49.) Absence of the defendant at this stage is presumptively harmful, which presumption is entirely unrebutted by the record, and reversal is required.

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pronouncement of decision is the precise recognition of this Court's reference in *Boyett* to issuance, rather than rendition, being the determinative date for Coney to apply. Compare, e.g., the definition of "issue" as "[t]o send forth; to emit; to promulgate;" Black's Law Dictionary 830 (6th ed. 1990), *with* "rendition" in Florida Rule of Appellate Procedure 9.020(g) (rendition does not occur until the disposition of any timely filed motion for rehearing). This Court, in *Boyett* and progeny, has properly recognized that Coney applies to trials which were held, as was the instant one, after January 5, 1995, the date of issuance. In each of those cases, this Court stated: "[A] rule of law which is to be given prospective application does not apply to those cases which have been tried before the rule is ***announced,"*** (emphasis added.)

## CONCLUSION

Based on the foregoing, the evidence was insufficient for conviction, and the cause should be reversed and remanded with directions to enter a judgment of acquittal. Alternatively, the judgment and sentence should be reversed, under *Coney v. State,* on the ground of exclusion of the defendant from exercise of peremptories, and the cause remanded for a new trial.

Respectfully submitted,

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By: _____
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Consuelo Maingot, Assistant Attorney General, Office of the Attorney General, 110 Tower, **1 10 SE 6th Street, Tenth Floor, Fort Lauderdale, Florida 33301** , this 23rd day Of December, 1996.

BRUCE A. ROSENTHAL
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,178

DARRYL HENDERSON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

_____/

**APPENDIX**

**PAGE**

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1996

DARRYL HENDERSON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

CASE NO. 95-1421

LOWER TRIBUNAL
CASE NO. 94-30300B

Opinion filed July 31, 1996.

An appeal from the Circuit Court of Dade County, Alex E. Ferrer, Judge.

Bennett H. Brummer, Public Defender, and Bruce A. Rosenthal, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Consuelo Maingot and Paulette R. Taylor, Assistants Attorney General, for appellee.

Before COPE, LEVY, and FLETCHER, JJ.

FLETCHER, Judge.

Defendant Darryl Henderson appeals his conviction for two counts of robbery with a firearm, contending that the trial court

App. A.

erred in (1) denying his motion for judgment of acquittal as, he claims, he unknowingly was the driver of the get-away car; and (2) conducting juror challenges at sidebar without his being present. We reject both contentions and affirm his convictions.

1.

Henderson argues that the trial court erred in not granting his motion for judgment of acquittal as the State's evidence did not prove beyond a reasonable doubt and inconsistent with any reasonable hypothesis of innocence, his intent to participate in the perpetration of the crime. Henderson's position is based on his role in events that made him the driver of the automobile in which he and the two persons who actually committed the robbery fled the crime scene.

While we must agree with Henderson that the State was required to provide evidence inconsistent with any reasonable hypothesis Of innocence, we emphasize that the state was not required to exclude any unreasonable hypothesis. Our review of the facts in this case reveals that Henderson's stated reason for having the two passengers in his car, in light of the evidence, created a legitimate question for the jury to determine.

Specifically, the victims of the robbery were driving to their home, having been out on business. They pulled into their driveway some forty to fifty feet off their street and opened their car doors, at which time two men (one with a firearm) ~~immediately~~

hurried down the driveway and robbed the victims. The two robbers then immediately turned around and, with their booty, ran directly to an older model Cadillac automobile waiting at the end of the driveway, in the street, with the engine running. Arriving at the automobile, the two men opened the doors and got inside. The car then drove off, but not before one of the victims was able to observe Henderson'as the driver.

It should be noted that the testimony reflects that the entire incident took only a few minutes. ("Two minutes," according to defense counsel in his closing argument.) It should also be noted that when the victims drove their vehicle into their driveway, neither Henderson's Cadillac nor Henderson and his passengers were on the scene. Finally, when Henderson was stopped by the police, the explanation he gave was that he was simply driving his two passengers to the Metrorail station (four or five miles distant).

From the foregoing facts, all in evidence, several indisputable inferences follow: (1) The Cadillac, with Henderson and his companions, arrived on the scene almost simultaneously with the victims (as the speed with which the two robbers appeared and then arrived at the victim's car reveals). (2) Henderson's car and passengers were following the victims (as the victims observed neither Henderson's car, nor Henderson and his passengers, through the front window of their car as they arrived and pulled into the driveway). (3) Henderson deliberately stopped and let his

passengers exit at the end of the victims' driveway, making it possible for the robberies to be committed. (4) Henderson's statement that he was only taking his passengers to the Metrorail Station is inconsistent with his having stopped four Or five miles from the station to let his passengers exit the car at the victims' home. (5) The sheer nanosecond timing of the events leaves no room for any explanation but a planned event.

The foregoing facts and inferences are consistent with a reasonable hypothesis of Henderson's guilt. They are inconsistent with any reasonable hypothesis of ignorance on Henderson's part, including Henderson's stated theory of the events, i.e., that he was merely taking his passengers to a Metrorail station. Accordingly, the trial court correctly denied Henderson's motion for judgment of acquittal and allowed the case to go to the jury. State v. Law, 559 So. 2d 187 (Fla. 1989); Toole v. State, 472 SO. 2d 1174 (Fla. 1985): State v. Allen, 335 So. 2d 823 (Fla. 1976). As the Court held in State v. Law:

> "The state is not required to 'rebut conclusively every possible variation' of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events."

559 So.2d at 189 (Footnote and citation omitted).

We have carefully reviewed the cases brought to our attention by Henderson. In Stuckey v. State, 414 So. 2d 1160 (Fla. 3d DCA 1982), this Court noted that the State had failed to present

evidence sufficient to exclude the defendant's explanation of events, whereas such was accomplished here. In A.Y.G. v. State, 414 so. 2d 1158 (Fla. 3d DCA 1982), this Court concluded that evidence of the defendant's presence at the scene and her driving the getaway car at the request of the perpetrator did not refute the reasonable inference that she did not know of the crime until after it was committed. Here, the method of arrival of the perpetrators on the scene, the timing, and the poised getaway car, with Henderson behind the wheel, sufficiently refute a lack of knowledge of what was about to occur and refute lack of the requisite intent. In J.H. v. State, 370 So. 2d 1219 (Fla. 3d DCA 1979), cert. denied, 379 So. 2d 209 (Fla. 1980), the defendant was merely present at the scene and fled on foot after his companion snatched a purse. The defendant volunteered when apprehended that he had done nothing wrong, but that his companion grabbed the purse and they both ran. As there was no other evidence than this, we concluded that the State had not excluded lack of knowledge and thus intent. In Douglas v. State, 214 So. 2d 653 (Fla. 3d DCA 1968), the defendant was a passenger in a car driven by another person, who stopped the vehicle, left the defendant seated in the car, entered a house and robbed the victim. On exiting, the perpetrator asked the defendant to drive, which he did. We concluded that the evidence was insufficient to prove aiding and abetting. The facts here differ substantially as seen. In E.H. v. State, 452 So. 2d 664 (Fla. 3d DCA 1984), the defendant drove

one of the robbers to a bar (the crime scene) and then drove both robbers home afterwards. she subsequently testified (uncontradicted) that she had no previous knowledge of the crime (which this Court noted was corroborated by the fact that she did not attempt to escape).

The facts here are much stronger than those of the cited cases. Here, there are added elements which properly led to the jury's conclusion that Henderson knew exactly what was occurring and that he was an active participant in the robberies, aiding and abetting his passengers as a wheelman. These additional elements are legally sufficient, as were the additional facts in Lincoln v. State, 459 So. 2d 1030 (Fla. 1984), to show knowledge and intent. Although the evidence of Henderson's intent was circumstantial (the jury could not poke around in his gray matter for clues), there was sufficient competent evidence inconsistent with Henderson's theory of events to deny the acquittal motion. It thus became the jury's duty to determine whether the evidence was sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt. This duty the jury carried out.

2.

Henderson's second argument, that the trial court erred in conducting jury challenges at sidebar in the absence of the defendant, is based upon Coney v. State, 653 So. 2d 1009 (Fla.), cert. denied, ___ U.S. - I 116 S.Ct. 315, 133 L.Ed.2d 218 (1995).

Indeed, Conev does require the defendant's presence at sidebar to assist in making peremptory challenges, or his specific waiver of that right, or his ratification of the peremptory strikes. In Henderson's case, we are not certain that the record sufficiently reflects his absence from the sidebar. Assuming, however, that he was absent, we find that Conev is inapplicable as its application is prospective only, 653 So. 2d at 1013, and Henderson's trial took place prior to the effective date of State[1] See Ogden v ____, 658 So.2d 621 (Fla. 3d DCA), rev. denied, 666 So. 2d 144 (Fla. 1995).

Affirmed.

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[1] Conev was pending on rehearing at the time of Henderson's trial. Opinions of appellate courts are not final until the time for rehearing and the disposition thereof, if any, has run. Caldwell v. State, 232 So. 2d 427 (Fla. 1st DCA 1970).

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1996

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| DARRYL HENDERSON, | ** | |
| Appellant, | ** | |
| vs. | ** | CASE NO. 95-1421 |
| THE STATE OF FLORIDA, | ** | LOWER TRIBUNAL CASE NO. 94-30300B |
| Appellee. | ** | |

Opinion filed September 18, 1996.

An appeal from the Circuit Court of Dade County, Alex E. Ferrer, Judge.

Bennett H. Brummer, Public Defender, and Bruce A. Rosenthal, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Consuelo Maingot and Paulette R. Taylor, Assistants Attorney General, for appellee.

Before COPE, LEVY, and FLETCHER, JJ.

ON MOTION FOR CERTIFICATION

PER CURIAM.

On motion of the appellant, we certify that the opinion issued in this case on July 31, 1996 passes upon a question of great public importance so as to permit further review by the Supreme

App. B

Court of Florida. Fla.R.App.P. 9.030(a)(2)(A)(v). We certify the following question to the Florida Supreme 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 CASES IN WHICH THE JURY SELECTION PROCESS TOOK PLACE AND THE ENTIRE TRIAL CONCLUDED DURING THE PERIOD OF TIME AFTER THE ISSUANCE OF THE CONEY OPINION BUT PRIOR TO THE TIME THAT CONEY BECAME FINAL BY THE DISPOSITION OF ALL MOTIONS FOR REHEARING DIRECTED TO THAT OPINION?

tiff's statutorily-authorized query, "How much of the defendant's money do you hold," with, "We arc not going to tell you," and must pay the consequences for this recalcitrance. Otherwise, the sanction of default would be reduced to a nullity in a garnishment proceeding.

Our liberal standards for setting aside defaults upon a proper showing of diligence, excusable neglect, and a meritorious defense recognize the strong policy favoring trial on the merits and the severity of a default, where defenses on the merits are precluded. *See, e.g., Cinkat Transp., Inc. v. Maryland* Casualty Co., 596 So.2d 746 (Fla. 3d DCA 1992); *Espinosa v. Racki,* 324 So.2d 105 (Fla. 3d DCA 1975). The bank's failure to offer any record evidence of excusable neglect, due to either misfeasance of counsel or the unavailability of such evidence, is unfathomable. We should not, however, allow the unfortunate results of this failure to color our interpretation of the consequences of a default in a garnishment proceeding. In the same way that a defendant is less likely to be cavalier in its reaction to a personal injury suit claiming permanent brain damage than to one claiming a hangnail injury, a garnishee presumably would react more conscientiously to a writ indicating a judgment debt of ten million than to one claiming ten dollars. Here, for whatever reason, the bank has flouted a $36,576 garnishment claim and now should pay.[12]


**Darryl HENDERSON, Appellant,**

**v.**

The **STATE of Florida, Appellee.**

**No. 95-1421.**

District Court of Appeal of Florida, Third District.

July 31, 1996.

Opinion Certifying Question Sept. 18, 1996.

Defendant was convicted in the Circuit Court, Dade County, Alex E. Ferrer, J., of robbery with firearm and defendant appealed. The District Court of Appeal, Fletcher, J., held that: (1) evidence was inconsistent with any reasonable hypothesis of defendant's innocence, and (2) decision of *Coney v. State* was prospective and, thus, did not apply to defendant's trial.

Affirmed.

12. This result is consistent with the rationale of section 77.081 which makes the defaulting garnishee liable for the full amount of the plaintiffs claim with interest and costs, True, it is nowhere explicitly stated that section 77.081, which was part of the formerly separate prejudgment interest provisions, is Intended to now apply to postjudgment garnishment as well. However, I agree with the cited holdings of the First, Second. and Fourth District Courts of Appeal that section 77.081 applies to postjudgment garnishments. I disagree with the court's assertion that this provision is in any Way inconsistent with subsection 77.06(1). Subsection 77.06(1) makes the garnishee liable to the plaintiff for the assets of the garnishment defendant, whatever amount they may be, upon service of the writ. The garnishee's subsequent answer would address the specific amount of-assets. The garnishee's refusal to answer compels the conclusion under subsection 77.081(2) that the garnishee holds sufficient assets to cover the full amount of the plaintiffs judgment plus interest and costs.

In the case of prejudgment garnishment, the legislature, with section 77.08 1, had enacted a provision which could, in the case of default, require a prejudgment garnishee bank to pay 100 times or more than the amount the defendant had on deposit. There is no basis for the court's reasoning that similar consequences could not be intended to also apply to the postjudgment garnishee merely because of their magnitude or severity. The courts of several other states have similarly recognized statutory provisions that impose full judgment-debt liability on the defaulting postjudgment garnishee. See, e.g., In *re Pioneer Oil & Gas* Co., 333 F.Supp. 1055, 1058 (E.D.La. 1971); *Aluminum Co. of* America *v. Higgins, 5* Ark.App. 296, 635 S.W.2d 290, 291 (1982); *Barnett Home Appliance Corp. v. Guidry, 224* So.2d 134. 136 (La.Ct.App.), *writ refused,* 254 La. 795, 226 So.2d 922 (1969); *Conejos* County Lumber *Co. v. Citizens Savings & Loan Ass'n, 80* N.M. 612. 459 P.2d 138, 140 (1969); *Bianco v. Pullo,* 195 Pa.Super. 623; 171 A.2d 620, ,626 (1961).

App. C

1. Robbery ⇐24.20

Evidence that victims drove into driveway, that two men immediately hurried after them, robbed victims and ran directly back to automobile which was waiting with engine running, and that defendant who was driving automobile immediately took off was inconsistent with any reasonable hypothesis of defendant's innocence despite defendant's claim that he did not knowingly participate in robbery but was merely driving his friends to train station which was few miles down road.

2. Criminal Law ⇐753.2(3.1)

Although state must provide evidence inconsistent with any reasonable hypothesis of innocence in order to submit case to jury, state is not required to exclude any unreasonable hypothesis.

3. Courts ⇐100(1)

Decision of *Coney v. State* which requires defendant's presence at sidebar to assist in making peremptory challenges, or his waiver of that right, or his ratification of peremptory strikes was inapplicable to defendant's trial which took place after Coney 's effective date as *Coney* decision applied only prospectively.

4. Courts ⇐107

Opinions of. appellate courts are not final until time for rehearing and disposition thereof, if any, has run.

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Bennett H. Brutnmer, Public Defender, and Bruce A Rosenthal, Assistant Public Defender, for appellant.

Robert A Butterworth, Attorney General, and Consuelo Maingot and Paulette R. Taylor, Assistant Attorneys General, for- appellee.

Before COPE, LEVY and FLETCHER, JJ.

FLETCHER, Judge.

Defendant Darryl Henderson appeals his conviction for two counts of robbery with a firearm, contending that the trial court erred in (1) denying his -motion.- for judgment of acquittal as, he claims, he unknowingly was the driver of the get-away car; and (2) conducting juror challenges at sidebar without his being present. We reject hoth contentions and affirm his convictions.

I.

[1] Henderson argues that the trial court erred in not granting his motion for judgment of acquittal as the State's evidence did not prove beyond a reasonable doubt and inconsistent with any reasonable hypothesis of innocence, his intent to participate in the perpetration of the crime. Henderson's position is based on his role in events that made him the driver of the automobile in which he and the two persons who actually committed the robbery fled the crime scene.

[2] While we must agree with Henderson that the State was required to provide evidence inconsistent with any reasonable hypothesis of innocence, we emphasize that the State was not required to exclude any *unreasonable* hypothesis. Our review of the facts in this case reveals that Henderson's stated reason for having the two passengers in his car, in *light* of *the evidence,* created a legitimate question for the jury to determine.

Specifically, the victims of the robbery were driving to their home, having been out on business. They pulled into their driveway some forty to fifty feet off their street and opened their car doors, at -which time two men (one with a firearm) *immediately* hurried down the driveway and robbed the victims. The two robbers then immediately turned around and, with their booty, ran directly to an, older model Cadillac automobile waiting at the end of the driveway, in the street, with the engine running. Arriving at the automobile, the two men opened the doors and got inside. The car then drove off, but not before one of the victims was able to observe Henderson as the driver.

It should be noted that -the testimony reflects that the entire incident took only a few minutes. ("Two minutes," according to defense counsel in his closing argument.) It should also be noted that when the victims drove their vehicle into their driveway, neither Henderson's Cadillac nor. Henderson and his passengers were on the scene. Finally, when Henderson was stopped by the

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police, the explanation he gave was that he was simply driving his two passengers to the Metrorail station (four or five miles distant).

From the foregoing facts, all in evidence, several indisputable inferences follow: (1) The Cadillac, with Henderson and his companions, arrived on the scene almost simultaneously with the victims (as the speed with which the two robbers appeared and then arrived at the victim's car reveals). (2) Henderson's car and passengers were following the victims (as the victims observed neither Henderson's car, nor Henderson and his passengers, through the front window of their car as they arrived and pulled into the driveway). (3) Henderson deliberately stopped and let his passengers exit at the end of the victims' driveway, making it possible. for the robberies to be committed. (4) Henderson's statement that he was only taking his passengers to the Metrorail station is inconsistent with his having stopped four or five miles from the station to let his passengers exit the car at the victims' home. (5) The sheer nanosecond timing of the events leaves no room for any explanation but a planned event.

The foregoing facts and inferences axe consistent with a reasonable hypothesis of Henderson's guilt. They are inconsistent with any reasonable hypothesis of ignorance on Henderson's part, including Henderson's stated theory of the events, i.e., that he was merely taking his passengers to a Metrorail station. Accordingly, the trial court correctly denied Henderson's motion for judgment of acquittal and allowed the case to go to the jury. *State* v. *Law*, 559 So.2d 187 (Fla.1989); *Toole v. State*, 472 So.2d 1174 (Fla.1985); *State v. Allen*, 335 So.2d 823 (Fla.1976). As the Court held in *State v. Law*:

> "The state is not required to 'rebut conclusively every possible variation' of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events."

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These additional elements are legally sufficient, as were the additional facts in *Lincoln v. State*, 459 So.2d 1030 (Fla.1984), to show knowledge and intent. Although the evidence of' Henderson's intent was circumstantial (the jury could not poke around in his gray matter for clues), there was sufficient competent evidence inconsistent with Henderson's theory of events to deny the acquittal motion. It thus became the jury's duty to determine whether the evidence was sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt. This duty the jury carried out.

2.

[3, 4] Henderson's second argument, that the trial court erred in conducting jury challenges at sidebar in the absence of the defendant, is based upon *Coney* v. *State*, 653 So.2d 1009 (Fla.), cert. *denied*, — U.S. —, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995). Indeed, *Coney* does require the defendant's presence at sidebar to assist in making peremptory challenges, or his specific waiver of that right, or his ratification of the peremptory strikes. In Henderson's case, we are not certain that the record sufficiently reflects his absence from the sidebar. Assuming, however, that he was absent, we find that Coney is inapplicable as its application is prospective only, 653 So.2d at 1013, and Henderson's trial took place prior to the effective date of *Coney*.[1] See Ogden *v.* State, 658 So.2d 621 (Fla. 3d DCA), *rev.* denied, 666 So.2d 144 (Fla.1995).

Afflrmed.

## *ON MOTION FOR CERTIFICATION*

P E R CURIAM. ,

On motion of the appellant, we certify that the opinion issued in this case on July 31, 1996 passes upon a question of great public importance so as to permit further review by the Supreme Court of Florida. Fla.R.App.P. 9.030(a)(2)(A)(v). We certify the following question to the Florida Supreme 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 CASES IN WHICH THE JURY SELECTION PROCESS TOOK PLACE AND THE ENTIRE TRIAL CONCLUDED DURING THE PERIOD OF TIME AFTER THE ISSUANCE OF THE *CONEY* OPINION BUT PRIOR TO THE TIME THAT CONEY BECAME FINAL BY THE DISPOSITION OF ALL MOTIONS FOR REHEARING DIRECTED TO THAT OPINION?

1. *Coney* was pending on rehearing at the time of Henderson's trial. Opinions of appellate courts are not final until the time for rehearing and the disposition thereof, if any, has run. *Caldwell v. State*, 232 So.2d 427 (Fla. 1st DCA 1970).


**The STATE of Florida, Petitioner,**

v.

**Eduardo RIVAS–MARMOL, Respondent.**

**No. 96-385.**

District Court of Appeal of Florida, Third District.

July 31, 1996.

Rehearing Denied Oct. 9, 1996.

Appeal was taken from county court order suppressing introduction of chemical breath test results into evidence in driving under influence (DUI) criminal prosecution. The Circuit Court, Dade County;. Judith L. Kreeger and Victoria Platzer, JJ., affirmed. State sought certiorari review. The District Court of Appeal, Fletcher, J., held that test results were admissible, given that police officer administered test after making lawful arrest.

writ issued.

Cope, J., dissented with opinion.

**Automobiles** ⇨1 1

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Before COPE, I
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FLETCHER, J

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