087

FILED
SID J. WHITE
MAR 12 1997
CLERK, SUPREME COURT
By_______________
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JAMES D. GANYARD,

Petitioner,

v.

CASE NO. 89,759

STATE OF FLORIDA,

Respondent.

# RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS . . . . . . . . . . . . . . . . . . . . . . . . . . i

TABLE OF CITATIONS . . . . . . . . . . . . . . . . . . . . . . . . . ii

PRELIMINARY STATEMENT . . . . . . . . . . . . . . . . . . . . . . . 1

STATEMENT OF THE CASE AND FACTS . . . . . . . . . . . . . . . . . . 1

SUMMARY OF ARGUMENT . . . . . . . . . . . . . . . . . . . . . . . . 4

ARGUMENT . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 6

ISSUE I

DOES CONEY V. STATE, 653 SO. 2D 1009 (FLA.) CERT. DENIED, ___ U.S. ___, 116 S. CT. 315, 133 L. ED.2D 218 (1995), PROVIDE A BASIS FOR REVERSAL OF A CONVICTION WHEN THE DEFENDANT'S COUNSEL EXERCISED NO PEREMPTORY CHALLENGES? (CERTIFIED QUESTION) . . . . . . . . . . . . . . . . . . . . . . . . . 6

ISSUE II

SHOULD THIS COURT ADDRESS AN ISSUE WHICH THE DISTRICT COURT DECLINED TO ADDRESS AND AFFIRMED WITHOUT COMMENT? (RESTATED) . . . . . . . . . . . . . . . . . . . . . . . . . . 9

CONCLUSION . . . . . . . . . . . . . . . . . . . . . . . . . . . . 11

CERTIFICATE OF SERVICE . . . . . . . . . . . . . . . . . . . . . . 12

## TABLE OF CITATIONS


CASES PAGE(S)

Amendments to Florida Rule of Criminal Procedure 3.190, 21 Fla. L. Weekly S518 (Fla. 27 November 1996) . . . . . . . . . . . . . . . . . 4,6,7

Bovett v. State, 21 Fla. L. Weekly S535 (Fla. December 5, 1996) . . . . . . . . . . . . . . . . . 4,6,7

Butler v, State, 21 Fla. L. Weekly D1498 (Fla. 1st DCA 27 June 1996) . . . . . . . . . . . . . . . . . 8

Conev v. State, 653 So. 2d 1009 (Fla.) cert. denied, U.S. , 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995) . . . . . . . . . . . . . . . . . passim

Cosbv v. State, 297 so. 2d 617 (Fla.1st DCA 1974) . . . . . . . . . . . . . 6

Evans v. St. Reuis Paper Co., 287 So. 2d 296 (Fla.1973) . . . . . . . . . . . . . . . . 6

Francis v. State, 413 so. 2d 1175 (Fla. 1982) . . . . . . . . . . . . . . . 4,7

Lee v. State, 21 Fla. L. Weekly S541a (Fla. 12 December 1996) . . . . . . . . . . . . . . . . . . 4,6,7

Lowe v. Price, 437 So. 2d 142 (Fla. 1983) . . . . . . . . . . . . . . . . . . . . 7

Meiia v. State, 21 Fla. L. Weekly D1355 (Fla. 1st DCA 13 June 1996), rev. pending, case no. 88,568 . . . . . . . . . . . . . . . 8

Paqe v. State, 22 Fla. L. Weekly S22a (Fla. 19 December 1996) . . . . . . . . . . . . . . . . . 4,6,7

Wheeler v. State, 344 So. 2d 244 (Fla. 1977), cert. denied, 440 U.S. 924, 99 S. Ct. 1254, 59 L. Ed. 2d 478 (1979) . . . . . . . . . . . . . . . . . . 6

Williams v. Wainwriaht,
325 So. 2d 485 (Fla.4th DCA 1975) . . . . . . . . . . . . . . 6

Vann v. State,
22 Fla. L. Weekly D168
(Fla. 1st DCA 6 January 1997) . . . . . . . . . . . . . , . . 8

## PRELIMINARY STATEMENT

Respondent State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referred to as Respondent, the prosecution, or the State. Petitioner, JAMES D. GANYARD, the Appellant in the DCA and the defendant in the trial court, will be referred to as Petitioner or by proper name.

Emphasis through bold lettering is supplied by the state unless otherwise indicated.

## STATEMENT OF THE CASE AND FACTS

Petitioner's lengthy statement of the facts is not relevant to the certified question and thus potentially misdirects the court and the parties from their task. The state supplies the following.

Jury selection took place on 27 March 1995. Unnumbered volume, TR1-59. Respondent/defendant was present in the courtroom and represented by counsel. TR23. There is no indication in the transcript that either counsel or respondent/defendant ever left the courtroom during the jury selection or that any proceedings were conducting outside defendant's presence in the courtroom. TR1-59. At a bench conference following voir dire, the parties were permitted to alternatively challenge or strike jurors, or accept the jury as tendered. The state proceeded first and alternatively struck six venire members. Each time, the defendant

accepted or tendered the jury without challenge or strike. TR55-57.

At trial, a bench conference was held at which defense counsel asked the prosecutor to "talk quieter, please." He did so without objection. Vol. 2 of 4, TR92.

During closing argument, defense counsel argued that the victim had brought the sexual battery charges because she was a social snob who did not wish it known that "in a moment of lust" she had engaged in sexual intercourse with a social inferior. Vol. 3 of 4, TR204. Further, that the victim had delayed reporting the sexual battery because of her uncertainty on whether she had consented to the sexual intercourse. TR204-205.

In response, the prosecutor argued that sexual battery is the most under reported crime in the United States; that crime victims think nothing of reporting thefts and other similar crimes but hesitate to report sexual crimes involving bodily penetration. TR209-212. Defense counsel objected that this was a "golden rule" argument and moved for a mistrial. The trial court ruled that the phraseology used was not a conscious effort to argue golden rule to the members of the jury but was a generic reference to the reluctance of victims to report sexual batteries. Accordingly, the trial court cured the reference with an instruction. TR209-211. The prosecutor resumed the argument with a more careful choice of words which did not evoke an objection. TR211-212.

Subsequently, the prosecutor argued to the jury that the sentence to be imposed, if a conviction was returned, was up to the trial court which could take into consideration the factors heard during the guilt phase and others not heard. Defense counsel objected and moved for a mistrial. The trial court heard argument and denied the objection. TR220-221.

## SUMMARY OF ARGUMENT

This Court has receded from the holding in Conev v. State, 653 SO* 2d 1009 (Fla. 1995) that a defendant was not present in the court room because he was not at the bench during conferences on the exercise of peremptory challenges. Bovett, Lee, Page, and Amendments, supra. The certified question is not of great public importance because it is grounded on a procedural rule of law which has been overruled. Indeed, it is purely hypothetical in that it addresses what would happen if a non-error was treated as an error and if that non-error was then followed by another non-error.

This Court should decline to answer the certified question and make it clear to all that the so-called Coney issue has been superseded by this Court's recession from Coney; there is no error if a defendant is present in the courtroom and is represented by counsel unless a trial court affirmatively prohibits the participation of the defendant in jury challenges as in Francis v. State, 413 so. 2d 1175 (Fla. 1982).

If the Court nevertheless wishes to address the hypothetical question, it should answer no. Petitioner does not allege that any juror who served was anything less than impartial. There is no constitutional requirement that a defendant exercise peremptory challenges. It is not per se error to accept a jury as tendered when both defendant and counsel are present in the courtroom. There is no fundamental error if nothing happens during a jury selection bench conference.

Petitioner also asks the Court to function as an error review court by addressing an argument which the district court found so unpersuasive as to affirm without comment, i.e., by the equivalent of a per curiam affirmance. If the Court does address the per curiam affirmance, it should affirm the conviction and sentence and hold that neither the trial court nor the district court erred.

## ARGUMENT

## ISSUE I

**DOES CONEY V. STATE, 653 SO. 2D 1009 (FLA.) CERT. DENIED, ___ U.S. ___ 116 S. CT. 315, 133 L. ED.2D 218 (1995), PROVIDE A BASIS-& REVERSAL OF A CONVICTION WHEN THE DEFENDANT'S COUNSEL EXERCISED NO PEREMPTORY CHALLENGES? (CERTIFIED QUESTION)**

The district court decision below issued on 30 December 1996. The state pointed out in a petition for rehearing and clarification that this Court had recently receded from the definition of "presence" on which the certified question was based. Bovett v. State, 21 Fla. L. Weekly 5535 (Fla. December 5, 1996) and Amendments to the Florida Rules of Criminal Procedure; Amendments to Florida Rule of Criminal Procedure 3.190, 21 Fla. L. Weekly S518 (Fla. 27 November 1996)[1]. The state urged the court to withdraw its certified question but the district court declined to do so without further comment.

Except under special circumstances, as when a new procedural rule is announced as prospective only, it is hornbook law that the:

> "decisional law in effect at the time an appeal is decided governs the issues raised on appeal, even where there has been a change of law since the time of trial. Evans v. St. Regis Paper Co., 287 So.2d 296 (Fla.1973); Williams v. Wainwright, 325 So.2d 485 (Fla.4th DCA 1975); Cosby v. State, 297 So.2d 617 (Fla.1st DCA 1974)." Wheeler v. State, 344 So.2d 244 (Fla.1977),

---

[1] See, also, Lee v. State, 21 Fla. L. Weekly S541a (Fla. 12 December 1996) and Page v. State, 22 Fla. L. Weekly S22a (Fla. 19 December 1996) to the same end.

cert. denied, **440 U.S. 924, 99** S.Ct. 1254, 59 L.Ed.2d 478 (1979).

The decision in Lowe v. Price, 437 So. 2d 142 (Fla. 1983) is particularly instructive because, as here, it involves the adoption of a procedural rule subsequent to trial. In Lowe, this Court adopted a speedy trial rule subsequent to Lowe's prosecution which, if followed, had the effect of upholding a trial court order denying Lowe's motion for discharge on speedy trial grounds which had been issued prior to the new rule. Applying the principle that decisional law or ru es in effect at the time of appeal control even though there has been a change since trial, this Court ruled against Lowe on the authority of the new rule.

Lowe in on-point. In Coney, this court created a new rule which defined presence during bench bar jury selection conferences as being physically standing at the bench bar and not merely in the trial court. However, on reexamination, this Court has explicitly receded from, and superseded the Coney rule of presence by holding that presence in the courtroom itself satisfies the right to be present. Bovett, Lee, Paae and Amendments. Thus, since early December 1996, the decisional law of the state has overruled Coney in relevant part by holding that it is not error if defendants are physically present **in the courtroom** during jury challenges provided they are represented by counsel and are not prohibited from being at bench bar conferences. Francis v. State, 413 So. 2d 1175 (Fla. 1982).

Thus, under the decisional law controlling this case on appeal, there is no error on which to base the certified question.

The Court should decline to answer the question but, instead, should point out that the Coney rule has been entirely superseded both prospectively and retroactively. The judicial system has already been burdened with needless litigation on this subject, including reversals for retrials where no error had occurred. Meiia v. State, 21 Fla. L. Weekly D1355 (Fla. 1st DCA 13 June 1996), rev. pending, case no. 88,568; Butler v. State, 21 Fla. L. Weekly D1498 (Fla. 1st DCA 27 June 1996); and Vann v. State, 22 Fla. L. Weekly D168 (Fla. 1st DCA 6 January 1997). This pointless litigation should cease forthwith*.

Arguendo, if the Court addresses the certified question, it should be answered no. There is nothing in this transcript even remotely suggesting that petitioner was denied the right to be present at bench bar, or that he or his counsel were not permitted to fully consult with each other, or that either objected in any way to the jury selection process. Petitioner/defendant accepted the jury from the outset of the bench conference and never deviated from that decision. There is no case law holding that an appellant must personally conduct the jury selection process.

---

[2]Shepardizing Coney shows that there have been scores of appellate cases addressing the issue including many which were certified to this Court for review because some of the district courts apparently have difficulty accepting that a new procedural rule should be prospective only as this Court flatly stated in Coney.

The state suggests that there is no rational reason why a decision which has been overruled, Coney, should be retroactively expanded beyond its original bounds to become fundamental error for a window of time which has already expired. This certified question is more akin to an autopsy than an appellate review of a question of great public importance.

## ISSUE II

**SHOULD THIS COURT ADDRESS AN ISSUE WHICH THE DISTRICT COURT DECLINED TO ADDRESS AND AFFIRMED WITHOUT COMMENT?**

Petitioner argued below that the prosecutor violated the golden rule by urging the jury to place itself in the position of the victim[3]. The district court declined to address this unpersuasive issue and simply denied it out-of-hand without comment. Thus, on the basis of a certified question which is itself purely hypothetical, petitioner asks this Court to transform itself into an error correction court and to review the actions of the trial court in denying the motion for mistrial and giving instead a curative instruction. The state urges the Court to simply decline to address this argument.

---

[3]Petitioner also argues that there was error in the exchange at volume 2 of 4, TR92, where the defense counsel asked the prosecutor to "talk quieter, please" and the prosecutor did so without further objection. The state is unable to comprehend how the trial court can be said to have erred in the absence of any contemporaneous objection from petitioner/defendant or how petitioner can cloud appellate review with an unsupported assertion that the jury heard the exchange.

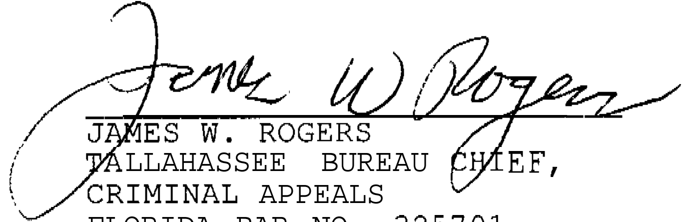
Arguendo, if the Court does address the argument, it should be rejected. It is readily apparent from the transcript that the prosecutor did not make a true golden rule argument but simply responded to the arguments of the defense counsel attacking the credibility of the victim in not immediately reporting the sexual battery. There are many reasons why victims of sexual battery hesitate before reporting such crimes and the state was entitled to point those out to the jury in response to petitioner's argument that the victim's report here was not credible. The trial court handled the matter correctly, as the district court concluded. There is no basis for finding reversible error.

## CONCLUSION

This Court should approve the decision below and decline to address the certified question. The Court should make it clear in so declining that there is no longer a Coney issue, either prospectively or retroactively. If addressed, the question should be answered no.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



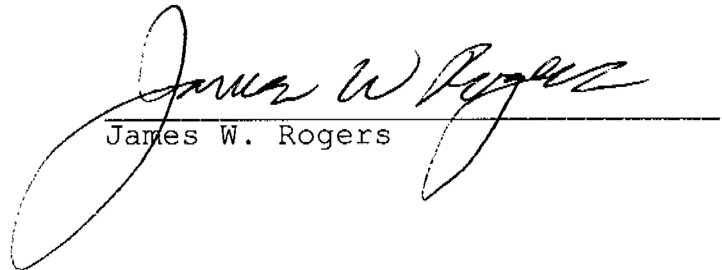
JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) **488-0600**

COUNSEL FOR RESPONDENT
[AGO# L97-1-2043]

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Charles Raymond Dix, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 12th day of March, 1997.



James W. Rogers

[A:\GAYNARBA.WPD --- 3/12/97,2:21 pm]