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IN THE SUPREME COURT OF FLORIDA

JAMES D. GANYARD,

Petitioner,

v.

CASE NO. 89,759

STATE OF FLORIDA,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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I. PRELIMINARY STATEMENT

This appeal is taken from a jury trial in the Second Judicial Circuit, in and for Leon County Florida, held before Judge Lewis Hall, Jr., Tuesday, March 28, 1995. James Ganyard was referred to as "appellant" or "defendant" in the initial appeal briefs, and shall be referred to by name or as "petitioner" here. The State of Florida shall be referred to as the "respondent" or as "the state."

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

"R.___ - Record on Direct Appeal to this Court. Pagination in the lower right hand corner.

"T.__" - Transcript of proceedings, Vol. I and II, the trial. Pagination in upper right hand corner.

"S___" - Transcript of the Sentencing held April 20, 1995. Pagination in the lower right hand corner, consecutive to that of the "Record.".

"J.___" - Transcript of Jury Selection held March 27, 1995 (Supplement).

"O.___"- Opinion of the First District Court of Appeal.

"IB.__" - Petitioner's First District Court of Appeal initial brief.

"SB.__" - State's First District Court of Appeal answer brief.

"AR.__" - Petitioner's Reply First District Court of Appeal reply brief.

All other citations will be self-explanatory or will otherwise be explained.

IIa. STATEMENT OF THE CASE

Charges

Petitioner, James D. Ganyard, was charged by indictment with sexual battery, victim physically helpless, on September 13, 1994. The indictment alleges that on April 9, 1994, the appellant committed sexual battery upon a person 'twelve years of age or older, by vaginal penetration or oral union with her sexual organ, without the victim's consent, while the victim was physically helpless to resist." (R.1-2, 45). The arrest warrant was filed September 15, 1995, with bond set at $1,000.00. (R.3).

Jury selection

Jury selection takes 55 pages of transcript, with less than 3 additional pages dedicated to the actual selection at the bench. (J.55-57).

Trial

Trial was held and the jury returned a verdict of guilty as charged. (R.17). A motion for new trial was filed alleging a violation of the 'Golden Rule" by the prosecution and further error in not allowing the appellant to inquire into the victim's past sexual history. (R.23-24). The state responded. (R.25-28). Denied. (S.68)

Sentencing

The sentencing score sheet indicates that the appellant has no prior convictions, and received a score of 131 for this crime alone. (R.29-31, 46-48). The Defense noted that Mr. Ganyard was 25 years old, had absolutely no criminal history, and his

employer indicated he was an excellent worker and a very dependable person. (S.69).

Mr. Ganyard was adjudicated guilty, (R.32, S.85), and sentenced to prison for 8 ½ years, to be followed by probation of 15 years. (R.35, 39, 47, S.85). Additionally, the court classified Mr. Eanyard as "sexual predator." (R.37, 42, S.85).

Appeal was filed, (R.49), with the judicial acts to be reviewed including overruling of various objections and denial of the motion for new trial. (R.51). The public defender was appointed, (R.60), the appeal lost, and this petition follows.

IIb. FACTS OF THE CASE

Generally

This case revolves around an incident which occurred one night after a college party. Mr. Ganyard, the petitioner, was employed as a security guard at High Point in Tallahassee, which was also the residence of the victim and her roommate, Mr. Sergio Llach.

The following is uncontested: In the early morning hours of April 9, 1994, the victim, Mr. Ganyard and others had shared a hot tub and drank alcoholic beverages. (T.27-40). When it was finally time to retire, the petitioner was invited to stay, (T.62, 139, 169), at the apartment of the victim and Mr. Llach because he appeared too intoxicated to drive home. The victim gave Mr. Ganyard a blanket and pillows and made a bed for him on a couch, (T.121, 140), in the common area of the apartment, and then she went to her room. (T.122, 140).

Sometime later, during the early morning daylight hours, Mr. Ganyard committed cunnilingus on the victim while she was in her bed naked, (T.123), and he was fully clothed. (T.126). Neither Ms. Beeker, the guest in the third bedroom, nor house mate Llach, nor Llach's girlfriend who was staying with him, were awakened by the incident. (T.70).

Mr. Ganyard admits commiting the act, (T.173), but testified that it was consensual.

The questions addressed at trial were, 1) was the act consensual and, 2) was the victim asleep or physically helpless at the time.

Testimony of the victim

The night before the incident the victim and some girl-friends went to "a bar called Club Park Avenue" in downtown Tallahassee, (T.107), and were intoxicated when they left the bar at 2 am. (T.108). She continued to drink after she arrived home. (T.112-113).

Later in the early morning hours, she, Mr. Ganyard and four or five other persons went to the hot tub. (T. 113). She does not recall drinking at the hot tub. (T.114).

The victim lived in an apartment with two men, (T.117), and always closed her bedroom door for privacy. (T.117-118). This particular night she was intoxicated and very tired. (T.118). After making a bed for Mr. Ganyard on the couch, she went to bed, closing her door behind her. (T.122, 123). She did not invite him into her bedroom when they got to the apartment. (T.119).

The victim describes herself at that time as "Very much tired, somewhat still intoxicated, just very worn out from the whole night, the day, and the hot tub really drained." (T.122).

The victim slept in the nude, (T.123), and testified that she felt something happening before she was fully awake. (T.123-124). She did not know who was in bed with her, however, she saw the top of Mr. Ganyard's head between her legs, and could feel his tongue inside her vagina. (T.124).

While she did not call out because she was 'frozen with fear," (T.143), she immediately pulled the blankets around herself and pushed him away, telling him to stop. (T.125). She told him to leave her alone, and Mr. Ganyard who was fully dressed,

(T.174), said he was sorry, but kept kissing her on the back of the neck and shoulders and trying to pull her over to him. (T.126). She testified that he left when she threatened to go to Mr. Llach's room. (T.127).

The victim testified that she never had a man spend the night in her bedroom while she was living with Mr. Llach, (T.117), and she never had consensual sex with the petitioner, James Ganyard. (T.111, 136, 151).

Much of the victim's testimony concerned the impact this incident has had upon her life.

Testimony of the petitioner

James Ganyard testified in his own behalf that Mr. Llach had invited him to come by the party on the night in question and he arrived around 12:30 am, early Saturday morning. (T.162-163). Later in the evening the victim suggested he borrow shorts from Mr. Llach so that he could join the group in the hot tub. (T.165-166). Mr. Llach invited Mr. Ganyard to stay and the victim concurred and got the pillow and blanket for him. (T.169). She soon went to bed but Mr. Ganyard and Mr. Llach talked for a while before Mr. Llach went to bed. (T.170).

Mr. Ganyard testified that he had used the guest restroom and upon leaving noticed the victim's door open 4 to 6 inches and could hear music coming out of her room. (T.170-171). Wondering if she was still awake, he knocked on her door and asked -- she responded yes, that she was awake, but no she did not want company, and she was going to sleep. (T.171).

Mr. Ganyard went back out to the couch, but was unable to sleep and returned to the victim's door, tapped again, she answered, he went in, sat on the foot of the bed and asked if he could rub her back, to which he indicates she said yes, for a little while. (T.171). He continued rubbing, moving to her legs and up one thigh -- she was completely conscious and knew exactly what was happening. (T.172). He further testified that she physically responding to what he was doing, and when he kissed the back of her thigh she rolled over from her stomach to her back -- which is when he found out she was naked. (T.172).

Additionally, when the victim rolled over, it had placed her vagina "right in front of (his) face..." and with that response he 'assumed it was an invitation or an offer." Mr. Ganyard responded by having oral sex with her. (T.173).

Finally, Mr. Ganyard testified that he did not think the victim was dreaming by her responses, including moaning, giggling, pulling his head harder against her, **and** in his opinion, achieving orgasm. (T.173).

After reaching what Mr. Ganyard believed was a climax, the victim rolled over with her back to him, and no longer responded. (T.174-175). He asked what was wrong, she said nothing, and indicated she wanted to stop -- to go no further. (T.175). Mr. Ganyard testified that he was no longer kissing her, that he stopped and asked if he should go home, to which she sat up and said no. (T.175). He further testified that she suggested he go back out to the couch, and asked him not to tell Mr. Llach about

what had occurred. (T.176). He left the apartment at noon that day. (T.177).

Mr. Ganyard testified that he believed the victim 'was a completely consensual participant," that "she was not sound asleep," that she had not passed out from alcohol consumption, (T.180), and that from her actions he believed she was consenting. (T.193-194). He did not specifically ask her permission to have oral sex with her, and admits that she never specifically granted permission. (T.187).

Mr. Ganyard recounted what he took to be a suggestive remark from the victim: "She was standing there ... wearing only a towel when she handed me the blanket and said, if there's anything else you need, just come and ask me." (T.191). However, it is noted that his answer to a compound question asked by the state, could be taken as he did not mind performing a sex act on her while she was asleep. (T.192-193).

OTHER TESTIMONY PRESENTED

Mr. Llach

Mr. Llach instigated the party the night before, (T.27-28), and invited Mr. Ganyard, (T.31-32), with whom he was on a first name basis, (T.57), to drop by, (T.31-32), though he did not normally socialize with Mr. Ganyard. (T.32). The victim arrived around 2 am as the party was winding down, (T.34), and as she indicated, only 15 or 20 people were left. (T.109). Around 3 am, Mr. Ganyard arrived, was loaned a swimsuit by Llach, (T.38), and went with the victim and another person to the Jacuzzi. (T.36). The victim "was drunk that night after she got back and they were

drinking down by the Jacuzzi, but that's fairly normal." (T.40, 133). Llach indicated that she could walk and was not near blackout, describing her condition as 'just a party intoxication." (T.40).

It took Mr. Llach a while to convince the victim to leave the hot tub at 6 am, (T.60), despite problems with an unknown obnoxious drunk. (T.59-60). The victim and Mr. Llach were accompanied back to their apartment by Mr. Ganyard and since Mr. Ganyard appeared intoxicated, (T.41), Mr. Llach invited him to stay at the apartment, (T.62) and either Mr. Llach or the victim made a bed for him on the couch. (T.43).

The victim had gone to bed, (T.44), and Mr. Llach indicated that she and he always close their respective bedroom doors, he did not recall if she closed the hall or bedroom doors that morning. (T.44-45, 65-66) .

Police

The state presented an officer who collected the linens from the apartment and found what was stipulated as Mr. Ganyard's watch in the victim's bed sheets. (T.84-85). Those linens were then turned over to Ms. Walburn, an investigator who testified that she examined them for evidence. (T.94). She also said that Mr. Ganyard had told her that the victim **had** asked him not to tell her house-mate that it had happened. (T.95). She indicated that Mr. Ganyard had fully cooperated with her, even prior to his arrest. (T.97).

III. SUMMARY OF THE ARGUMENT

The trial court erred reversible where it failed to follow the mandate issued by this Court in Coney v. State, 653 So.2d 1009 (Fla. 1995). Nowhere does the record reflect that the petitioner was informed of his right to be present at the bench during juror selection. Nowhere does the record reflect that the trial court **inquired or certified** as to whether his absence was voluntary, nor does it reflect that the trial court **ratified** any peremptory strikes. It makes no difference whether prospective jurors were dismissed through peremptory challenges or not. Petitioner was not present where peremptories were exercised. The answer to the certified question should be yes.

The prosecutor violated the Golden Rule in his closing statement, and since the evidence presented to the jury was **not** overwhelming, being basically the word of the victim against the appellant as to consent and helplessness, this misconduct cannot be shown to be harmless.

IV. ARGUMENT

FIRST ISSUE PRESENTED (CERTIFIED): 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 CHALLANGES?

This question should be answered in the affirmative.

Jury selection in this case takes 55 pages of transcript, with less than 3 additional pages dedicated to the actual selection at the bench. (J.55-57). What is important to this issue is not so much what appears on the record, as what does **not appear:**

- Nowhere is it reflected that the appellant was informed of his right to be present at the bench.
- Nowhere is it shown that defense counsel conferred with his client before going to the bench.
- Nowhere is it indicated that the appellant was present at the bench.
- Nowhere does the trial court **inquire** if the appellant's absence from the bench is voluntary.
- Nowhere does the trial court **certify** that the appellant's absence from the bench is voluntary.
- Nowhere does the trial court ask the appellant to **ratify** the choice of jurors made by his counsel.

While it also appears on the record that no peremptory challenges were issued by the defense, this does not lift the onus from the trial court to inquire, certify, and ratify as required by this Court in Coney v. State, 653 So. 2d 1009 (Fla. 1995). What was done was totally insufficient to meet the standards under Conev. This case went to trial several months AFTER the decision in Coney, and prior to the change in Rule 3.180(a)(4), Fla. R. Crim. P.

Coney was originally decided January 5, 1995[1], and from that date until at least November 27, 1996, when the amendment to Fla. R. Crim. P. 3.180(b), became effective, Coney was the law of Florida as to *presence* of a defendant. It was during this window of time that Mr. Ganyard was tried. As this Court said in Bovett:

> In Coney we held for the first time that a defendant has a right under rule 3.180 to be physically present at the *immediate site* where challenges are exercised.

Id. at S535 (Emphasis in original).

It was December 5, 1996, in Boyett, that this Court announced it was receding from Coney 'to the extent that we held the new definition of 'presence' applicable to Coney himself." Id. at 536. However, this Court had already pointed out that Coney did not apply to Boyett, because Boyett was a "pipeline" case, tried after Coney's trial, but before the decision in Coney issued. This is not a pipeline case, but a post-Coney, pre-close the window case, where the rule announced in Coney applied.

The actual essence of this question appears to be: What is meant by the phrase "exercises peremptory challenges?" It is upon this phrase that the right to be present at the bench is qualified. Does the *exercise* of challenges mean actually asking for the removal of a juror? Or does the *exercise* of challenges mean being part of the process whereby one decides to challenge or not to challenge?

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[1] Reh denied, April 27, 1995.

In the following argument, Petitioner respectfully adopts wholly, the well reasoned dissent by Judge Webster in the First District Court's Opinion. (0.7-13). While the majority held that Coney applied because Mr. Ganyard was not present at the bench and he did not waive his presence, they found the error harmless because Petitioner's attorney did not ***exercise*** peremptory challenges and thus, the error was harmless. (0.2-3).

J. Webster argues that while one might disagree with this Court's assumption that a defendant can never have any meaningful input to offer on the question of whether his counsel should exercise a particular challenge for cause in such circumstances, the majority's conclusion that harmful error can occur only when the defendant's counsel actually exercises peremptory challenges in the defendant's absence is certainly not what this Court intended.

The majority focusses narrowly on the words "are exercised" in the language in Coney, 653 So.2d at 1013, and takes that to mean that challenges must actually be made. This does not comport with the language in Francis v. State, 413 So.2d 1175, 1178-79 (Fla. 1982), where this Court said that "[t]he exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant." This indicates that it is the process, not the actually challenge to a juror which is protected. The decision NOT to challenge a juror is as important as challenging one.

In Mejia v. State, 675 So.2d 996, 1000 (Fla. 1st DCA), rev. pending, Case No. 88,684 (filed Aug. 6, 1996), the court concluded "the procedural rule set out in Coney is intended to ensure the defendant's right to meaningful participation in decisions regarding the exercise of challenges, particularly peremptory challenges, is zealously protected." Then, the court takes the narrow view that the exercise of challenges exists only when a juror is actually challenged. Consider the times when a defendant may want his attorney to NOT challenge a juror, such as when to do so would place someone less desirable on the panel. The narrow view espoused by the First District is unreasonable.

As J. Webster pointed out in his dissent:

> [It is] much more plausible that, when the court used the phrase "[t]he exercise of peremptory challenges" in Francis, it intended to refer to the entire process by which one decides whether to exercise one or more peremptory challenges, rather than merely to the actual act of challenging a particular prospective juror. Likewise, I find it much more plausible that the court intended the same thing when it used similar language in Coney.

(0.10).

Where is the logic in a rule which is designed to protect a defendant's right to meaningful participation in decisions regarding the exercise of challenges, but would permit a finding of harmful error only when at least one peremptory challenge was exercised by a defendant's counsel? Surely, it is just as important that a defendant have an opportunity to offer input regarding the decision NOT to challenge a prospective juror as it is that a defendant have an opportunity to offer input regarding the decision TO challenge a particular prospective juror. Yet,

according to the majority, the former case is not harmful and the latter is harmful.

"[T]he fact that a challenge was made in one case but not in the other is a distinction without a difference if what we are concerned about is the defendant's right to meaningful participation in the decision." (0.11).

J. Webster also argues well, that:

> the same analysis holds with regard to challenges for cause. Assuming that the challenge is one regarding the exercise of which a defendant might offer meaningful input, (such as for instance, when the challenge is one which, for tactical reasons, might not be exercised even if available), I see no logical reason why Coney should not apply. It might well be that a defendant would prefer to have **a** particular prospective juror on the panel, given the alternatives, notwithstanding the availability of a challenge for cause. In such a case, application of Coney would ensure that the defendant would have an opportunity to inform counsel of his or her wishes.

(0.11-12).

J. Webster's argument is well taken. This Court obviously intended, or should have intended, that the rule apply during the **entire process** of challenging prospective jurors. Properly read and reasoned, absent a waiver or subsequent ratification of his counsel's decisions -- which did not occur here -- Coney requires the petitioner to have been present at the bench conference when his attorney decided not to issue challenges. He was not, and this was a violation of the law, which was harmful.

It is undisputed that petitioner Ganyard was not present at the bench when challenges were discussed and the decision to make or not make challenges was made by his attorney. It is also undisputed that petitioner Ganyard neither waived his right to be

present nor subsequently ratified his counsel's decisions. The question remaining is: Was the trial court's failure to follow the law as espoused by this Court in Coney harmful error.

> There is nothing in this record to suggest that [petitioner] was even aware of his right to participate in decisions regarding the exercise of peremptory challenges. It seems . . . entirely plausible that, had [petitioner] been present at the bench conference, he would have insisted that counsel excuse one or more prospective jurors. However, we shall never know because the procedure mandated by Coney was not followed.

(0.13).

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). The petitioner is entitled to a new trial (even if properly admitted evidence were sufficient to support the jury verdict) where the Court cannot say beyond a reasonable doubt that this error did not affect the fairness of the trial and if the Court is unable to assess the extent of prejudice sustained by Mr. Ganyard's absence of participation in the jury selection process. This was reversible error and the error -- by definition harmful. State v. Lee, 531 So. 2d 133 (Fla. 1988); Francis, at **1179.** Moreover, the absence of an accused at a critical stage of trial must be presumed harmful unless the state can show beyond **a** reasonable doubt to the contrary.

This Court need not consider how the November **1996** amendment to Fla. R. Crim. P. 3.180, nor how this Court's December 1996 decision in Boyett v. State, 21 Fla. L. Weekly S535 (Fla.

December 5, 1996), affect this Court's opinion in Mr. Ganyard's case. They do not, because they cannot be legally applied under the ex post facto provisions of the constitutions of the United States[2] or Florida[3]. Bouie v. City of Columbia, 378 U.S. 347, 353-354 (1964). In Matthews v. State, 22 Fla. L. Weekly D296a (Fla. 4th DCA January 29, 1997), the court reversed Matthews' conviction and remanded the case for a new trial, where Coney had not been complied with. In so doing, the court held:

> At no time did the **trial court,** through appropriate inquiry, certify that Matthews waived his presence during this conference. Thus the bench conference violated the dictates of Conev.
>
> * * *
>
> The exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant. (Citing Francis v State, 413 So.2d 1175 (Fla. 1982)).

Id.

Footnote 1, in Matthews indicates the court considered Boyett and the change in Fla. R. Crim. P. 3.180, and apparently found them to have no affect on the case.

The **record here was set out in detail in the statement and facts of the case,** so that this Court might better understand the prejudice. As J. Webster pointed out in his dissent, (0. at 13), this was not a case in which the evidence of guilt was over-whelming, but rather a swearing match between petitioner and his accuser. A **different jury might well have reached a different**

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[2] Art. I, Sect. 9.

[3] Art. I, Sect's. 9, 10.

verdict. As in Francis, 413 So.2d at 1179, we are unable to determine "The extent of prejudice, if any," which Mr. Ganyard may have suffered as a result of not being present at the bench during the 'exercise" of peremptory challenges. As in Francis, we are unable to say, to the exclusion of all reasonable doubt, that the error was harmless.

This Court should answer the certified question in the affirmative, and this case should be reversed and remanded for a new trial.

SECOND ISSUE PRESENTED: THE STATE VIOLATED THE "GOLDEN RULE" IN HIS CLOSING ARGUMENT, WHICH WHEN COMBINED WITH OTHER ERRORS, WAS SO PREJUDICIAL AS TO VITIATE THE ENTIRE TRIAL.

While this case is before the Court on the certified question above (Issue I), Petitioner hereby exercises his right to have reviewed all issues raised below. This Court is asked to consider that, at the very beginning of his closing statements, the prosecutor made the following argument:

> If you walk outside and you've left a purse or a wallet somewhere or a book and it's missing, would you hesitate to say my wallet has been stolen? No. But if someone **had penetrated your sexual organ without your consent in a situation like this, would you -**

(T.209)(Emphasis added).

This comment was a blatant violation of the "Golden Rule," the technique of asking jurors to place themselves in the position of the victim -- a technique which has been held to be improper and universally condemned in both criminal and civil cases. See Adams v. State, 192 So.2d 762 (Fla. 1966); Bullock v. Branch, **130** So.2d 74 (Fla. 1st DCA 1961). Such **a** statement to jurors is improper in that it tends to deprive a defendant of a fair trail by impartial jurors. See e.g., Lucas v. State, 335 So.2d 566, 567 (Fla. 1st DCA 1976). The **prohibition** of such remarks has long been the law of Florida. Barnes v. State, 58 So.2d 157 (Fla. 1951); Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985).

An objection was raised and sustained and a motion for mistrial made but denied. (T.209-210). The prosecutor, not denying

it was a violation, referred to it as a "slip of the tongue" and requested a curative instruction. The trial court issued a "curative" instruction, driving the comment deep into the psych of the jury, (T.210), any "curative" value being pure legal fiction.

Further in its closing, the state argued that the jury should not concern itself with the sentence in the case, that the court imposes sentence, 'And he can take into consideration all the factors you've heard today **and more that you haven't heard."** (T.220)(Emphasis added). Once again an objection was raised and motion for mistrial made (both denied) on the grounds that the state was testifying that there was evidence which the jury did not get to consider. **(T.221).** "It is impermissible for a prosecutor to comment in closing argument upon matters outside the record." Wheeler v. State, 425 So.2d 109, 110-111 (Fla. 1st DCA 1982) approved, State v. Wheeler, 468 So.2d 978 (Fla. 1985).

When examining Brenda Walburn, the state asked her to "describe the state of" Mr. Ganyard's apartment. Objection was raised, a bench conference called, and the state spoke loud enough that it had to be requested that he hold his voice down. (T.92). However, the state appears to have already made his point to the jury by saying out loud, "this is highly relevant because **it shows that he lives like a pig** and --" (T.92)(Emphasis added). The objection was sustained, but the damage was done. Like the inference in closing above, this was a comment on matters outside of the record, the prosecutor testifying to something he could not get before the jury, and it was harmful.

Finally, the state's cross-examination of petitioner Ganyard, even on a cold record, appears to be overzealous, (Generally, T.181-193), and when objection was raised as to "battering" the witness, it was sustained. (T.182).

All of this went before the jury, and given the evidence at trial, could not be harmless. Both the victim and the petitioner told stories which have the ring of truth, leaving the jury with what must have been a heavy burden. That burden was lightened by the state through improper tactics and argument designed to "win" a case, not seek justice.

This Court is asked to look at each error complained of and to consider what effect, when taken together, the comments may have had on the jury. Florida courts have clearly recognized the principle of cumulative error such as this. In Jones v. State, 569 So.2d 1234 (Fla. 1990), this Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235. In Allett v. Hill, 422 So.2d 1047, 1050 (4th DCA 1982), in the context of a civil action, the court held that the combined effect of three errors made by the trial court, though probably harmless if viewed individually, required reversal and remand for retrial on all issues. Here, Petitioner asks this Court to consider the errors complained of as to their cumulative effect, especially in light of the fact that the evidence here was not overwhelming.

While consent and whether or not the victim was helpless were the main issues to be decided, there was another related

issue, scienter -- guilty intent. This was raised by both the state and defense in closing in their respective comments on alcohol. The state indicates that drinking was important because "[i]t removes that layer of control." (T.226). The defense agreed, "drinking removes that layer of control. Drinking can remove some inhibitions." (T.229). Common sense indicates that this was true for both the victim and the appellant, as the jury must have realized. Thus, there would be a doubt, and that doubt would be reasonable, and either a not guilty or not guilty as charged should have issued from the jury. It did not happen though, because the state's tactics of violating the "Golden Rule" and otherwise improperly influencing the jury was successful. What occurred here was not just.

The Fourteenth Amendment's Due Process Clause demands that a prosecutor adhere to the fundamental principles of justice: "The [prosecutor] is the representative ... of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). "Being an arm of the Court he is charged with the duty of assisting the Court to see that justice is done, and not to assume the role of *persecutor."* Smith v. State, 495 So.2d 525, 527 (Fla. 1957)(emphasis in original). What occurred here did not comport with the law.

The First District Court of Appeals addressed similar issues of prosecutorial misconduct in Pacifico v. State, 642 So.2d 1178 (Fla. 1st DCA 1994). In reversing Pacifico for misconduct, the court indicated that automatic reversal for prosecutorial error

may not always be warranted, then it gave two examples where reversal was warranted:

- State v. Murray, 443 So.2d 955 (Fla. 1984) where the evidence of guilt was overwhelming, and the trial court admonished the prosecutor after an objection; and
- Bass v. State, 547 So.2d 680 (Fla. 1st DCA), review denied, 553 So.2d 1166 (Fla. 1989), where reversible error was found because "the trial of the case involved a two-witness swearing match, with little or nothing to corroborate the testimony of either witness." Pacifico, 1184.

Bass and Pacifico were reversed because witness credibility was the pivotal issue, as it is here. This was a swearing match between the victim and Mr. Ganyard. Thus, as in Bass and Pacifico, the prosecutorial impropriety is of such a nature that it cannot be shown to be harmless and requires a new trial. Additionally, where, as here, there is a question concerning the choice of jurors (Issue I), this cannot be, and is not a harmless error.

V. CONCLUSION

The appellant, James Ganyard based on all of the above, respectfully requests this Court to answer the certified question in the affirmative, to reverse his conviction and remand the case to the lower court for a new trial, and to grant all further relief as this Court may find equitable and just.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Initial Brief on the Merits has been furnished by U.S. Mail to James W. Rogers, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to petitioner, Mr. James D. Ganyard, on this 21st day of February, 1997.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEAL

JAMES GANYARD,

Petitioner,

v. CASE NO. 89,759

STATE OF FLORIDA,

Respondent.

A P P E N D I X

TO

PETITIONER'S INITIAL BRIEF ON THE MERITS

PD

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

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

CASE NO. 95-1536

JAMES D. GANYARD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed December 30, 1996.

An appeal from the Circuit Court for Leon County.
J. Lewis Hall, Jr., Judge.

Nancy A. Daniels, Public Defender, and Raymond Dix, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Douglas Gurnic, Assistant Attorney General, Tallahassee, for Appellee.

CRIMINAL DIVISION
EN BANC

ALLEN, J.

Having considered the various arguments presented by the appellant in this direct criminal appeal, we affirm his conviction. Only his argument pursuant to Coney V. State, 653 So. 2d 1009 (Fla.), cert. denied, U.S. ___, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995), requires discussion. We conclude that although error was committed when the appellant was not present during the

prosecution's exercise of challenges for cause, the error was harmless. We further conclude that there was no error by virtue of the fact that the appellant was absent when his counsel might have exercised peremptory challenges but failed to do so.

In Coney, the supreme court clarified the intent behind Florida Rule of Criminal Procedure 3.180(a)(4), which states that "[i]n all prosecutions for crime the defendant shall be present . . . at the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury." The court held that unless the defendant waives his presence or ratifies the strikes made outside his presence, he has the right to be physically present at the immediate site where pretrial juror challenges are exercised. The court held further that a violation of the rule as interpreted is subject to a harmless error analysis.

The appellant was not physically present at the bench conference during which jury challenges were exercised in the present case, and he never waived his presence or ratified the strikes made outside his presence. The rule, as interpreted in Coney, was therefore violated. Nevertheless, the error was harmless.

Only the prosecution exercised peremptory challenges in the present case. The appellant was not prejudiced by his absence from the bench when these challenges were exercised because the challenges were within the discretion of the prosecutor.

The appellant argues, however, that there was harmful error because of his absence when his counsel might have exercised peremptory challenges. But there was no error at all in this regard because the court in Conev. did not hold that a defendant has a right to be physically present whenever peremptory challenges might be exercised. The court held that a defendant has a right to be present only when peremptory challenges "are exercised."

The Coney court indicated that a defendant's absence from a bench conference at which peremptories are exercised is permissible where the defendant has expressed his "approval of the strikes" and willingness to "ratify strikes." The court made no mention of any obligation to secure a defendant's ratification of a decision not to exercise available peremptories, thus indicating that a defendant has no right to be present when defense counsel declines to exercise available peremptories.

Further, the Coney court found no basis for reversal due to Coney's absence from the bench conference therein where only challenges for cause were exercised. Peremptories presumably could have been exercised during the bench conference, but, observing that none were actually exercised, the court concluded that there was no basis for reversal.

Because the defense exercised no peremptories in the present case, there is no basis for reversal. However, we certify to the supreme court the following question of great public importance:

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 CHALLANGES?

The appellant's conviction is affirmed.

MINER, J., CONCURS; LAWRENCE, J., SPECIALLY CONCURS WITH WRITTEN OPINION; WEBSTER, J., DISSENTS WITH WRITTEN OPINION; MICKLE, J., JOINS IN WEBSTER, J.'S DISSENT.

LAWRENCE, J., specially concurring,

I concur with the majority opinion affirming Ganyard's conviction for sexual battery. I write only to address any suggestion in the dissenting opinion that Florida Rule of Criminal Procedure 3.180(a)(4) is the only significant safeguard to a defendant's meaningful participation in jury selection.

It has long been the obligation of counsel for a criminal defendant to consult with and inform his client regarding the right to meaningful input in the jury-selection process. See R. Regulating Fla. Bar 4-1.2(a) ("A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."); R. Regulating Fla. Bar 4-1.4(b) ("Duty to Explain Matters to Client. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."). If an attorney fails to do so during the course of the trial, a defendant may call such failure to the attention of the trial judge for redress. If a defendant is unaware of his right in this regard, he also may obtain relief in postconviction proceedings. Fla. R. Crim. P. 3.850. Apparently these lesser safeguards worked remarkably well during the fifteen-year pre-Coney period[1]--claims for relief on

[1]For a history of events leading up to the Coney interpretation of Florida Rule of Criminal Procedure 3.180, see Justice Overton's concurring opinion in Coney v. State, 653 So. 2d 1009, 1015-16 (Fla.) (Overton, J., concurring in result

this issue during this period were uncommon, both during trial and in postconviction proceedings. The position taken in the dissent would unduly narrow the supreme court's harmless error analysis, beyond what is required to safeguard a defendant's right to have meaningful participation in jury selection.

I accordingly conclude that the Conev court wisely adopted a more liberal harmless error standard than the narrow approach urged by the dissent. I concur with the majority for this reason, as well as for the reasons expressed in its opinion .

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only), cert. denied, __ U.S. __, 116 s. ct. 315, 133 L. Ed. 2d 218, (1995) .

WEBSTER, J., dissenting.

The majority holds that a Coney[2] error occurred only because appellant was not physically present at the immediate site where the state exercised peremptory challenges, and he did not waive his presence. However, that error was harmless because appellant could not have provided any meaningful input regarding the exercise of those challenges by the state. I agree that any Conev error that occurred because of appellant's absence during the exercise of challenges by the state was harmless. Nevertheless, I would reverse and remand for a new trial because I do not believe that the rule announced in Coney requires that peremptory challenges actually be exercised by a defendant's counsel as a condition to its applicability, and I am unable to conclude that appellant's absence when his counsel decided not to exercise any peremptory challenges was harmless beyond a reasonable doubt. Accordingly, respectfully, I dissent.

As noted by the majority, in Coney, the supreme court purported to "clarify" the intent behind Florida-Rule of Criminal Procedure 3.180(a)(4), which states that, "[i]n all prosecutions for crime[,] the defendant shall be present . . . at the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury"; and its previous decision in Francis v. State, 413 So. 2d 1175 (Fla. 1982). In Coney, the court held:

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[2] Coney v. State, 653 So. 2d 1009 (Fla.), cert. denied, ___ U.S. ___, 116 s. ct. 315, 133 L. Ed. 2d 218 (1995).

> The defendant has a right to be physically present at the immediate site where pretrial juror challenges' are exercised. See Francis. Where this is impractical, such as where a bench conference is required, the defendant can waive this right and exercise constructive presence through counsel. In such a case, the court must certify through proper inquiry that the waiver is knowing, intelligent, and voluntary. Alternatively, the defendant can ratify strikes made outside his presence by acquiescing in the strikes after they are made. 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.

653 So. 2d at 1013. The court held, further, that a violation of rule 3.180(a)(4), as interpreted, is subject to a harmless error analysis. Id.

In Mr. Coney's case, "[j]uror challenges . . . were exercised on two occasions: first, during a brief bench conference after prospective jurors had been polled concerning their willingness to impose death, and second, during a lengthy proceeding at the conclusion of voir dire." Id. Coney was absent only on the former occasion, when challenges for cause were exercised by the state and Coney's counsel. Id. Because Coney neither waived his presence at the bench conference nor ratified the challenges for cause exercised by his counsel, the court concluded that error had occurred. Id. However, because the challenges "*involved a legal issue toward which [Coney] would have had no basis for input,' i.e., the death qualifying of prospective jurors," the court

concluded, further, that the error was harmless. Id. (citation omitted). From this, it seems to me relatively clear that Coney was absent only when Witherspoon[3] challenges were being exercised by counsel--he was present at the immediate site where peremptory challenges (and, perhaps, cause challenges based on grounds other than views regarding the death penalty) were exercised, It seems to me, further, that the court concluded that Coney's absence from the site of the exercise of the Witherspoon challenges was harmless solely because it assumed that Coney could not have had any input regarding whether a particular Witherspoon challenge should be exercised. While one might disagree with the court's assumption that a defendant can never have any meaningful input to offer on the question of whether his counsel should exercise a particular challenge for cause in such circumstances, it seems to me that the majority reads far more into this portion of the court's opinion than was intended when it concludes that harmful error can occur only when the defendant's counsel actually exercises peremptory challenges in the defendant's absence.

The majority focuses narrowly on the words "are exercised" in the language from Coney that "[t]he defendant has a right to be physically present at. the immediate site where pretrial juror challenges are exercised." 653 So. 2d at 1013. In Francis v. State, 413 So. 2d 1175, 1178-79 (Fla. 1982), the court said that

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[3] Witherspoon v. Ill- . ., 391 U.S. 510, 88 s. ct. 1770, 20 L. Ed. 2d 776 (1968).

"[t]he exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant." In Tella v. State, 675 So. 2d 996, 1000 (Fla. 1st DCA), review pending, Case No. 88,684 (filed Aug. 6, 1996), we concluded "that the procedural rule set out in Coney is intended to ensure that a defendant's right to meaningful participation, in decisions regarding the exercise of challenges, particularly peremptory challenges, is zealously protected." It seems to me that the majority's reading of the language regarding "the exercise" of challenges is unreasonably narrow. I find it much more plausible that, when the court used the phrase "[t]he exercise of peremptory challenges" in Francis, it intended to refer to the entire process by which one decides whether to exercise one or more peremptory challenges, rather than merely to the actual act of challenging a particular prospective juror. Likewise, I find it much more plausible that the court intended the same thing when it used similar language in Coney.

Frankly, I am unable to see the logic in a rule which is designed to protect a defendant's right to meaningful participation in decisions regarding the exercise of challenges, but would permit a finding of harmful error only when at least one peremptory challenge was exercised by a defendant's counsel. Surely, it is just as important that a defendant have an opportunity to offer input regarding the decision not to challenge any prospective

jurors peremptorily as it is that a defendant have an opportunity to offer input regarding the decision to challenge a particular prospective juror peremptorily. In the latter case, it is clear that, if the defendant is not present at the immediate site where the challenge is made and has neither waived the right to be present nor subsequently ratified the challenge, Conev has been violated, Yet, according to the majority, in the former case, no Conev error occurs because defendant's counsel exercised no peremptory challenges, notwithstanding that the defendant was not present at the immediate site where the decision not to exercise any peremptory challenges was made by counsel, and neither waived the right to be present nor subsequently ratified counsel's decision. It seems to me that the fact that a challenge was made in one case but not in the other is a distinction without a difference if what we are concerned about is the defendant's right to meaningful participation in the decision.

It seems to me, further, that the same analysis holds with regard to challenges for cause. Assuming that the challenge is one regarding the exercise of which a defendant might offer meaningful input (such as, for instance, when the challenge is one which, for tactical reasons, might not be exercised even if available), I see no logical reason why Coney should not apply. It might well be that a defendant would prefer to have a particular prospective juror on the panel, given the alternatives, notwithstanding the availability of a challenge for cause. In such a case, application

of Coney would ensure that the defendant would have an opportunity to inform counsel of his or her wishes.

In short, based upon my reading of Conkv, it seems to me that the court intended the rule to apply during the entire process of challenging prospective jurors, to ensure that a defendant would have an opportunity to discuss possible challenges with counsel before a decision is made. More particularly, I believe that Coney was intended to apply to cases such as this one, notwithstanding the fact that appellant's counsel did not exercise any peremptory challenges. In my opinion, pursuant to Coney, absent a waiver or a subsequent ratification of his counsel's decision, appellant was entitled to be present at the bench conference during which his counsel decided not to exercise any peremptory challenges.

It is undisputed that appellant was not present at the bench conference during which challenges were discussed (and his counsel announced that he would not exercise any peremptory challenges), and that appellant neither waived his right to be present nor subsequently ratified his counsel's decision. Accordingly, I suggest that the only remaining question is whether the failure to follow Coney constituted harmful error. We discussed the appropriate harmless error analysis in Mejia v. State, 675 So. 2d 996 (Fla. 1st DCA), review pending, Case No. 88,684 (filed Aug. 6, 1996). Applying that analysis to the facts of this case, I am unable to conclude "that there is no reasonable possibility that the error contributed to the conviction." State v. DiGuilio, 491

So. 2d 1129, 1138 (Fla. 1986). There is nothing in this record to suggest that appellant was even aware of his right to participate in decisions regarding the exercise of peremptory challenges. It seems to me entirely plausible that, had appellant been present at the bench conference, he would have insisted that counsel excuse one or more prospective jurors. However, we shall never know because the procedure mandated by Coney was not followed.

This was not a case in which the evidence of guilt was overwhelming. Rather, the case was essentially a swearing match between appellant and his accuser. A different jury might well have reached a different verdict. As in Francis, 413 So. 2d at 1179, I am unable to determine "the extent of prejudice, if any," appellant sustained as the result of not being present at the bench conference held for the purpose of permitting the exercise of peremptory challenges. Accordingly, as in Francis, I am unable to say, to the exclusion of all reasonable doubt, that the error was harmless. Therefore, I would reverse, and remand for a new trial. Because the majority affirms, I dissent.