IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

RICHARD BROWER,

Respondent.

CASE NO, 89 ,968
4th DCA CASE NO. 95-2765

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE

Respondent was a criminal defendant in the Nineteenth Judicial Circuit in and for Martin County, Florida, and on June 22, 1995, was convicted of first degree murder and aggravated burglary. On July 13, 1995, respondent appealed to the Fourth District Court of Appeal, and in its opinion, which was filed December 11, 1996, the district court of appeal reversed respondent's conviction, "notwithstanding overwhelming evidence against him," on the basis that the procedure for waiving the defendant's presence at the bench during counsel's peremptory challenges, as required under Coney ***v. State'***, 653 So. 2d 1009(Fla.), *cert. denied*, __ U.S. __, 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995), was not followed by the *COW. Brower v. State, 684* So, 2d 1378 (Fla. 4th DCA 1996).

However, when the *Brower* opinion was issued, this Court had on December 5, 1996, already issued its opinion in *Boyett v. State*, 688 So. 2d 308 (Fla. 1996). The substance of *Boyett* was to recede from *Coney*, at least to the extent that ***Coney*** held that immediate site means at the bench for purposes of Fla. R. Crim. P. 3.180.

Petitioner filed a timely motion for rehearing, based in part on the holding of *Boyett*, which was denied. The mandate was issued on February 7, 1997; however, Petitioner timely filed a motion to recall the mandate and its notice to invoke the discretionary jurisdiction of this Court. The district court of appeal recalled its mandate on February 2 1, 1997, and this Court accepted jurisdiction by its order entered May 14, 1997.

'Coney was issued January 5, 1995.

STATEMENT OF THE FACTS

Prior to trial, the parties conducted individual voir dire in the jury room (T 1348, 1361-2608). Appellant/respondent sat in the jury room during voir dire (T 1350). General questioning by the court was conducted in the courtroom.

Peremptory challenges of panel #1 were conducted in the courtroom at sidebar (T 1886). Shortly thereafter, the court recessed for the evening (T 2002). Two days later, peremptory challenges of panels #1 & 2 were conducted in the courtroom at sidebar (T 2610). Prior to going back into the courtroom to accept the peremptory challenges, the trial court asked defense counsel where he wanted respondent positioned, at the table or closer to the front (2608/22). Defense counsel stated, "I guess we can go back and forth, Judge" (T 2608125). The prosecutor then suggested that peremptory challenges could be made in the jury room (T 2609/3), but defense counsel indicated that this was unacceptable (T 2609/5). Consequently, the trial court decided that peremptory challenges would be made in the courtroom at sidebar, with respondent sitting at counsel table (T 2609/17).

At the hearing on respondent's motion for new trial, defense counsel Ronald Smith made the following statement:

> "Now, I don't mean to tell the court that as we were sitting at counsel table and the State was asking questions of the jurors, certainly Richard participated in voicing opinions and talking about the potential jurors" (T 4799/15-18).

In response to the trial court indicating that he wanted the record to reflect whether there had been any impediment to defense counsel's ability to speak with appellant during jury challenges at side-bar, defense counsel responded:

> "NO. No. And I don't mean to imply that. And certainly Richard was physically inside the courtroom" (T 4801/17).

During this hearing and a discussion regarding the procedure that had been used for peremptory challenges, the prosecutor recalled that the parties had discussed this matter off the record prior to the challenges being made, and they all decided to use sidebars in the courtroom; the trial court agreed with this recollection, and defense counsel offered no disagreement (T 4803/10-23). The prosecutor then mused that they may have put something on the record regarding this agreed procedure, and defense counsel agreed (T 4803/24-5).

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal erred in its decision by not applying the holding of *Boyett* ***v. State, 688 So.*** 2d 308 (Fla.1996), which receded from ***Coney v. State, 653 So.*** 2d 1009 (Fla.), ***cert. denied,*** __ U.S. __, 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995), to the extent that it required a defendant's presence at the bench during peremptory challenges.

The district court of appeal also erred by not retroactively applying the January 1, 1997 amendment to Fla. R. Crim. P, 3.1 SO(b), which clarifies that a defendant is present if he or she is physically in the courtroom and has a meaningful opportunity to be heard through counsel.

The district court of appeal also erred by not finding any error, regarding respondent's presence during peremptory challenges, harmless, since respondent was present during voir dire, was in the courtroom during jury challenges, communicated his opinions to counsel regarding jury selection, was present when the process for making jury challenges was determined, and never complained about this process or that he was not given ample opportunity to be heard on the subject.

ARGUMENT

THE DISTRICT COURT OF APPEAL ERRED BY RULING THAT THE TRIAL COURT'S FAILURE TO REQUIRE RESPONDENT EITHER TO BE PRESENT AT THE BENCH DURING PEREMPTORY CHALLENGES OR TO PROPERLY WAIVE HIS PRESENCE CONSTITUTES REVERSIBLE ERROR

Fla. R. Crim. P. 3.180(a)(4) requires a defendant's presence at the beginning of a trial during the examination, challenging, impanelling, and swearing of *the jury. In Coney v. State,* 653 So. 2d 1009(Fla.), *cert. denied,* __ U.S. __, 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995), this Court held for the first time that under Fla. R. Crim. P. 3.180, a defendant's right to be physically present where juror challenges are exercised means at the mediate site where they are exercised. Also in *Coney,* the State conceded that defendant's absence from the bench during peremptory challenges was error[2], and this Court accepted that concession.

However, in *Boyett* v. *State,* 688 So. 2d 308 (Fla. 1996), this Court stated that, "It was incorrect for us to accept the state's concession of error. Because the definition of 'presence' had not yet been clarified, there was no error in failing to ensure Coney was at the immediate site." *Id.* at 3 10. This Court further stated that such clarification was being provided in an approved amendment to Fla. R. Crim. P. 3.1 &O(b), which reads, "A defendant is present for purposes of this rule if the defendant is physically present in attendance for the courtroom proceeding, and has a meaningful opportunity to be heard through counsel on the issues being discussed. *Id.* This rule was amended effective January 1, *1997. Amendments to the Florida Rules of Criminal*

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[2]This concession was therefore that if peremptory challenges are made at the bench, immediate site means at the bench.

procedure, 685 So. 2d 1253 (Fla. 1996).

Boyett overruled Coney in regard to its application of the new definition of presence. In other words, *Boyett* at the very least holds that immediate site does not mean "at the bench." Therefore, as of December 5, 1996, when *the Boyett* opinion was issued, the rule of law concerning presence was either that a defendant has a right to be physically present at the immediate site where jury challenges are exercised (without the Coney concession that immediate site means at the bench), or it was this definition with the added clarification that immediate site means in the courtroom and having a meaningful opportunity to be heard through counsel. Furthermore, pursuant to *Boyett* even if the above clarification was not effective until the effective date of the amendment to the rules of procedure, there can be no error in failing to ensure respondent was at the immediate site, before the definition of "presence" had in fact been clarified.

Any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final. *Smith* v. *State,* 598 So. 2d 1063 (Fla. 1992). Since this appeal was pending when *Boyett* was issued, the Fourth District Court of Appeal should have applied this new rule of law announced therein to this case. However, the Fourth District Court of Appeal improperly applied the expanded definition of presence, which was derived from this Courts acceptance of the state's concession of error in Coney.

Furthermore, even if the new rule of law espoused in *Boyett* was not intended to become effective until January 1, 1997, the effective date of the amendment to the rules of criminal

procedure, it should have been retrospectively applied to this pending case. While statutory changes in the law are normally presumed to apply prospectively, procedural changes are to be applied to pending cases. *Harris* v. *State*, 400 So. 2d 819 (Fla. 5th DCA 1981).[3]

In this matter, the record clearly reflects that respondent was present during the questioning of the potential jurors and was in the courtroom and had a meaningful opportunity to be heard through counsel during peremptory challenges. The trial court and the parties discussed and settled on a procedure that would permit respondent every opportunity to communicate to and through counsel regarding these matters. Defense counsel indicated that respondent did in fact communicate his opinion regarding potential jurors to him. At no time did respondent ever object to the procedure used or his inability to communicate his preferences. Therefore, pursuant to ***Anderson*** v. *State*, 22 Fla. L. Weekly D736 (Fla. 5th DCA March 21, 1997), respondent could not have been prejudiced by the procedure used, any error was therefore harmless and respondent should be estopped from now asserting that he was not given an opportunity to be heard on the issue of jury selection, See ***also*** *Kellar* ***v. State,*** 22 Fla. L. Weekly D560 (Fla. 1st DCA Feb. 28, 1997).

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[3]Appellee acknowledges that ***State*** v. ***Green,*** 473 So. 2d 823 (Fla. 2d DCA 1985) and ***Jackson*** v. ***Green, 402*** So. 2d 553 (Fla. 1st DCA 1981), both of which cite as authority ***Poyntz v. Reynolds,*** 37 Fla. 533, 19 So. 649 (1896), distinguish procedural statutes and rules of court and appear to be in conflict with ***Harris;*** however, the procedural change in ***Harris,*** as this case, was to a rule of criminal procedure.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities cited herein, the State respectfully requests that this Honorable Court reverse the decision of the district court of appeal and affirm respondent's conviction.

Respectfully submitted,

ROBERT BUTTERWORTH
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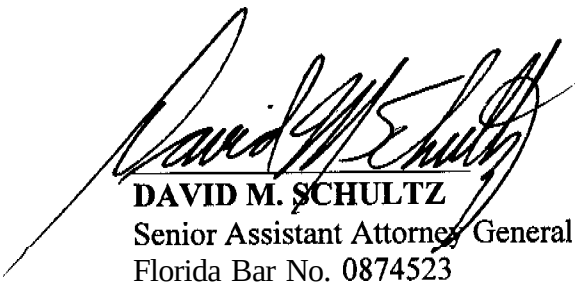
Tallahassee, Florida



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by courier to Joseph R. Chloupek, Assistant Public Defender, Counsel for Respondent, at 421 3rd Street, 6th Floor, West Palm Beach, FL 33401 this 4th day of June, 1997.

DAVID M. SCHULTZ
Of Counsel