3-23

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 BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited **Page Number**

STATE CASES

RULES OF PROCEDURE

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 on December 11, 1996, the district court of appeal reversed for a new trial (A-1)[1]. Petitioner filed a timely motion for rehearing (A-2), which was denied (A-3). The mandate was issued on February 7, 1997 (A-4). Petitioner timely filed a motion to recall the mandate (A-5) and its notice to invoke the discretionary jurisdiction of this Court (A-6). The district court of appeal recalled its mandate on February 21, 1997 (A-7).

'Exhibit 1 of Appendix; found at 21 Fla. L. Weekly D2612.

STATEMENT OF THE FACTS

In its opinion, which was filed December 11, 1996, the Fourth 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*[2], *653 So.* 2d 1009, *cert. denied,* __ U.S. __, 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995), was not followed by the court.

However, this Court had already issued its opinion in *Boyett v. State*[3], 21 Fla, L. Weekly S535 (Fla. December 5, 1996). The substance of *Boyett was* to recede from *Coney,* holding that if a defendant is in the courtroom and has a meaningful opportunity to be heard through counsel, he is present for purposes of Fla. R. Crim. P. 3.180.

**Coney* was issued January 5, 1995.

[3]Attached to petitioner's motion for rehearing at Exhibit 2 of Appendix.

SUMMARY OF ARGUMENT

This Honorable Court may invoke its discretionary jurisdiction pursuant to Fla. R. App. P. 9.030 (a)(2)(A)(iv), since the decision in this matter issued by the Fourth District Court of Appeal is in direct conflict with the decision of this Court on the same question of law in *Boyett v. State,* 21 Fla. L. Weekly S535 (Fla. December 5, 1996), and with the decision of *Harris v. State, 400 So.* 2d 819 (Fla. 5th DCA 1981).

ARGUMENT

THIS HONORABLE COURT HAS JURISDICTION TO REVIEW THE DISTRICT COURT'S DECISION WHICH IS IN DIRECT CONFLICT WITH A DECISION OF THIS COURT.

Fla. R. Crim. P. 3.180 (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, 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 has a right to be physically present at the immediate site where jury challenges are exercised, and applied this new definition to mean at the bench, if that is where challenges were exercised, absent a proper waiver.

In *Boyett v. State,* 21 Fla. L. Weekly S535 (Fla. December 5, 1996), this Court announced a new and different definition of presence, to mean in the courtroom and having a meaningful opportunity to be heard through counsel. Petitioner has interpreted *Boyett* as overruling Coney in regard to the definition of presence. 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 applied the definition of presence provided in Coney. Therefore, the decision of the Fourth District Court of Appeal is in direct conflict with *Boyett,* and pursuant to Fla. R. App. P. 9.030 (a)(2)(A)(iv) this Court may take discretionary jurisdiction to review this matter.

If the change in this rule of law became effective, not upon the issuance of *Boyett* but on the effective date of the amendment to Fla. R. Crim. P. 3.1 80 (b)[4], this would create a window, from December 5, 1996 to January 1, 1997, during which criminal defendants such as respondent might enjoy a windfall, since this change in the rule of law may not be necessarily applied to their case. Such a windfall to criminal defendants could likely cost the State of Florida millions of dollars to re-litigate these matters. Petitioner therefore believes that it was not the intent of this Court to announce a change in the definition of presence but to create this window of opportunity, during which the rule of Coney would still be applied.

Furthermore, the mandate in this case was not initially issued, until after the effective date of the amendment to Fla. R. Crim. P. 3.180 (b); therefore, pursuant to ***Harris v. State, 400 So.*** 2d 8 19 (Fla. 5th DCA 1981), this procedural change should have been applied to this case. It was not. Consequently, the decision of the Fourth District Court of Appeal is also in direct conflict with ***Harris,*** and pursuant to Fla. R. App. P. 9.030 (a)(2)(A)(iv) this Court may take discretionary jurisdiction.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities cited herein, the State respectfully requests that this Honorable Court accept jurisdiction of this matter.

Respectfully submitted,

ROBERT BUTTERWORTH
ATTORNEY GENERAL
Tallahassee, Florida

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[4]This rule was amended effective January 1, 1997, to reflect the new law announced in *Boyett* and incorporated a footnote indicating that the change superseded Coney.

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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 26th day of February, 1997.

DAVID M. SCHULTZ
Of Counsel

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,
Petitioner,

vs.

RICHARD BROWER,
Respondent.

CASE NO. _____
4th DCA CASE NO. 95-2765

PETITIONER'S APPENDIX

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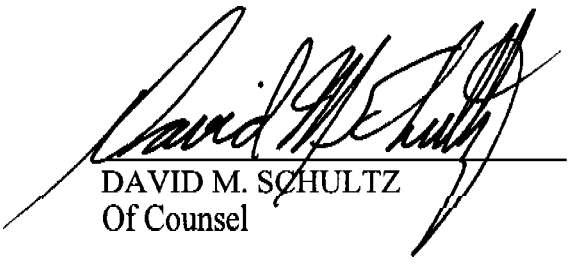
INDEX TO APPENDIX

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 26th of February, 1997.



DAVID M. SCHULTZ
Of Counsel

EXHIBIT 1

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1996

RICHARD BROWER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 95-2765

Opinion filed December 11, 1996

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; Dwight Geiger, Judge.
L.T. Case No. 93-992 CFA.

Richard L. Jorandby, Public Defender, and Joseph R Chloupek, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and William A. Spillias, Assistant Attorney General, West Palm Beach, for appellee.

STONE, J.

Appellant was convicted of first degree murder and aggravated burglary. We are obliged to reverse, notwithstanding overwhelming evidence against him, because the procedure for waiving the defendant's presence at the bench during counsel's peremptory jury challenges, as mandated by the supreme court in Conev v. State, 653 So. 2d 1009, 1012-13 (Fla.), cert. denied, ___ U.S. ___, 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995), was not followed by the court. See Wilson v. State, 680 So. 2d 592 (Fla. 3d DCA 1996).

The record reflects that defense counsel chose to leave Appellant seated at the counsel table, when making peremptory challenges, about thirty feet away. Appellant did not waive his right to be present during the challenging of the jury, nor did he subsequently ratify the jury selected.

Defense counsel raised the presence issue at a hearing on his motion for new trial, which the trial court denied. Counsel acknowledged at the hearing that he did not advise Appellant of his right to participate actively in making peremptory challenges. Apparently the trial court was not cognizant of the then recent Coney decision and found that the requirement of Appellant's presence at jury selection was satisfied by his presence in the courtroom and the lack of impediment to his consulting with counsel. See Turner v. State, 530 So. 2d 45 (Fla. 1987), cert. denied, 489 U.S. 1040, 109 S. Ct. 1175, 103 L. Ed. 2d 237 (1989).

In Coney, the supreme court announced a new procedure, to be applied prospectively.[1] Coney v. State, 653 So. 2d at 1013. Coney was issued January 5, 1995, and became final on April 27, 1995; Appellant's trial began on June 5, 1995. The supreme court in Coney clarified that portion of Florida Rule of Criminal Procedure 3.180(a)(4) which requires the defendant's presence in a

[1] In Lett v. State, 668 So. 2d 1094 (Fla. 1 st DCA 1996), the First District held that Coney was inapplicable to trials that took place before the supreme court released its decision in Coney, and certified to the supreme court the question as to whether it intended Coney to apply to "pipeline" cases of similarly situated defendants, pending on direct appeal or not yet final when Coney was released. In Meiia v. State 675 So. 2d 996 (Fla. 1st DCA 1996), it considered but did not need to decide whether Coney applied to a trial which commenced four days before the date Coney became final, finding the error harmless even assuming Coney applied.

criminal prosecution during the challenging of me jury. The court concluded that the rule meant "just what it says: The defendant has a right to be physically present at the immediate site" of pretrial juror challenges, unless the court certifies the defendant's waiver was knowing, intelligent and voluntary, or the defendant ratifies the strikes, on proper court inquiry, afterward. Id.

This court recently described the impact of Conev in Quince v. State, 660 So. 2d 370, 371 (Fla. 4th DCA 1995) (citations omitted):

> Prior to Coney, the supreme court had required the presence of the defendant at jury selection or the waiver of his presence when the defendant was actually absent from the place where the jury selection was made. Where the defendant was present in court but not at the bench when the actual selection was made, this court held that the jury was selected in the defendant's presence where there were no limitations on the defendant's ability to consult with counsel before any decisions or challenges were made. In this case, the defendant had the opportunity to consult with counsel and to actually come to the bench to do that consulting. Under the pre-Coney cases, the trial court did not abuse its discretion or deny the appellant his constitutional right to be present at a critical stage of the proceedings. However, we caution the trial court that *Coney* now requires the physical presence of the defendant at the bench or the express questioning of the defendant as to his waiver of his right to be present, or, alternatively, his express ratification of the jury selection made.

We have considered the state's argument that Appellant failed to raise a timely objection, based on Gibson v. State, 661 So. 2d 288 (Fla. 1995), which was decided after Conev, and which the state construes as modifying Coney. In Gibson the supreme court determined that the defendant had shown neither error nor prejudice in the trial court's refusing his counsel's request for a recess to consult with the defendant immediately before the bench conference on challenges for cause. The supreme court rejected the defendant's argument that the trial court had violated his right to be present during the challenging of jurors and his right to assistance of counsel, noting he had not asserted those issues below. See Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

We find Gibson inapposite. The opinion does not reflect that the supreme court was concerned about the applicability of the Conev procedure. Gibson is a "pipeline" case[2] to which Coney did not apply. Lett. Additionally, in Gibson, the issue raised, namely whether the court erred in denying defense counsel's request for a recess, did not implicate the issue of the defendant's presence at the time of jury challenges. In any event, even applying Coney, any error in Gibson would be deemed harmless because the challenges were for cause, not peremptory challenges. See Coney, 653 So. 2d at 1013.

The supreme court did not imply any need for a contemporaneous objection in Coney, and it is clear that violating a defendant's right to be present at the time of peremptory jury challenges is fundamental error that may be raised for the first time on motion for new trial or on appeal. See Francis v. State, 413 So. 2d 1175, 1177-79 (Fla. 1982); Meiia v. State, 675 So. 2d 996 (Fla. 1st DCA 1996); Salcedo v. State, 497 So. 2d 1294, 1295 (Fla. 1st DCA 1986), rev. denied, 506 So. 2d 1043 (Fla. 1987). Patently, the procedure the Coney court prescribed in order for a defendant to waive his presence or ratify jury selection in the defendant's absence would be superfluous if the simple failure to make a timely objection had the same result. We note that in Mejia, the First District recognized that to require a contemporaneous objection to preserve for appeal the issue of deprivation of the right to be present at the bench conference for peremptory challenges would render it meaningless. 675 So. 2d at 999.

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[2] Supreme court records indicate that notice of appeal in Gibson was filed in 1993; therefore, that appellant's trial concluded over a year before the supreme court released Coney.

Accordingly, it is clear that violation of the Coney procedure requires reversal for new trial, see Wilson (reversing, absent a knowing voluntary waiver, due to defendant's not participating at side-bar exercise of challenges - fundamental error); Butler v. State, 676 So. 2d 1034 (Fla. 1st DCA 1996) (reversing for new trial because defendant's attorney, not defendant personally, waived defendant's right to be present in courtroom during jury selection), unless it can be demonstrated beyond a reasonable doubt that the error was harmless. See also Francis, 413 So. 2d at 1178.

A showing of harmless error requires the state to prove, beyond a reasonable doubt, that the error in question did not contribute to the verdict, or that there is no reasonable possibility that it contributed to the conviction. State v. DiGuilio, 491 So, 2d 1129, 1135 (Fla. 1986).

The harmless error doctrine can be applied to certain cases of fundamental error. State v. Clark, 614 So. 2d 453 (Fla. 1992). In Clark, the supreme court recognized that appellate courts can fmd harmless error when a violation of sixth amendment rights is raised for the first time on appeal. In that case, the fundamental error concerned the admission of evidence in violation of the confrontation clause.

Rather than an evidentiary right, rule 3.180(a) seeks to protect the constitutional right of the accused to be present "at the stages of his trial where fundamental fairness might be thwarted by his absence." Francis, 413 So. 2d at 1177. Application of harmless error analysis in cases involving fundamental error requires that we consider whether it is shown that fundamental fairness to the accused was not prejudiced. In Garcia v. State, 492 So. 2d 360, 364 (Fla.), cert. denied, 479 U.S. 1022, 107 S. Ct. 680, 93 L. Ed. 2d 730 (1986), the Supreme Court specified that the standard for determining harmless error in cases concerning violations of rule 3.180(a) was as follows:

> [W]hile rule 3.180(a) determines that the involuntary absence of the defendant is error in certain enumerated circumstances, it is the constitutional question of whether fundamental fairness has been thwarted which determines whether the error is reversible. In other words, when the defendant is involuntarily absent during a crucial stage of adversary proceedings contrary to rule 3.180(a), the burden is on the state to show beyond a reasonable doubt that the error (absence) was not prejudicial. ***Delaware v. Van Arsdall***, ___ U.S. ___, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); ***United States v. Hasting,*** 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983); *Chapman* ***v. California, 386*** U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

Applying that standard, the Supreme Court determined that the state had met its burden of showing the appellant had not been prejudiced by his absence at a pretrial conference in which the court granted his counsel's motion for individual voir dire and deferred action on counsel's other three motions, as his presence would not have aided defense counsel in arguing those issues. Id. at 363-64.

In Conev, the court applied a harmless error analysis and found no prejudice was shown because the defendant was not present during a bench conference on a legal issue as to which he would have had no input anyway, and no jurors were excused peremptorily at that time, although several were struck for cause. 653 So. 2d at 1013. See also Harvev v. State, 529 So. 2d 1083, 1085-86 (Fla. 1988) (tiding no prejudice in violation of rule 3.180(a)(4) because appellant was not present at conference in which juror challenge was made for cause; conference involved legal issue in which appellant would have had no input), cert. denied, 489 U.S. 1040, 109 S. Ct. 1175, 103 L. Ed. 2d 237 (1989).

In Meiia, where defense counsel waived the defendant's presence at the bench conferences during which peremptory challenges were made, the First District found that error harmless; the defendant had suffered no prejudice because the record showed he consulted with counsel before his peremptory challenges were exercised. 675 So. 2d

at 1000-001. Accord Brown v. State, 676 So. 2d 1034 (Fla. 1st DCA 1994) (although Coney was not applicable, court would have found noncompliance with Coney procedure was harmless, as record reflected appellant consulted with counsel immediately before bench conference and immediately after, before counsel accepted jury). See also Stano v. State, 473 So. 2d 1282, 1288 (Fla, 1985), (finding no error in defendant's absence from status conference in which trial court granted one motion, where that act was merely ministerial, and deferred acting on another because of the absence), cert. denied, 474 U.S. 1093, 106 S. Ct. 869, 88 L. Ed. 2d 907 (1986).

In Francis, the supreme court emphasized the importance of the right to exercise peremptory challenges to a fair trial:

> 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. *Pointer v. United States*, *151* U.S. 396, 14 S.Ct. 410, 38 L.Ed. *208* (1894); *Lewis v. United States, 146* U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892). It is an arbitrary and capricious right which must be exercised freely to accomplish its purpose. It permits rejection for real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another or upon a juror's habits and associations.

413 So. 2d at 1178-79. The Francis court determined that the appellant' s involuntary absence without waiver or ratification was reversible error entitling him to a new trial because it was unable to assess the extent of prejudice, if any, which resulted. Id. at 1179.

We need not determine in this case whether we concur in the harmless error application in Mejia, as here, the record of the hearing on the motion for new trial indicates that there were no conferences between Appellant and his counsel while his peremptory challenges were being exercised. While neither he nor his counsel objected to the procedure, and his counsel expressly approved it, it is impossible to determine the extent of the prejudice Appellant suffered, if any, as a result, and therefore we are obliged to reverse for a new trial.

We find moot an additional issue raised on a motion to dismiss the jury venire due to juror misconduct, and we fmd no merit in the other eight issues Appellant raised,

SHAHOOD, J., concurs.
FARMER, J., concurs specially with opinion.

FARMER, J . , concurring specially.

Although I concur in the reversal of the conviction for a new trial, I cannot agree that the new trial is required because of any perceived error in the procedure used for the exercise of peremptory challenges of jurors. In my opinion, the entire venire of prospective jurors was incurably poisoned by comments of some of the prospective jurors before their voir dire examination. Thus, I think it puts the cart before the horse to address the peremptory challenge issue, for I do not understand why either side must waste peremptory challenges on tainted jurors.

The venire of prospective jurors was taken to the courtroom for voir dire examination and seated there to await the opening of court. As they waited with conversation among themselves, some of them began to talk about the case on which they would presently be examined to sit as jurors. Three prospective jurors later testified to hearing comments made within the hearing of all. These comments included the following: several jurors were heard to say "hang him, hang him; " someone said "they ought to just hang him" and "they ought to just fire him up;" another heard, "where I come from, they just string them up;" still another heard "why don't we just get it over with; " another heard that it would "save time" if defendant had committed suicide; and finally some suggested that defendant's pre-trial flight indicated his guilt. Some of the testifying jurors sought to minimize these remarks as just "joking", as "not serious",

or as mere attempts to avoid serving on the jury. All of these prospective jurors who testified to hearing (but not saying) the above were excused for cause. The rest of the venire was not.

Frankly, I fmd these comments both intolerable and appalling. We should condemn them in the strongest terms, To show our condemnation, we should refuse to go forward with prospective jurors exposed to such corrupt and destructive influences. Nor do I believe that the lame attempts of the jurors to minimize the words justify any discretion of the trial judge. There are some things that simply may not be said or done by prospective jurors without poisoning the entire pool. The comments here are surely among them. No amount of after-the-fact justification can possibly remove the stain and save the venire. I do not understand why any trial judge would not unhesitatingly get rid of the entire room of jurors who had been subjected to these comments and start anew with an uncontaminated group.

These citizens were summoned to hear a case of first degree murder that had been the subject of substantial attention in the press. In circumstances like these, when the glare of the media lurks all around, the conduct of the individual is most susceptible to the pressures, whether overt or subtle, of the group in which one has been placed. Within a group of peers, even of strangers, the compulsion to conform to the strongest, the most vocal, the most assured, is invisibly formidable. This is especially true in jury duty. All have been summoned, all are strangers; all are uncertain; but all desire the approbation of both the court and their peers.

The spoken word can be no less lasting than the written; in this setting, words do not have to be on paper to linger in the mind's ear. Some voices will resound in the courtroom long after they have stopped speaking. To paraphrase (however profanely) the wondrous poet Khayyàm:

"The waggling tongue speaks: and, having spoken,
Echoes: nor all thy piety nor wit
Shall lure it back to cancel half a tone,
Nor all ***of*** *thy protests conceal a word."*

Unless we are willing to let juries become lynch mobs, the trial judge should have started over. 1 would now require him to do so, but not because of a possible procedural error (as to which I have strong doubts there was error, anyway) in the exercise of peremptory challenges.

EXHIBIT 2

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

RICHARD BRO WER,

Appellant,

v. CASE NO. 95-2765

STATE OF FLORIDA,

Appellee,
_____/

MOTION FOR REHEARING

Appellee the State of Florida, by and through its undersigned counsel and pursuant to Fla. R. App. P. 9.330, moves this honorable court to grant a rehearing in this matter on the good faith basis that this court has overlooked certain points of law and fact, and in support thereof would state:

1. On December 11, 1996 this court issued an opinion in the present case which reversed appellant's conviction, on the basis that the procedure for waiving defendant's presence at the bench during counsel's peremptory jury challenges was not followed pursuant to *Coney v. State,* 653 So. 2d 1009, 1012-13 (Fla.), *cert. denied,* U.S. ___, *116 S.* Ct. 315, 133 L. Ed. 2d 218 (1995).

2. However, on December 5, 1996 the Florida Supreme Court issued its opinion in the matter styled *Matthew Dale Boyett v. State of Florida', No.* 8 1,971, a copy of which is attached

[1]Due to the recency of this case, it was not cited by the parties to bring it to this court's attention.

hereto as Exhibit "A", which receded from *Coney* to the extent that so long as a defendant is in the courtroom, he is considered to be physically present at the immediate site where challenges are exercised, although he may not be present at a bench conference.

3. The record of this case clearly shows that pursuant to *Boyett*, appellant was present in the courtroom during counsel's jury challenges, and that appellant had a meaningful opportunity to be heard through counsel (T 4799/15-24, 4800/12-19, 4801/4-18, 4804/6-4805/2, 1886/13, 2608/21-2610/14). For example:

a. At the hearing on defendant's motion for new trial, defense counsel Ronald Smith made the following statements:

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

4. The rule of law enunciated in *Boyett* must be applied in this case, since this case was still pending on direct review when the *Boyett* opinion was issued. *Smith v. State, 598 So.* 2d 1063 (Fla. 1992).

WHEREFORE, the State of Florida requests that this court grant a rehearing in the present case, withdraw its opinion and issue a new opinion affirming appellant's conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing had been furnished by courier to Joseph R. Chloupek, Assistant Public Defender, Richard L. Jorandby, Public Defender, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401 this the 18th day of December, 1996

David M. Schultz
Of Counsel

Supreme Court of Florida

No. 81,971

MATTHEW DALE BOYETT,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

[December 5, 1996]

PER CURIAM.

We have on appeal the judgment and sentence of the trial court imposing the death penalty upon Matthew Dale Boyett. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Boyett was convicted of first-degree murder and burglary of

Exhibit "A"

a dwelling. The trial judge overrode the jury's life recommendation and imposed the death penalty. For the reasons set forth below, we affirm Boyett's conviction, but reverse his death sentence.

On August 5, 1992, Boyett shot and fatally wounded the victim, Bill Hyter, while attempting to rob him in his home. Boyett was acquainted with the victim and had visited his home frequently. On several occasions the victim had made sexual advances to Boyett. Boyett was upset by this and rebuffed the victim. On at least one occasion, the victim attempted to engage in sexual activity with Boyett while Boyett was passed out. There was a violent confrontation. Approximately six weeks before the shooting, Boyett told the victim he would kill him if he did not stop making sexual advances. He stopped associating with the victim.

Several days before the shooting, when Boyett and a teenage friend were driving past the victim's house, Boyett told his friend that he was going to shoot and rob the occupant of the house. Boyett later showed his friend a pistol; explained his plan for robbing and shooting the victim; and asked his friend to help him execute it. His friend declined and would later serve as a state witness against Boyett.

On the day of the murder, Boyett entered the victim's home, attempted to rob him, and shot him twice, Boyett stated that he fired his pistol when the victim picked up a baseball bat. The victim was wounded and fled through the front door. He told neighbors and emergency personnel that Boyett was his attacker. He died in the hospital a short time later.

When arrested, Boyett admitted to law enforcement officers that he had shot the victim. He also told them where to find the gun.

Boyett was charged with first-degree murder, predicated on premeditation or a felony murder theory, and burglary of a dwelling. Testimony presented at trial included evidence of the serious emotional trauma Boyett had undergone as a result of his broken family life, evidence of prior instances when Boyett had been sexually molested by other men, and expert testimony as to the mental problems incidents such as those in Boyett's past would cause.

The jury returned a guilty verdict as to both the murder and the burglary charges, but did not specify on which theory the murder verdict was based. The jury recommended a life sentence, but the circuit judge overrode and imposed the death penalty for the murder, as well as eight years imprisonment for the burglary.

The judge found two aggravating circumstances present, "cold, calculated, and premeditated" (CCP) and "committed in the course of a burglary" and specifically rejected statutory mitigating circumstances. He did find that the evidence supported five non-statutory mitigating circumstances: 1) Boyett suffered from long-term substance abuse, 2) he was sexually abused as a child, 3) he kxhibited good behavior while in custody, 4) he suffered remorse for the killing; and 5) he had an unstable, broken family life. The judge found that only factors 2 and 5 deserved substantial weight.

Boyett appealed the conviction and sentence to this Court, raising one guilt phase issue and five penalty phase issues. He argues that there was 1) error because he was not present at the site where peremptory challenges to prospective jurors were exercised, 2) error in finding the CCP aggravator, 3) error in failing to find or properly consider statutory and nonstatutory mitigators, 4) **error in overriding the jury's recommended life** sentence when there were mitigators on which it could reasonably have relied, and 5) error in allowing the state's sentencing memorandum to be filed late. Additionally, although he does not raise the issue, **we have reviewed the record to ensure that there was competent: and substantial evidence presented at** trial **to**

sustain his convictions for both first-degree murder and burglary.

We find that Boyett's guilt phase issue is without merit. The record reflects that Boyett was present in the courtroom, but not at the bench, when peremptory challenges were exercised. Boyett argues that our decision in Conev v. State, 653 So. 2d 1009 (Fla. 1995), cert. denied, 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995), should apply to him insofar as it requires that a defendant be present at the actual site where jury challenges are exercised. Although in that case we explicitly stated that our ruling was to be prospective only, Boyett argues that he should be entitled to the same relief because his case was not final when the opinion issued, or, in the alternative, that the rule announced in Coney was actually not new, and thus should dictate the same result in his case. We reject both of these arguments.

In Coney, we interpreted the definition of "presence" as used in Florida Rule of Criminal Procedure 3.180. We expanded our analysis from Francis v. State, 413 So. 2d 1175 (Fla. 1982), which concerned both a defendant whose right to be present had been unlawfully waived by defense counsel, and a jury selection process which took place in a different room than the one where the defendant was located. 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. See Conev, 653 So. 2d at 1013. Thus, we find Boyett's argument on this issue to be without merit.[1]

Boyett's second Coney argument--that the rule of that case should apply because Boyett's case was non-final when the decision issued--is also without merit. In Coney, we expressly held that "our ruling today clarifying this issue is prospective only." Coney, 653 So. 2d at 1013. Unless we explicitly state otherwise, 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. See Armstrons v. State, 642 So. 2d 730, at 737-38 (Fla. 1994), cert. denied, 115 S. Ct. 1799, 131 L. Ed. 2d 726 (1995). Because Boyett had already been tried when Coney issued, Coney does not apply.

We recognize that in Coney we applied the new definition of

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[1]Although it does not change our analysis in this case, we note that we have recently approved an amendment to rule 3.180(b) which will provide a clearer standard by which to resolve such issues in the future. The rule will now read: "A defendant is present for purposes of this rule if the defendant is physically 'in attendance for the courtroom proceeding, and has a meaningful opportunity to be heard through counsel on the issues being discussed." Amendments to the Florida Rules of Critninal Procedure, No. 87,769, slip op. at 2 (Fla. Nov. 27, 1996).

"presence" to the defendant in that case: the state conceded that the defendant's absence from the immediate site where challenges were held was error, and we found that the error was nonetheless harmless. Coney, 653 So. 2d at 1013. 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. Although the result. in Coney would have been the same whether we found no error or harmless error, we recede from Coney to the extent that we held the new definition of "presence" applicable to Coney himself.

As to Boyett's penalty phase arguments, we agree that the trial judge's override of the jury recommendation was improper. The standard we announced in Tedder guides our analysis: "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). We expanded on this in Ferry:

> The principle announced in Tedder . . . has bken consistently interpreted by this Court to mean that when there is a reasonable basis in the record to support a jury's recommendation of life, an override is improper. When there are valid

> mitigating factors discernible from the record upon which the jury could have based its recommendation an override may not be warranted.

a

Ferry v. State, 507 So. 2d 1373, 1376 (Fla. 1987) (citation omitted).

Here there is mitigating evidence in the record upon which the jury reasonably could have relied in recommending life. This evidence includes Boyett's age (18 at the-time of the incident); past history of sexual abuse; ongoing, significant emotional and psychological problems; traumatic family life; history of drug abuse; past relationship with the victim; remorse; and cooperation with law enforcement officials. The jury reasonably could have viewed this evidence as valid mitigation which would support a life recommendation. See, e.g., Esty v. State, 642 So. 2d 1074, 1080 (Fla. 1994) (holding that override was improper where evidence supported "heinous, atrocious, or cruel" and "cold, calculated, and premeditated" aggravators, but also supported mitigation including youth, lack of criminal history, potential for rehabilitation, and possibility that defendant acted in an emotional rage), cert. denied, 115 S. Ct. 1'380, 131 L. Ed. 2d 234 (1995). In light of this evidence, we find that i--here was a reasonable basis for the jury's recorntnendation

Therefore, we reverse the override.

Because we find that the override was improper, we do not need to address the other penalty phase issues raised by Boyett.

Accordingly, we affirm Boyett's convictions for first-degree murder and burglary, vacate his death sentence, and remand for imposition of sentence of life imprisonment without eligibility for parole for twenty-five years.

It is so ordered.

OVERTON, GRIMES, HARDING and WELLS, JJ., concur.
KOGAN, C.J., and ANSTEAD, J., concur in result only as to the convictions and concur as to the sentence.
SHAW, J., concurs in result only.

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

EXHIBIT 3

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

RICHARD BROWER

Appellant(s),

vs.

STATE OF FLORIDA

Appellee(s).

CASE NO. 95-02765

L.T. CASE NO. 93-992 CFA
MARTIN

January 21, 1997

96-141780

BY ORDER OF THE COURT:

ORDERED that appellee's motion filed December 18, 1996, for rehearing is hereby denied.

I hereby certify the foregoing is a
true copy of the original court order.

MARILYN BEUTTENMULLER
CLERK

cc: Public Defender 15
Attorney General-W. Palm Beach
State Attorney 19

/KB

EXHIBIT 4

95-1417 80

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

This cause having been brought to the Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause as may be in accordance with the opinion of this Court, and with the rules of procedure and laws of the State of Florida.

WITNESS the Honorable Bobby W. Gunther, Chief Judge of the District Court of Appeal of the State of Florida, Fourth District, and seal of the said Court at West Palm Beach, Florida on this day.

DATE: February 7, 1997

CASE NO.: 95-2765

COUNTY OF ORIGIN: Martin

T.C. CASE NO.: 93-992 CFA

STYLE: Richard Brower v. State

A TRUE COPY

Marilyn Beutcenmüller, Clerk
District Court of Appeal
Fourth District

ORIGINAL TO: Hon. Marsha Stiller, Clerk

cc: Public Defender #15
Attorney General - W. Palm Beach

/CR

RECEIVED
OFFICE OF THE
ATTORNEY GENERAL

FEB 10 1997

CRIMINAL OFFICE
WEST PALM BEACH

EXHIBIT 5

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

RICHARD BROWER,

Appellant,

v. CASE NO. 95-2765

STATE OF FLORIDA,

Appellee.

EMERGENCY
MOTION TO RECALL MANDATE PENDING REVIEW

Appellee State of Florida, by and through undersigned counsel, moves this Honorable Court to recall issuance of its mandate in this cause and as grounds therefore states the following:

1. This court issued its initial opinion in this case on December 11, 1996, reversing appellant's conviction on the basis that the procedure for waiving defendant's presence at a bench conference during peremptory challenges was not followed pursuant to Coney *v. State, 653 So.* 2d 1009, 1012-13 (Fla.), *cert. denied,* __ US. __, 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995).

2. On December 18, 1996, appellee filed a motion for rehearing with this court, alleging that its opinion in this matter was in conflict with *Boyett v. State,* 21 Fla. L. Weekly S535 (Fla. December *5, 1996).*

3. On January 21, 1997, this Court issued its order denying appellee's motion for rehearing, and on February 7, 1997, it issued the mandate.

4. Contemporaneously herewith, appellee is filing its notice of intention to seek the discretionary jurisdiction of the Florida Supreme Court.

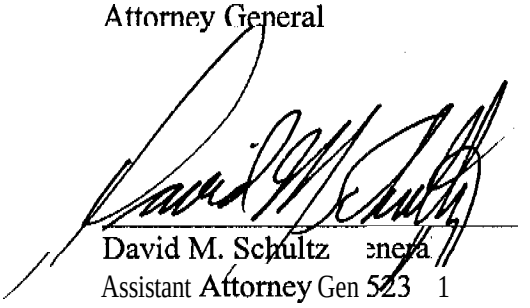
5. Since this case is not yet final, appellee asserts that it would be in the interests of justice for the mandate to be recalled pending resolution by this Court. See: Rule 9.130(f) Fla. R. App. P.; State v, McKinnon, 540 So. 2d 111 (Fla. 1989).

6. Petitioner asserts that it has a good chance of prevailing in this Court in light of *Boyett*.

Wherefore, appellee respectfully requests this court recall the mandate pending review in the Florida Supreme Court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



David M. Schultz
Assistant Attorney General
Florida Bar No. 0874 3
1655 Palm Beach Lakes Blvd., Ste. 300
West Palm Beach, Florida 33401
561/688-7759

CERTIFICATE OF SERVICE

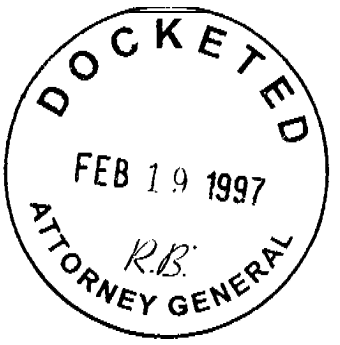
I HEREBY CERTIFY that a true and accurate copy of the foregoing had been furnished by courier to Joseph R. Chloupek, Assistant Public Defender, Richard L. Jorandby, Public Defender, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401 this the 19th day of February, 1997.

David M. Schultz
Of Counsel

EXHIBIT 6

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT



RICHARD BROWER,

Appellant,

v. CASE NO. 95-2765

STATE OF FLORIDA,

Appellee.

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that appellee State of Florida invokes the discretionary jurisdiction of the Florida Supreme Court to review the decision of this Court rendered January 2 1, 1997. The decision is in direct conflict with a decision of the Florida Supreme Court on the same question of law.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

David M. Schultz
Assistant Attorney General
Florida Bar No. 0874523
1655 Palm Beach Lakes Blvd., Ste. 300
West Palm Beach, Florida 3340 1
56 1/688-7759

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing had been furnished by courier to Joseph R. Chloupek, Assistant Public Defender, Richard L. Jorandby, Public Defender, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401 this the 19th day of February, 1997.

David M. Schultz
Of Counsel

EXHIBIT 7

K

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

RICHARD BROWER

Appellant(s),

vs.

STATE OF FLORIDA

Appellee(s).

CASE NO. 95-02765

L.T. CASE NO. 93-992 CFA
MARTIN

February 21, 1997

95-141780

BY ORDER OF THE COURT:

ORDERED that appellee's emergency motion filed February 19, 1997, to recall mandate pending review is hereby granted.

I hereby certify the foregoing is a
true copy of the original court order.

MARILYN BEUTTENMULLER
CLERK

cc: Public Defender 15
Attorney General-W. Palm Beach
Marsha Stiller, Clerk

/CH