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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

RICHARD BROWER,

Respondent.

Case No. 89,968

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Respondent was the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida, and Appellant in the Fourth District Court of Appeal. Petitioner was Appellee, below.

In the brief, the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF CASE

Respondent accepts Petitioner's Statement of the Case.

STATEMENT OF THE FACTS

As reported in Brower v. State, 684 So.2d 1378 (Fla. 4th DCA 1997), the relevant material facts are as follows: During Respondent's trial, defense counsel exercised his peremptory challenges while [Respondent was] seated at counsel's table. . . about thirty feet away," id . at 1379. Respondent neither waived his right to be present during the exercise of these challenges nor ratified the jury ultimately selected for his trial. Respondent's trial had begun on June 5, 1995, subsequent to this Court's decision in Coney v. State, 653 So. 2d 1009, 1012-1013 (Fla. 1995) certiorari denied U.S., 116 S. Ct. 315, 133 L.Ed 2d 218 (1995), a case in which this Court held that a criminal defendant must be actually present at the "immediate site" of juror challenges, unless he either waives his right or ratifies the exercised challenges after an on-the-record inquiry by the trial court, id. at 1379. Finding it "impossible to determine the extent of the prejudice [Respondent] suffered" from not conferring with counsel during peremptory challenges, the Fourth DCA in Brower reversed Respondent's convictions and sentences and remanded for a new trial, 684 So. 2d at 138 1 .

In Bovett v. State, 21 FLW S535 (Fla. December 5, 1996), the relevant material facts are as follows: Boyett was "present in the courtroom, but not at the bench, when peremptory challenges were exercised," 21 FLW at S535. Although Boyett's trial ended prior to the date when Coney became final, Boyett argued that Coney should apply to his case, either because Coney did not announce a "new" interpretation of Florida Rule of Criminal Procedure 3.180 or Coney would govern Boyett's then non-final appeal, id. both of Boyett's arguments, finding Coney to constitute a new rule of law on the question of "presence" during juror challenges, and that appellate decisions such as Coney which are determined to apply

prospectively are inapplicable to cases tried before the rule's announcement. Nonwithstanding the aforementioned bases for denying relief, this Court in Boyett then "receded " from Coney '"to the extent that we held the new definition of "presence" applicable to Coney himself," id. at S536. This Court explained that "because the definition of "presence" had not yet been clarified, there was no error in failing to ensure Coney was at the immediate site [of juror challenges]," 21 FLW at S535.

Finally, on November 27, 1995, this Court in Amendments to the Florida Rules of Criminal Procedure, 2 1 FLW S5 18, 52 1 (Fla., November 27, 1995) amended Rule 3.180, effective January 1, 1997, to 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".

SUMMARY OF ARGUMENT

Petitioner's attempt to invoke this Court's discretionary jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030 (a) (2) (A) (4) must be denied, since the decision of the Fourth District Court of Appeal(DCA) in Brower v. State, 684 So. 2d 1378 (Fla. 4th DCA 1997) is not in direct conflict with either this Court's decision in Bovett v. State, 21 FLW S535 (Fla. December 5, 1996) or Harris v. State, 400 So. 2d 819,820 (Fla. 5th DCA 1981).

ARGUMENT

THIS COURT MUST DENY PETITIONER'S PETITION TO INVOKE DISCRETIONARY JURISDICTION BASED ON "DIRECT CONFLICT".

Petitioner claims that the Fourth DCA's resolution of Respondent's "presence during peremptory challenges" issue improperly relied on this Court's previous decision on this subject in Coney v. State, 653 So. 2d 1009, 1012-1013 (Fla. 1995), certiorari denied, 116 S. C. 315, 133 L-ED.21 8 (1995), in "direct conflict" with this Court's subsequent opinion in Boyett v. State, 21 FEW S535 (Fla. December 5, 1996). Specifically, Petitioner claims that Boyett effectively overruled Coney on the factual question of "actual presence" covered in Respondent's case; that is, a criminal defendant present in the same courtroom where peremptory challenges are exercised, albiet without actual contact or consultation with defense counsel during the challenge process, Petitioner's Brief on Jurisdiction at p. 4. Thus, according to Petitioner, since Boyett effectively announced a "new rule of law" during the time when Respondent's appeal with the Fourth DCA remained pending (Petitioner having filed a motion for rehearing), this "new rule" should have been applied to Respondent's direct appeal. Finally, noting this Court's amendment to Florida Rule of Criminal Procedure 3.180 (b), which redefined "presence" in the context of juror challenges as physical presence at the location of any challenges as well as "a meaningful opportunity" to consult with counsel, Petitioner additionally argues that the amended rule must be applied to Respondent's appeal, since the rule's effective date was January 1, 1997, a date prior to the Fourth DCA's denial of rehearing below. According to Petitioner, the latter circumstance places Brower in conflict with Harris v. State, 400 So. 2d 819, 820 (Fla. 5th DCA 198 1) on the question of applying changes to rules of criminal procedure to pending appeals. However, as Respondent will demonstrate,

neither of Petitioner's arguments have merit, disentitling Petitioner to invoke this Court's discretionary jurisdiction.

First, a cursory glance at this Court's prior decisions interpreting the phrase '"direct conflict" shows that Petitioner cannot establish such a conflict in this case. For example, in Nielsen v. City of Sarasota, 117 So. 2d 73 1, 734 (Fla. 1960), this Court described "conflict" jurisdiction as involving either (1) the announcement of a rule of law by the intermediate appellate court conflicting with this court's prior pronouncement on the same subject, or (2) applying an agreed-upon rule to produce a different result involving cases with "substantial the same controlling facts," id. at 734. In discerning whether conflict jurisdiction exists, this Court can only examine the facts reported on the face of the intermediate appellate court's opinion, rather than examining the record below or a party's proffered appendices, see Hardee v. State, 534 So. 2d 706,708 (Fla. 1988); Reaves v. State, 485 So. 2d 829, 830, n.3 (Fla. 1986). In making this examination, this Court will not find conflict unless the cases allegedly conflicting are "on all fours factually in all material respects," Florida Power and Light Company v. Bell, 113 So. 2d 697,698 (Fla. 1959) (citation omitted). Additionally, any conflict must be "express and direct, i.e. . . . in other words, inherent or so called "implied" conflict" is insufficient, Department of Rehabilitative Services v. National Adoption Counseling: Service. Inc. 498 So. 2d 888, 889 (Fla. 1986) (citations omitted). The ultimate purpose behind these rules for determining conflict jurisdiction is to allow Florida's District Courts of Appeals to, in most cases, be "final and absolute," Johns v. Wainwright, 253 So. 2d 873, 874 (Fla. 1971). Thus:

> The so-called "conflict jurisdiction" was not conveyed to the Supreme Court merely to convert it into a "court of selected errors" whereby the Justices of this Court could whimsically select cases

> for review in order to satisfy some notion that the case would be of such importance as to justify the interest or attention of this Court. . . when our jurisdiction is invoked pursuant to this provision of the constitutionwe are not permitted the judicial luxury of upsetting a decision of a court of appeal merely because we might personally disagree with the so-called "justice of the case" as announced by the Court below. In order to assert our power to set aside the decision of a court of appeal on the conflict theory we must find in that decision a real, live and vital conflict within the limits [we have previously] announced.

Neilson v. City of Sarasota, supra. at 734-735.

Judged by the foregoing standards, Petitioner has unquestionably failed to establish conflict between Brower and Boyett. In Brower, the "actual presence" issue was resolved by the Fourth DCA on the merits because Brower's trial began subsequent to Coney, whose holding on its face was said to apply prospectively only, 653 So. 2d at 1013. In Boyett, this Court denied relief on the basis of procedural bars, both in terms of Coney's so "new rule of law" status and its - o n l y application, which excluded Boyett from Coney's effect, since that decision was final after Boyett's trial. As a result, an examinationof the opinions and decisions of Brower and Boyett , see Seaboard Airline Railroad Comnanv v. Branham, 104 So. 2d 356,358 (Fla. 1958) shows that the "controlling facts" of each case (the date of each defendant's trial vis-a-vis Coney) establishes that each case's ultimate holding rested on a different basis, precluding a finding of conflict jurisdiction, see e.g. Kennedy v. Kennedy, 641 So, 2d 408, 409 (Fla. 1994); Denartment of Health and Rehabilitative Services v. National Adoption Counseling Service. Inc, 498 So. 2d 888, 889 (Fla. 1986) (DCA decision based on procedural default (lack of standing) ; Supreme Court decision "on the merits;" no conflict established). Thus, Petitioner'sattempt to invoke this Court's "conflict jurisdiction" as between Brower and Boyett must fail.

Equally unavailing is Petitioner's claim that Brower 'conflicts with Harris v. State, 400 So. 2d 819 (Fla. 5th DCA 1981) on the question of applying this Court's amendment to Rule 3.180 concerning '"actual presence" during juror challenges. Respondent's trial below began on June 5, 1995, while the amendment to Rule 3.180 was deemed effective on January 1, 1997, 21 FLW S518, 519 (Fla., November 27, 1995). Where an explicit effective date for rule changes exists, this Court has previously found a rule amendment improperly applied retroactively, Cerniglia v. Cerniglia, 679 So. 2d 1160, 1164 (Fla. 1996); Mendez-Perezv. Perez-Perez, 656 So.2d 458, 459-460 (Fla. 1995). Moreover, although the disposition of a case on appeal is generally made on the basis of the law in effect at the time of the appellate court's decision, this rule does not apply where a substantive legal right is altered, State v.Lavazzoli, 434 So. 2d 321, 323 (Fla. 1983). As the Fourth DCA noted in Matthews v. State, 22 FLW D296 (Fla. 4th DCA, January 20, 1997), citing this Court's decision in Francis v. State, 413 So. 2d 1175, 1177-1179 (Fla. 1982):

> A [criminal] defendant has a constitutional right to be present at all stages of a trial where fundamental fairness might be thwarted by his or her absence. . . the examination and challenge of potential jurors is one of the essential stages of a criminal trial where a defendant's presence is mandated [, since] [t]he exercise of jury challenges by the defendant is not necessarily a mere mechanical function. . [,as] [i]t may involve the formulation of on-the-spot strategy decisions which may be influenced by the actions of the state at the time. . . . 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. . . (citations omitted).

As a result, application of the amendment to Rule 3.180 to Respondent would be improper in this case, see e.g. Naiar v. State, 614 So. 2d 644,645, n.1 (Fla. 2d DCA 1993) (improper to apply amendment to criminal rule involving sentencing guidelines to permit scoring victim injury for each count at conviction, as change substantive, rather than procedural); Compare e v . Strasser,

445 So. 2d 322, 323 (Fla. 1984) (amendment to rule of procedure allowing trial court to refuse instruction on lesser-includedoffense of attempt where only evidence showed completed offense; rule effective on retrial, making relief "'ineffectual").

In contradistinction to the effect of amending Rule 3.180, the rule amendment involved in Harris v. State, 400 So. 2d 819 (Fla. 5th DCA 1981) changed Florida's statutory speedy trial rule, which has a statutory, rather than constitutional, basis, Butterworthv. Fluellen, 389 So. 2d 968, 970 (Fla. 1980); State v. Lopez, 402 So.2d 1189, 1190 (Fla. 2d DCA 198 1). Accordingly, since Harris involved a rule change effecting procedural, rather than substantive rights, that amendment was properly applied to Harris himself; by way of contrast, the amendment involved in this case affected Respondent's substantive right to be present during a "critical stage" of his trial, i.e., the exercise of peremptory challenges. As a result, the "controlling [material] facts" on the question of applying an amendment to a rule of criminal procedure are different in Harris and Brower, and not indicative of "conflict", expressed or implied.

Finally, Petitioner's "argument" that a "windfall window" for application of Coney exists on the "actual presence" issue between the dates Boyett became final and the effective date of the amendment to Rule 3.180 for a criminal defendant such as Respondent is puzzling, since the Fourth DCA's decision in Respondent's appeal became final on January 21, 1997. If Petitioner is suggesting that this Court is incapable of judging the appropriate equities in retroactive versus prospective application of either Coney or Rule 3 .180, Respondent suggests that an examination of State v. Brown, 655 So. 2d 88 (Fla. 1995) should dispel this notion. In any event, the question before this Court concerns the appropriateness of its exercise of "conflict jurisdiction" in this cause, not a fanciful raid on the public treasury due to errors such as occurred below, where the

trial court refused to apply a decision of this Court (Coney) clearly in effect at the time of Respondent's trial. Petitioner's monetary gambit disrespects the extent to which this Court can and must act dispassionately in enforcing constitutional rights articulated by this very Court, whatever Petitioner's view of same.

Wherefore, Respondent requests this Court deny Petitioner's request to invoke this Court's "conflict" jurisdiction as factually and legally unfounded.

CONCLUSION

Respondent asks this Court to deny Petitioner's Petition to Invoke Discretionary Jurisdiction .

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to David M. Schultz Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 340 1-2299 this 7th day of March, 1997.

Counsel for Respondent