IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

RICHARD BROWER,

Respondent.

CASE NO. 89,968

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Respondent accepts factually Petitioner's Statement of the Case. Respondent disputes Petitioner's legal analysis, masquerading as a Statement of the Case, found in sentence (2) of paragraph (2), Petitioner's Initial Brief at p. 1.

STATEMENT OF THE FACTS

Respondent accepts Petitioner's Statement of the Fact, subject to the following additions:

(1) Defense counsel for Respondent at trial stated, as an officer of the Court, during the Motion for New Trial, that Respondent, during the actual jury selection process, "did not actually or actively participate in that stage of the proceedings" (R 4798-4799).

(2) Defense counsel further stated that during voir dire examination of prospective jurors, ". . . [Respondent] participated in voicing opinions and talking about the potential jurors. However, when we finished the questioning and came up to the bench and your Honor came down at the podium and once we got started in the actual peremptory challenges.. . [Respondent] was never advised by [trial defense counsel] that he had a right to be up there to actively participate in [jury selection]. . ." (R 4799, 4801).

(3) During the motion for new trial hearing on this subject, defense counsel informed the trial court that the court didn't "specifically [ask Respondent] if he wanted to be actively present or actually present as we were doing the peremptories . . . Judge, the only issue I am still sort of unclear in my mind [is] whether or not one of us, the Court or myself [,] should have advised [Respondent] that he could come

up if he wanted to. That's the only issue". In response, the trial court stated "okay. I don't think that's required. [Respondent] was clearly present in the courtroom. There was no impediment to his consultingwith counsel. And I believe the presence requirement is satisfied by that." (R 4802, 4804-4805).

SUMMARY OF ARGUMENT

Brower v. State, 684 So.2d 1378, 1381 (Fla. 4th DCA 1997) represents an appropriate application of this Court's decision in Conev v. State, 653 So. 2d 1009, 1013 (Fla. 1995) certiorari denied ____U.S. ___, 116 S. Ct. 315, 113 L.Ed.2d 218 (1995), since this Court's subsequent decision in Bovett v. State, 688 So. 2d 308, 3 10 (Fla. 1996) at most merely made clear that Coney was prospective-only as to Coney himself. Additionally, the "receded-from"language in Boyett constituted mere dicta, rendering the language inapplicable to Respondent's case. Nor can the subsequent amendment to Florida rule of criminal procedure 3.180, which purports to redefine the "actual presence" of a criminal defendant during jury selection, be applied to Respondent's case on appeal, since the scope of this rule involved Respondent's substantive constitutional right to be present during all "critical stages" of the proceedings against him. Finally, the error committed below in failing to apply Coney to Respondent's trial, which clearly began subsequent to the date Coney became final, was not harmless under the facts of this case, since defense counsel's statement that Respondent in fact did not participate in actual jury selection, as compared to voir dire examination, stands unrebutted. In such circumstances, Petitioner cannot carry its burden of showing the error harmless as to Respondent. Thus, the Fourth District Court of Appeal's decision in Totover in

constituted an appropriate application of Coney, and must be affirmed by this Court.

ARGUMENT

BROWER V. STATE, 684 So. 2d 1378, 1381 (Fla. 4th DCA 1997) MUST BE AFFIRMED.

Petitioner makes three arguments in support of reversal of Brower v. State, 684 So. 2d 1378 (Fla. 4th DCA 1997). First, Petitioner contends that this Court's decision in Bovett v. State, 688 So. 2d 308 (Fla. 1996) effectively overrules the Court's prior decision in Conev v .State, 653 So. 2d 1009 (Fla. 1995) certiorari denied ___ U.S. , 116 S.Ct. 315, 133 L.Ed.2d 218 (1995) on the question of whether a criminal defendant can said to be "actually present" during jury selection without being at the immediate site where jury selection takes place. Thus, according to Petitioner, since Boyett was decided prior to the Fourth DCA's ruling in Brower, that decisions' reliance on Coney was misplaced, entitling Petitioner for reversal in this Court. Second, Petitioner interprets this Court's subsequent amendment to Rule 3.180 (b) of the Rules of Criminal Procedure, which specifically defines "presence" in a manner contrary to Coney , Amendments to the Florida Rules of Criminal Procedure, 685 So.2d 1253, 1259 (Fla. 1996), as a mere "procedural change," entitling Petitioner to retroactive application of the Rule change to Respondent's appeal. Finally, Petitioner claims that any error committed below on this issue was harmless, since Respondent could have consulted with defense counsel during jury selection. Unfortunately for Petitioner, its arguments are entirely wrong.

As a result, this Court must affirm Brower.

Initially, Respondent would note that any language in Boyett purporting to recede from the "actual presence" language in Coney applicable to Respondent's appeal was pure dicta, rendering Boyett nonbinding authority on the issue, see Bunn v. Bunn, 3 11 So. 2d 387,389 (Fla. 4th DCA 1975); Medial Faculties Development, Inc. v. Little Arch Properties, Inc., 656 So. 2d 1300, 1303 (Fla. 3d DCA 1995); Town of Lantana v. Pelczynski, 290 So. 2d 546,568 (Fla. 4th DCA 1974) affirmed 303 So. 2d 326 (Fla. 1974). Specifically, in Boyett this Court resolved the "actual presence" issue adverse to Boyett on the basis that Boyett's trial occurred prior to the date Coney was final, since Coney itself stated that its holding would be applied prospectively-only, 688 So. 2d at 3 10. Additionally, this Court found that Boyett's argument that the Coney rule was not new, entitling Boyett to the benefit of Coney, was unavailing, 688 So. 2d at 309-3 10. Clearly, the discussion in Boyett concerning, whether Coney should have been applied to Coney himself was pure, unadulterated obiter dicta, since the discussion was unnecessary to resolve Boyett's appeal. In such circumstances, this Court has previously found itself not bound by prior dicta where an issue discussed in dicta was not necessary for resolving the previous case, see e.g. State v. Florida State Imwrovement Commission, 60 So. 2d 747, 750 (Fla. 1952); see also Costal Petroleum Company v. American Cyanamid, 492 So. 2d 339,

344 (Fla. 1986) certiorari denied 479 U.S. 165, 107 S.Ct. 9.50, 93 L.Ed.2d 999 (1986) (Supreme Court dicta "to answer irrelevant argument put to us by the parties" not binding on subsequent case where issues differed factually). Therefore, Boyett does not control as binding precedent on the issue presented in Respondent's appeal.

More importantly, a close examination of Boyett shows it does not "recede from" Coney on the precise issue involved in Respondent's appeal, i.e., whether Respondent's presence in the same room as jury selection, but not at the immediate site of selection, constitutes error. Instead, it is clear that Boyett merely clarified that Coney was meant to be applied prospectively as to Coney himself, and not just as to criminal defendants whose trials occurred subsequent to Coney:

> We recognize that in Coney we applied the new definition of "presence" to the defendant in that case. , , it was incorrect for us to accept the state's concession of error [on this issue]. Because the definition of "presence" had not yet been clarified, there was no error in failing to ensure Coney was at the immediate site. . . we recede from Coney to the extent that we held the new definition of "presence" applicable to Coney himself.

688 So. 2d at 3 10 (emphasis supplied). As the Fifth DCA found in Anderson v. State, 22 FLW 0736 (Fla. 5th DCA, March 21, 1997):

> By this statement, [this] Court only expressly receded from Coney to the extent that the new definition of "presence" should not have been applied to that case, since

> it was first formulated in that opinion. [This] Court did not, by this statement, expressly recede from the new definition [itself].

In fact, the extension of prospectivity for the Coney decision in Boyett to Coney himself, as well as Coney's own prospective-only ruling, is not unprecedented; this Court has on numerous prior occasions announced that its decisions were to be given prospective-only application, either in general or including the defendants involved in those appeals, see e.g. Allen v. State, 662 So. 2d 323 (Fla. 1995) (procedure for presenting mitigating evidence in death penalty case prospective only); In Re Instructions in criminal cases, 652 So. 2d 814, 815 (Fla. 1995) (deletion of standard jury instruction concerning inconsistent exculpatory statements applied only to trials commencing subsequent to date that decision became final); Pietri v. State, 644 So. 2d 1347 (Fla. 1994) certiorari denied S . 115 S. Ct. 2588, 132 L.Ed.2d 836 (1994) (Supreme Court decision barring use of flight instruction prospective); Peterka v. State, 640 So. 2d 59 (Fla. 1994) certiorari denied S . 115 S. Ct. 940, 130 L.Ed.2d 884 (1994) (Supreme Court decision requiring sentencing judge in capital murder case to discuss mitigating circumstances orally prospective-only); see also State v. Johans, 613 So. 2d 1319, 1321 (Fla. 1993) (requirement that trial court inquire in all circumstances where issue raised concerning racial bias in peremptory challenges prospective-only, and didn't apply to Johans himself); accord

Valentine v. State, 616 So.2d 97 1,974 (Fla. 1993); Reaves v. State, 574 So. 2d 105 (Fla. 199 1) appeal after remand 639 So. 2d 1 (Fla. 1993) certiorari denied at ___ U.S. , 115 S. Ct. 488, 130 L.Ed.2d 400 (1994) (rule announced in Supreme Court decision disqualifying prosecutor who previously represented charged defendant applied prospectively-only). Thus, as Respondent has made abundantly clear, Petitioner's claim that Boyett undermines the holding in Coney applicable to Respondent's appeal is totally without merit.

Equally unavailing is Petitioner's claim that Brower conflicts with Harris v. State, 400 So.2d 1 (5th DCA 1981) on the question of applying this Court's amendment to Rule 3.180 concerning "actual presence" during peremptory challenges. Respondent's trial below began on June 5, 1995, while the amendment to rule 3.180 (b) was deemed affective on January 1, 1997, Amendments to Florida Rules of Criminal Procedure, 685 So. 2d 1253, 1255 (Fla. 1996). Where an explicit effective date for rule changes exists, this Court has previously found a rule amendment improperly applied retroactively, Cerniglia v. Cernielia, 679 So.2d 1160, 1164 (Fla. 1996); Mendez-Perez v. 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

32 1, 323 (Fla. 1983). As the Fourth DCA noted in Matthews v. State, 687 So.2d 908,909 (Fla. 4th DCA 1997), citing this Court's decision in Francis v. State, 413 So.2 d 1175, 1177-1179 (Fla. 1982) appeal after remand 473 So. 2d 672 (Fla. 1986);

> 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 [by] a defendant . . . (citations admitted).

As a result, application of the amendment to Rule 3.180 (b) to Respondent would be improper in this case, see e.g. Najar 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 changed substantive, rather than procedural).

In contradistinction to the effect of amending Rule 3.180 (b), the rule amendment involved in Harris v. State changed Florida's statutory speedy trial rule, which has a statutory, rather than constitutional, basis, Butterworth v. 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 improperly 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 harmless error analysis is flawed by its resort to speculation that Respondent "had a meaningful opportunity to heard through counsel during peremptory challenges" merely because he was "present during the questioning of the potential jurors," Petitioner's Initial Brief at p. 7. In Francis v. State, 413 So. 2d 1175, 1179 (Fla. 1982), appeal after remand 473 So. 2d 672 (Fla. 1986), this Court found "the exercise of peremptory challenges. . . to be essential to the fairness of a trial by jury. . . as one of the most important rights secured to a defendant," 413 So. 2d at 1178-1179 (citations omitted; emphasis supplied), In describing the process by which peremptory challenge are actually exercised, the Court noted:

> 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 and a juror's habits and associations. .

As noted in Francis, it is clear that the trial court's failure below to follow the procedure outlined in Coney could not constitute harmless error in this case, since Respondent's lack of participaion in jury selection would be considered harmful under Francis, see generallv Matthews v. State, 687 So. 2d 908, 909-9 10 (Fla. 4th DCA 1997). At the very least, this Court is "unable to [effectively] assess the extent of prejudice, if any, [Respondent] sustained by not being present to consult with his counsel during the time his peremptory challenges were exercised," Francis, supra., 413 So.2d at 1179.

This result is not changed by Petitioner's citation to Anderson v. State, 22 FLW D736 (Fla. 5th DCA, March 2 1, 1997) or Kellar v. State, 690 So. 2d 630 (Fla. 1 st DCA 1997). In Anderson, trial court told Anderson that he could participate in jury selection at sidebar; however, defense counsel stated that the defense "elected instead to take a recess before jury challenges," id. In those circumstances, the Fifth DCA in Anderson found that defendant had the opportunity to consult with his attorney during jury selection. Likewise, in Kellar the First DCA found that "the record reflects that [Kellar] and his counsel conferred" during jury selection, 690 So.

2d at **631.** Thus, in both of the aforementioned cases the record on appeal established actual consultation between client and counsel during jury selection. In Respondent's case, defense counsel stated without contradiction that Respondent did not "actually or actively participate in [jury selection]" (R 4799). Accordingly, neither Anderson nor Kellar persuasively establish the error in Respondent's case as harmless.

To like affect is Turner v. State, 530 So.2d 45, 48-49 (Fla. 1987) certiorari denied 109 S.Ct. 1175 **(1988).** In Turner, the Supreme Court remanded for an evidentiary hearing on the issue of whether that defendant was present during jury selection, 530 So. 2d at 46, On remand, the trial court in that case found that defense counsel and Turner had already agreed upon their peremptory challenges actually exercised prior to jury selection, after counsel and Turner had discussed whether Turner wanted to excuse specific prospective jurors, 530 So.2d at 48-49. Thus, Turner is clearly distinguishable from both Francis and Brower, in that the record on appeal in Turner indicated that the defendant and counsel actually discussed counsel's upcoming exercise of peremptory challenges. Since the record in Respondent's case is uncontradicted that no such discussion took place below, the Fourth DCA in Brower properly applied both Coney and Francis to find the error involved in this appeal was not harmless.

Lastly, Petitioner's claim that Respondent's counsel somehow waived this issue for purposes of appeal by not contemporaneously objecting during jury selection was authoritatively rejected in Brower, since the question of a criminal defendant's presence during jury selection can be raised for the first time on a motion for new trial, Salcedov. State, 497 So.2d 1294, 1295 (Fla. 1st DCA 1986) review denied 506 So. 2d 1043 (Fla. 1987). Petitioner's argument to the contrary is without support, Brower v. State, 684 So.2d 1378, 1380 (Fla. 4th DCA 1997).

As a result, since all Petitioner's arguments for reversal are contrary to establish law on the issues raised, Petitioner is entitled to affirmance of the Fourth DCA's decision in Brower v. State, 684 So.2d 1378 (Fla. 4th DCA 1997). Wherefore, Respondent prays this Court issue a mandate directing the Fourth DCA to enforce its decision below in the trial court of the Nineteenth Judicial Circuit, in and for Martin County, Florida.

CONCLUSION

Based on the foregoing argument and the authorities relied on therein, Respondent respectfully requests this Honorable Court to reverse this cause with such directives as it may deem appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to DAVID SCHULTZ, Senior Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 3340 1, this 13th day of June, 1997.

JOSEPH R. CHLOUPEK
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