ORIGINAL

IN THE SUPREME COURT OF FLORIDA

JOHNNIE E. HILL,

Petitioner,

vs.

Case No. 90,049

STATE OF FLORIDA,

Respondent.

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

AMENDED
INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

On January 10, 1995, the State Attorney in Hillsborough County, Florida, filed a superseding information[1] charging Appellant, Johnny E. Hill with robbery with a firearm of items including jewelry and a wallet containing currency, in violation of section 812.13(1) and (2)(a), Florida Statutes (1993), and carjacking in violation of section 812.133(2)(b), Florida Statutes (1993)(v1:R4, 19-21). The alleged offenses occurred on October 14, 1994 (v1:R19-20).

On January 11, 1995, a jury trial was held before the Honorable Cynthia Holloway (v1:R4-5, 22-24; v2:T5-150). The jury was selected in the morning (supp:R81-123). After counsel for the parties inquired of prospective jurors, the trial judge said the following: "You may approach the bench when you're ready, counsel" (supp:R115). A bench conference followed in which Mr. Hill did not participate (supp:R115-117). Three peremptory strikes were exercised by the State and four peremptory strikes were exercised by the defense (supp:R115-117).

There is no indication that Mr. Hill was physically present at the bench conference (supp:R115-117). There is no indication that

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[1] On November 3, 1994, the State Attorney filed the original information charging Appellant, Johnny E. Hill, and codefendants Tommy Lee Grimmage, Jr. and Robert G. Schoensee with robbery with a firearm of items including a motor vehicle, jewelry, and a wallet containing currency (v1:R1, 10-12). The information also charged Tommy Lee Grimmage, Jr. and Robert G. Schoensee with theft of an automobile (v1:R1, 10-12). On December 1, 1994, Grimmage and Schoensee entered pleas of guilty (v1:R2-3). Grimmage was sentenced to 24 months probation; Schoensee was sentenced to SIX months county jail (v1:R3).

defense counsel conferred with Mr. Hill (supp:R115-117). There is no indication that Mr. Hill was advised of his right to be present at the site where challenges were exercised (supp:T115-117). Mr. Hill did not waive his right to be physically present at the bench conference, and he did not ratify the actions taken by his attorney in his absence (supp:T115-117).

In its opening statement, the State asserted a codefendant pointed a gun at the victim and instructed Mr. Hill to take the victim's wallet, money, and keys (v2:T10). Mr. Hill complied and subsequently Mr. Hill drove off in the victim's automobile (v2:T11). Mr. Hill was later arrested driving the victim's car and wearing the victim's jewelry; the victim subsequently identified Mr. Hill (v2:T13-16).

The defense asserted in its opening statement that the victim had been robbed, but not by Mr. Hill (v2:T16-17). Mr. Hill was arrested while driving the car and wearing the jewelry, and this led to a misidentification by the victim (v2:T17-19).

The following testimony was produced at trial,

As Enrique Goitia left a bar, he was robbed at gunpoint by two young black men (v2:T21-36, 54-58). The tall stocky gunman ordered his short, small companion to take Mr. Goitia's wallet, money, chain, car keys, and car (v2:T23, 31, 34). Mr. Goitia did not notice what type of clothing the two individuals were wearing, but later believed the smaller man wore a sleeveless T-shirt (v2:T29-30, 38-40). The smaller man took Mr. Goitia's money, jewelry and car keys, but discarded his empty wallet (v2:T23-26, 31, 54-55).

The smaller man drove away in Mr. Goitia's car (v2:T25-26, 31, 35-36, 55-56). The gunman drove off in a van with other individuals who may have been black (v2:T26, 36, 55-56).

Mr. Goitia returned to the bar and called the police (v2:T26-27). Mr. Goitia described his car and his jewelry, but denied giving the height or weight of the robbers (v2:T27-28, 34-35, 46-47, 52). An officer testified Mr. Goitia described in detail the robbers and their clothing, including a tank top worn by the gunman's companion (v2:T53-54). At least fifty dollars had been taken, but Mr. Goitia might have told the officer he was missing twenty dollars (v2:T37, 55). Mr. Goitia denied being drunk (v2:T27). An officer testified Mr. Goitia did not appear to be drunk, but he had alcohol on his breath (v2:T51). Mr. Goitia told an officer that he did not have any gloves in his car (v2:T91-92).

The police located Mr. Goitia's car forty minutes later (v2:T32, 47-50, 58, 62-63, 68). Four people had been riding in the car (v2:T62, 69). A 5' 10" tall, 150 pound, black male in his late teens left the car's front passenger seat to go into an apartment house (v2:T62, 68-69). Mr. Grimmage jumped out of the car and ran up the street (v2:T69, 73). Mr. Hill, the driver, and a white male named Mr. Schoensee were detained (v2:T63, 69-70). Mr. Hill was wearing a tank top, shorts, camouflage gloves, and an item of jewelry around his neck (v2:T63-65).

Mr. Goitia was driven to the scene and he identified Mr. Hill, who was wearing Mr. Goitia's jewelry and was sitting in a police car, as the man who took his car (v2:T28-33, 38-43, 47-51, 58-60,

81-82). Mr. Goitia did not recognize any one else at the scene (v2:T43, 51-52, 57). Mr. Goitia also identified Mr. Hill in court as the gunman's companion (v2:T23, 41-43).

No gun and no substantial amount of money was found in the car (v2:T72-73). Neither the gun nor the van was ever found (v2:T59).

Mr. Hill, Mr. Grimmage and Mr. Schoensee were arrested and questioned (v2:T65-67). Police never apprehended or questioned the black male who entered the apartment house (v2:T70). An officer testified Mr. Hill said he and the other men drove off in the car that had been left running at a grocery by some juveniles (v2:T66-67, 71). An officer testified Mr. Hill said the necklace belonged to his sister and he never said he found the necklace in the Topaz (v2:T66, 72).

Mr. Hill denied taking Mr. Goitia's wallet, money, chain, keys, and car (v2:T82). Mr. Hill testified that on October 14, 1994, he was drinking beer with Mr. Schoensee and Mr. Grimmage at a grocery (v2:T76-77). Four young men left a car running while they entered the grocery (v2:T78).

Mr. Hill, Mr. Schoensee, and Mr. Grimage then jumped into the car (v2:T78). Mr. Hill drove, while Grimmage was in the front seat and Schoensee was in the rear seat (v2:T78-79). Mr. Hill noticed a pair of gloves and a necklace near the car's console (v2:T80,86). Mr. Hill placed the necklace around his neck, but he did not wear the gloves (v2:T80, 89). When Mr. Hill parked the car, the police detained Mr. Hill, Mr. Schoensee, and Mr. Grimmage (v2:T79-81, 87-88). Mr. Hill denied talking to police about his sister and denied

his sister gave him the necklace (v2:T87). Mr. Hill was previously convicted of three felonies (v2:T87).

The defense motions for judgment of acquittal were denied (v2:T74-75, 89). The jury found Mr. Hill guilty as charged of robbery with a firearm and carjacking (v1:R4-5, 22, 49; v2:T148-149).

On January 12, 1995, the trial court denied Mr. Hill's oral motion for new trial (v1:R5; v2:T154-155). The trial court adjudicated Mr. Hill guilty and sentenced him to concurrent terms of six and one-half years imprisonment (v1:R5, 51, 53, 56-61; v2:T156).

In Hill v. State, 22 Fla. L. Weekly D484 (Fla. 2d DCA Feb. 21, 1997), the Second District Court of Appeal affirmedwithout discussion Mr. Hill's Coney and double jeopardy issues. The court joined in the certified questions of the concurring opinion:

> I. ON WHAT DATE WAS THE CONEY DECISION ANNOUNCED?
>
> II. IF A CONEY ISSUE IS NOT PRESERVED AT TRIAL, MUST A PRISONER FILE A POSTCONVICTION MOTION ALLEGING UNDER OATH THAT HE OR SHE WOULD NOT HAVE EXERCISED PEREMPTORY CHALLENGES IN THE SAME MANNER AS HIS OR HER ATTORNEY?

Hill, 22 Fla. L. Weekly at D484-485 (Altenbernd, J., concurring).

SUMMARY OF THE ARGUMENT

The trial court erred in not insuring Appellant's right to be present at the bench conference at which his jury was selected. Mr. Hill's jury was selected on January 11, 1996. On January 5, 1995, the Conev opinion was originally released. The opinion was later modified. Since rehearing was denied and the ultimate opinion did not affect the rule originally published on January 11, 1995, the Conev rule is applicable to Mr. Hill's case. The Coney issue can be raised on direct appeal. A defendant should not be required to swear in a post-conviction motion that his jury would have been different if he had participated in the jury selection in order to raise this issue. The cause should be reversed and remanded for a new trial.

Appellant's dual convictions for carjacking and armed robbery cannot stand where both convictions arose from a single criminal transaction and both convictions are variants of the same core offense. Appellant's carjacking conviction and sentence must be vacated and his case remanded to the trial court for resentencing.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN NOT INSURING APPELLANT'S RIGHT TO BE PRESENT AT A BENCH CONFERENCE AT WHICH THE JURY WAS SELECTED.

A defendant has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence. Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982); Snyder v. Massachusetts, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934); U.S. Const. amends. VI and XIV; Fla. Const. art. I, §§ 9 and 16. Florida Rule of Criminal Procedure 3.180(a)(4) recognizes that a defendant's presence is mandated "[a]t the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury."

"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." Francis, 413 So. 2d at 1178 (citing Pointer v. United States, 151 U.S. 396, 14 S. Ct. 410, 38 L. Ed. 208 (1894)). An accused has a constitutional right to assistance of counsel in making his defense. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); Myles v. State, 602 So. 2d 1278, 1280 (Fla. 1992); U.S. Const. amends. VI and XIV; Fla. Const. art. I, § 16.

In Coney v. State, 653 So. 2d 1009 (Fla. 1995), this Court held that a defendant who is present in the courtroom at counsel

table is not present for the purposes of jury challenges made at the bench. This Court held:

> The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised. [Citation deleted.] 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. [Citation deleted.] Again, the court must certify the defendant's approval of the strikes through proper inquiry=

Coney, 653 So. 2d 1009 (Fla. 1995).

In the case at hand, after counsel for the parties inquired of prospective jurors, the trial judge said the following: "You may approach the bench when you're ready, counsel" (supp:R115). A bench conference followed in which Mr. Hill did not participate (supp:R115-117). Three peremptory strikes were exercised by the State and four peremptory strikes were exercised by the defense (supp:R115-117).

There is no indication that Mr. Hill was physically present at the bench conference (supp:R115-117). There is no indication that Mr. Hill was advised of his right to be present at the site where challenges were exercised (supp:T115-117). There is no indication that defense counsel conferred with Mr. Hill before the bench conference (supp:R115-117). Mr. Hill did not waive his right to be physically present at the bench conference, and he did not ratify the actions taken by his attorney in his absence (supp:T115-117).

At the onset of the bench conference during jury selection, the trial court specifically requested counsel, but not Mr. Hill, to approach the bench. The court's requests for counsel to approach the bench indicate that Mr. Hill was not present during the bench conferences. See Wilson v. State, 680 So. 2d 592, 593 (Fla. 3d DCA 1996) (State's suggestion of presence refuted by the trial judge stating "The attorneys will come up here and we'll decide who the jury will be in this case.").

Conducting the critical stage of jury selection in Mr. Hill's absence violated his Florida and United States constitutional rights to counsel and due process[2]. The record in the instant case fails to establish a waiver of presence or a ratification of

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[2] No objection was made at trial to the absence of Mr. Hill during the bench conferences, but no objection is necessary to preserve this issue.

> If a contemporaneous objection were required to preserve for appeal the issue of deprivation of that right, it seems to us that, as a practical matter, the right would be rendered meaningless. Accordingly, to ensure the viability of the rule laid down (or "clarified") by the supreme court in Coney, we conclude that a violation of that rule constitutes fundamental error, which may be raised for the first time on appeal, notwithstanding the lack of a contemporaneous objection.

Mejia v. State, 675 So. 2d 996, 999 (Fla. 1st DCA 1996); Wilson v. State, 680 So. 2d at 593 ("Where peremptory challenges are used, the trial court's failure to comply with the requirements of Coney constitutes fundamental error which may be raised for the first time on appeal."); Dorsey v. State, 22 Fla. L. Weekly D603, 604 (Fla. 4th DCA Dec. 18, 1996) (no objection necessary to preserve Coney issue because that would make meaningless the Coney requirement that the trial court certify waiver of presence or ratification of counsel's strikes); Brower v. State, 21 Fla. L. Weekly D2612, 2613 (Fla. 4th DCA Dec. 11, 1996) ("Patently, the procedure the Coney court prescribed in order for a defendant to waive his presence would be superfluous if the simple failure to make a timely objection had the same result.").

strikes exercised by counsel and therefore the cause must be reversed and remanded for a new trial. Butler v. State, 676 So. 2d 1034, 1035 (Fla. 1st DCA 1996) ("Because such personal waiver or acquiescence was not obtained in the present case, the appealed orders are reversed and the case is remanded.").

It is impossible to show that Mr. Hill's absence from the bench conferences during jury selection was harmless[3]. Chapman v.

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[3] Courts have found Coney error to be harmless based on the record indicating no peremptory strikes were exercised by the defense or based on the record indicating defense counsel waived the defendant's presence, the defendant was aware of his right to participate in jury selection, and the defendant consulted with counsel before the peremptory strikes were exercised.

This Court in Coney held that the error was harmless in that case where cause strikes were exercised, but no peremptory strikes were exercised. Coney, 652 So. 2d at 1013. (This Court subsequently held that the rule of Conev did not apply to Coney's case. Bovett v. State, 21 Fla. L. Weekly S535, 536 (Fla. Dec.5, 1996)).

In Ganyard v. State, 22 Fla. L. Weekly D92 (Fla. 1st DCA Dec. 30, 1996), the court found a Coney error harmless where only the prosecution exercised peremptory strikes. In Judge Webster's dissent he stated that Coney does not require peremptory challenges to be exercised by defense counsel as a condition of applicability. He further noted:

> 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. . . . It seems to me that the fact that a challenge was made in one case but not in another 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. . . . 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. . . .

Ganvard, 22 Fla. L. Weekly at D93-94 (Webster, J. dissenting).

Finding harmlessness where no peremptory strikes were exercised or where only cause challenges were exercised is improper because a different panel may have been chosen if the defendant had participated. Involuntary absence without waiver or ratification is reversible error because the extent of prejudice can not be assessed. Francis, 413 So. 2d at 1178-1179 (Fla. 1982) (the exercise of peremptory challenges "is an arbitrary and capricious right which must be exercised freely to accomplish its purpose.")

In the instant case, the jury was selected, with peremptory strikes exercised by both the State and the defense, at bench conferences in Mr. Hill's absence. Therefore, the circumstances found to be harmless error in Coney and Ganyard are not to be found in this case.

In Mejia v. State, 675 So. 2d 996, 1000, 1001 (Fla. 1st DCA 1996), the court found harmless "the technical error" of failing to certify the defendant waived his presence or ratified his attorney's exercise of challenges where the record indicated the defense counselwaivedthe defendant's presence, the defendant was aware of his right to participate in jury selection, and the defendant consulted with counsel before the peremptory strikes were exercised. See Williams v. State, 22 Fla. L. Weekly D 204 (Fla. 3d DCA Jan. 15, 1997) (error is harmless where defense counsel stated defendant chose not to be present at bench conference and defendant and counsel consulted about jury selection); Kellar v. State, 22 Fla. L. Weekly D560 (Fla. 1st DCA Feb. 28, 1997) (error harmless where defense counsel stated defendant chose not to be present at bench conference and defendant and counsel consulted about jury selection).

In Brower v. State, 21 Fla. L. Weekly D2612, 2614 (Fla. 4th DCA Dec. 11, 1996), the court held:

> 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 there were no conferences between Appellant and his counsel while the peremptories were 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.

California, 386 U.S. 18, 24 87 S. Ct. 824, 828, 17 L. Ed. 2d 705 (1967) (the burden is on the State as the beneficiary of error to establish there was no reasonable possibility that the error contributed to the conviction).

In Hill v. State, 22 Fla. L. Weekly D484 (Fla. 2d DCA Feb. 21, 1997), the court affirmed without discussion the Appellant's Coney issue. The court, however, joined in the certified questions of the concurring opinion:

> I. ON WHAT DATE WAS THE CONEY DECISION ANNOUNCED?
>
> II. IF A CONEY ISSUE IS NOT PRESERVED AT TRIAL, MUST A PRISONER FILE A POSTCONVICTION MOTION ALLEGING UNDER OATH THAT HE OR SHE WOULD NOT HAVE EXERCISED PEREMPTORY CHALLENGES IN THE SAME MANNER AS HIS OR HER ATTORNEY7

Hill, 22 Fla. L. Weekly at D484-485 (Altenbernd, J., concurring).

In Judge Altenbernd's concurrence, he asserted that the Coney decision was effective from the time of its original publication:

> Conev does not apply to "cases which have been tried before the rule (was] announced." Bovett v. State, 21 Fla. L. Weekly S535 (Fla. Dec.5, 1996). [Footnote deleted] The critical issue in this case is whether this procedural rule was "announced" on January 5, 1995, when the supreme court issued Coney, or on April 27, 1995, when it denied rehearing. In

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In the instant case, the jury was selected, with peremptory strikes exercised by both the State and the defense, at bench conferences in Mr. Hill's absence. Mr. Hill's attorney did not waive Mr. Hill's presence. The record does not indicate Mr. Hill was aware of his right to participate in jury selection. The record does not indicate defense counsel consulted with Mr. Hill before the bench conference. As in Brower, the Mejia harmless error analysis is inapplicable because it is impossible to determine the extent of the prejudice Mr. Hill suffered as a result. Therefore, this Court is obliged to reverse for a new trial.

certifying this issue to the supreme court, the Third District held that the rule in Coney applies only to cases decided after the denial of rehearing. Henderson v. State, 679 So. 2d 805 (Fla. 3d DCA 1996). See also Cardali v. State, 21 Fla. L. Weekly D2375 (Fla. 3d DCA Nov. 6, 1996) (Coney inapplicable to case tried before Coney decision became final). The Henderson court assumed that a rule is "announced" when the opinion becomes "final." It relied on a First District case, Caldwell v. State, 232 So. 2d 427 (Fla. 1970), which involved an opinion which was withdrawn on rehearing. Although a decision of an appellate court is not enforceable between the parties to the appeal until it is "final," it is not clear to me that trial courts in other cases can ignore the holding in an issued opinion until a motion for rehearing is resolved. The First District has not relied upon Caldwell in this context and has at least assumed that Conev applied to a trial in late January 1995. See Meiia v. State, 675 So. 2d 996 (Fla. 1st DCA 1996).

For purposes of Florida Rule of Criminal Procedure 3.850, this court has ruled that Hale v. State, 630 So. 2d 521 (Fla. 1993), cert. denied, __ U.S. __, 115 S. Ct. 278, 130 L. Ed. 2d 195 (1994), was announced on October 14, 1993, when the opinion was issued, and not on February 9, 1994, when rehearing was denied. Sikes v. State, 683 So. 2d 599 (Fla. 2d DCA 1996). Under circumstances where prospectivity was not a factor, both this court and the Fifth District applied Pope v. State, 561 so. 2d 554 (Fla. 1990), to "pipeline" cases when Pope was still pending on rehearing in the supreme court. See, e.g., Reed v. State, 565 So. 2d 708 (Fla. 5th DCA 1990) (finding no authority to delay Pope); Allen v. State, 561 So. 2d 1339 (Fla. 2d DCA 1990) (same). Treating the date of issuance as the date of announcement for a prospective rule appears consistent with the discussion in Smith v. State, 598 So. 2d 1063 (Fla. 1992), but that opinion is not dispositive. In an analogous context, the supreme court chose the date its opinion in Martinez v. State, 582 So. 2d 1167 (Fla. 1991), was "filed" as the date when a statute was voided by that opinion. As such, I conclude that the Martinez opinion was

> "filed" before the date that rehearing was denied. See § 25.041(2), Fla. Stat. (1995).
>
> I believe that the new procedural rule in Coney s "announced" on Thursday, January 5, 1995, when the supreme court issued its opinion. The rule was available to lawyers, judges and the public under the well-established procedures of the supreme court on that date. The rule was not modified on rehearing. If rehearing delayed implementation of a rule in other lawsuits, there would be a great incentive for parties to file frivolous motions for rehearing in an effort to affect the outcome in other cases. As a practical matter, determining whether a motion for rehearing has been filed and remains pending in the supreme court or a district court typically requires a telephone call to the clerk of court. While lawyers are free to debate whether the supreme court is infallible, the simple truth is that few rules of law are significantly modified on rehearing by that court or this court. Thus, both legal and practical reasons suggest that a rule is "announced" when the opinion is issued except in rare cases where the rule is modified on rehearing.

Hill, 22 Fla. L. Weekly at D484-485 (Altenbernd, J., concurring). Mr. Hill agrees that the Coney decision was effective from the time of its original publication on January 5, 1995. Mr. Hill's jury was selected on January 11, 1995 (supp:R81-123).

This Court in its original, January 5, 1995, Coney opinion stated that "our ruling todav clarifying this issue is prospective only." Coney v. State, 20 Fla. L. Weekly S16, 17 (Fla. Jan. 5, 1995) (emphasis added.) The January 5, 1995, Coney opinion was applicable to Mr. Hill's case.

In People v. Brooks, 527 N.E.2d 436 (Ill. App. 1 Dist. 1988), the court dealt with the problem of the effective date of a voir dire rule issued in a written opinion. The State contended that

the rule of People v. Zehr, 469 N.E.2d 1062 (Ill. 1984), was inapplicable to Brooks' case:

> ... because while the voir dire examination in this case was conducted on July 31, 1984, the decision in Zehr did not become effective until September 28, 1984, upon modification on a denial of a petition for rehearing. The State essentially argues that the trial court was not required to apply the law as set forth in Zehr at the time of the defendant's trial because a petition for rehearing had been filed, and the opinion was subsequently modified on September 28, 1994. As a result, the modified opinion of the court as set forth in Zehr superseded and vacated the rule of law concerning voir dire set forth in the opinion issued by the court on July 31, 1984. We find no merit in the State's argument.
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> A judgment of a court of review is entered when the opinion is filed. Long v. City of New Boston, 91 Ill.2d 456, 462, 64 Ill.Dec. 905, 907, 440 N.E.2d 625, 627 (1982). Moreover, contrary to the State's opinion, the filing of a petition for rehearing does not alter the effective date of the judgment of a reviewing court unless the petition for rehearing is granted. PSL Realty Company v. Granite Investment Company, 86 Ill.2d 291, 305, 56 Ill.Dec. 368, 375, 427 N.E.2d 563, 570 (1981). In the event that a petition for rehearing is allowed, the effective date that the judgment is entered on rehearing (PSL Realty Company v. Granite Investment Company, 86 Ill.2d 291, 305, 56 Ill.Dec. 368, 375, 427 N.E.2d 563, 570), and only then does-the later modification of the filed opinion supersede and vacate the effect of the earlier opinion. Long, 91 Ill.2d 456, 462, 64 Ill.Dec. 905, 907, 440 N.E.2d 625, 627.
>
> In the present case, the opinion in Zehr was filed on March 23, 1984. The opinion was later modified upon the denial of a petition far rehearing and refiled on September 28, 1984. While a modification of an opinion following rehearing does supersede and vacate the earlier opinion [citation omitted], this did not occur here. Rather, the petition for rehearing was denied, and the modification concerned a matter completely unrelated to the voir dire issue originally addressed by the

> supreme court in the July 31, 1984, Zehr opinion. Therefore, the modification of the unrelated issue did not supersede and vacate that portion of Zehr dealing with voir dire. As a result, the law as set forth in Zehr on July 31 was clearly applicable to the voir dire proceeding in defendant's case.

527 N.E. 2d at 438-439. In Coney as in Brooks, the motion for rehearing was ultimately denied and the modified opinion subsequently released did not change the voir dire rule of the case. In the case at hand, as in Brooks, the voir dire rule, clarified on January 5, 1995, should be applied to cases tried after the original opinion was released[4]. Everone was on notice of the Coney decision after January 5, 1995, and it should be applicable to all cases occurring after January 5, 1995.

In Judge Altenbernd's concurrence, he also asserted that Conev issues can only be raised in a 3.850 motion accompanied by a statement swearing the defendant would have had a different jury had he participated in the jury selection. Hill, 22 Fla. L. Weekly D484-485. Mr. Hill disagrees.

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[4] The issue of when Coney became effective was also presented in Henderson v. State, 679 So. 2d 805 (Fla. 3d DCA 1996), where the court certified the following question:

> DOES THE DECISION IN Coney v. State, 653 So.2d 1009, 1013 (Fla.), cert. denied U.S. 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995); APPLY TO CASES IN WHICH THE JURY SELECTION PROCESS TOOK PLACE AND THE ENTIRE TRIAL CONCLUDED DURING THE PERIOD OF TIME AFTER THE ISSUANCE OF THE CONEY OPINION BUT PRIOR TO THE TIME THAT CONEY BECAME FINAL BY THE DISPOSITION OF ALL MOTIONS FOR REHEARING DIRECTED TO THAT OPINION?

Requiring defendants to file a sworn statement about what they would have done during events from which they were excluded has inherent problems. What one would have done, based on memories of feelings and appearances, had a procedure been conducted differently is not a matter susceptible to articulation in a sworn statement. Defendants may not remember what occurred during voir dire with sufficient clarity to support an attestation. A defendant swearing he would have chosen a different jury would be entitled to a hearing on his or her motion while a defendant admitting confusion or lack of clear memories may be denied. Some records may indicate a juror whose responses may be sufficiently troubling that a peremptory strike may have been appropriate, while in other cases peremptory strikes may be exercised on mere feelings or appearances.

The nature and purpose of peremptory challenges makes impossible an assessment of the prejudice caused when a defendant is not present to consult with counsel during the exercise of the challenges. Francis, 413 So. 2d at 1179; Walker v. State, 438 So. 2d 969, 970 (Fla. 2d DCA 1983). See Dorsey v. State, 22 Fla. L. Weekly D603, 604 (Fla. 4th DCA Dec. 18, 1996) ("If defendant had participated in the exercising of peremptory strikes, it may have resulted in different jurors deciding his guilt or innocence. We cannot, under those circumstances, conclude beyond a reasonable doubt that the error did not affect the verdict.").

Jury challenges are "often exercised on the basis of sudden impressions and unaccountable prejudices based only on bare looks

and gestures of another or upon a juror's habits and associations." Matthews v. State, 22 Fla. L. Weekly D296 (Fla. 4th DCA Jan. 29, 1997). The exercise of jury challenges "may involve the formulation of an-the-spot strategy decisions which may be influenced by the actions of the state at the time." Matthews, 22 Fla. L. Weekly at D296 (citing Walker v. State, 438 So. 2d 969 (Fla. 2d DCA 1983)). Mr. Hill, who was not present at the bench conferences, could not aid his counsel in making on-the-spot decisions of whether or not to challenge jurors peremptorily or for cause, or how to react to the actions of the State at those conferences.

> While there are many facets to the right to assistance of counsel, there can be no doubt that a core element is ready access to and communication with counsel during trial.
>
> . . .
>
> Any delay in communication between defendant and defense counsel obviously will chill this constitutional right. Communication between defendant and defense counsel must be immediate during the often fast-paced setting of a criminal trial.

Mvles, 602 So. 2d at 1280.

Violating a defendant's right to be present during the exercise of jury challenges is fundamental error that may be raised for the first time on appeal. See Francis, 413 So. 2d at 1177-1179. The First[5], Third[6], and Fourth' District Courts of Appeal

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[5] Vann v. State, 22 Fla. L. Weekly D168 (Fla. 1st DCA Jan. 6, 1997); Rosers v. State, 21 Fla. L. Weekly D2493 (Fla. 1st DCA Nov. 19, 1996); Butler v. State, 676 So. 2d 1034 (Fla. 1st DCA 1996).

[6] Wilson v. State, 680 So. 2d 592 (Fla. 3d DCA 1996).

have reversed and remanded for a new trial based on Coney, apparently without any sworn statement from the defendant required. The fact that a defendant was absent from proceedings at which the jury was selected and there was no waiver or ratification should be sufficient to require reversal. The requirement of a sworn statement may result in the denial of claims of inarticulate pro se movants. Judge Altenbernd's suggestion is unnecessary and inappropriate.

The cause should be reversed and remanded for a new trial.

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[7] Dorsey v. State, 22 Fla. L. Weekly D603 (Fla. 4th DCA Dec. 18, 1996); Brower v. State, 21 Fla. L. Weekly D2612 (Fla. 4th DCA Dec. 11, 1996).

ISSUE II

APPELLANT'S DUAL CONVICTIONS FOR ARMED ROBBERY AND CARJACKING CANNOT STAND WHERE BOTH CONVICTIONS AROSE FROM A SINGLE CRIMINAL TRANSACTION AND BOTH CONVICTIONS ARE VARIANTS OF THE SAME CORE OFFENSE'.

Count one of the superseding information recited that Mr. Hill "did then and there unlawfully, by force, violence, assault or putting in fear rob, steal and take away from the person or custody of ENRIQUE GOITIA certain property to wit: jewelry, and a wallet containing U.S. currency andmiscellaneous personal items" (v1:R19-21). Count II of the supersedes information recited that Mr. Hill "did then and there unlawfully, by force, violence, assault or putting in fear rob, steal and take away from the person or custody of ENRIQUE GOITIA certain property to wit: a motor vehicle" (v1:R19-21). Both charges arose from the same act of taking Mr. Goitia's property. Mr. Hill in the instant case was convicted of both armed robbery and carjacking. (v1:R10-12, 49, 53; v2:T148).

Section 812.133(1), Florida Statute (1993), defines carjacking as:

> the taking of a motor vehicle which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner

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[8] This issue was affirmed by the district court without discussion. However, this Court may consider this issue. Kennedy v. Kennedy, 303 So. 2d 629 (Fla. 1974) ("In acquiring jurisdiction of a case, our Court has appropriate authority to dispose of all contested issues."); Atlas Properties, Inc. v. Didich, 226 So. 2d 684, 685 (Fla. 1969) (Florida Supreme Court has the power "to explore the entire record to see if the proper result has been reached in both the trial and District Courts.").

> of the motor vehicle, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

Section 812.13(1), Florida Statute (1993), defines robbery as:

> the taking of money or other property which may be the subject of larceny from the person or custody of another with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

The theft of a car can be adequately charged under either the robbery statute or the carjacking statute, where both require identical elements of proof. See Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932). Indeed, the State originally charged Mr. Hill and the codefendants with robbery with a firearm of items including a motor vehicle, jewelry, and a wallet containing currency without charging the robbery of the motor vehicle separately under the carjacking statute (v1:R1, 10-12).

In Sirmons v. State, 634 So. 2d 153 (Fla. 1994), this Court examined the propriety of dual convictions for grand theft and armed robbery where the convictions arose from a single taking of an automobile at knife point. Relying on the rationale enunciated in its previous decisions in Johnson v. State, 597 So. 2d 798 (Fla. 1992), and State v. Thompson, 607 So. 2d 422 (Fla. 1992), this Court held that dual convictions were barred where the offenses were "merely degree variants of the core offense of theft." Sirmons, 634 So. 2d at 154.

> The degree factors of force and use of a weapon aggravate the underlying theft offense to a first-degree felony robbery. Likewise, the fact that an automobile was taken enhances the core offense to grand theft. In sum, both offenses are aggravated forms of the same underlying offense distinguished only by degree factors. Thus, Sirmons' dual convictions based on the same core offense cannot stand.

Sirmons, 634 So. 2d at 154. Accord, Williams v. State, 635 So. 2d 1035 (Fla. 3d DCA 1994); Sullivan v. State, 631 So. 2d 1142 (Fla. 1st DCA 1994). The dual convictions in the instant case, like the dual convictions in Sirmons, are "degree variants of the offense of theft."

The court in Castelberrv v. State, 402 So. 2d 1231 (Fla. 5th DCA 1981), rev. denied, 412 So. 2d 470 (Fla. 1992), explained:

> Whether an item is taken as part of one theft or robbery, or two, necessarily depends upon chronological and spatial relationships. If a defendant thrusts a pistol into a victim's ribs and says, "Give me your watch, your wallet, and your tie!" and the victim complies, only one statutory violation, one robbery, has been committed.

Castelberrv, 402 So. 2d at 1232.

In the instant case, Mr. Goitia said that Mr. Hill was the gunman's companion. Mr. Goitia also said that the gunman told Mr. Hill to "take the money, take the chain, get the keys, take the car" (v2:T31). Thus, everything that was taken from Mr. Goitia, including his car, was taken by the same force and fear.

The taking of Mr. Goitia's car in the instant case served to enhance the core offense of theft to carjacking in the same manner that the taking of an automobile in Sirmons served to enhance the

core offense to grand theft. The use of the firearm by Mr. Hill's companion in the instant case was used to aggravate the underlying theft to a first-degree felony robbery. Thus both convictions are variants of the same core offense, theft, and thus preclude dual convictions for a single criminal transaction. See also Johnson v. State, 597 So. 2d 798 (Fla. 1992) (dual convictions for grand theft of cash and grand theft of firearm for snatching of purse impermissible because the "value of the goods or the taking of a firearm merely defines the degree" of the theft); State v. Thompson, 607 so. 2d 422 (Fla. 1992) (dual convictions for fraudulent sale of counterfeit controlled substance and felony petit theft impermissible where both convictions are aggravated forms of the same underlying offense distinguished only by degree).

Moreover, Nordelo v. State, 603 So. 2d 36 (Fla. 3d DCA 1992), and Fralev v. State, 641 So. 2d 128 (Fla. 3d DCA 1994) also suggest dual convictions in the instant case should be precluded. In Nordelo, the Court examined whether a defendant could be convicted of two counts of armed robbery which arose when the defendant took money from a cash register, then beat the victim and then took money from the victim's wallet. The Court noted that "[t]hough technical logic dictates that there were two separate acts of taking, practical logic dictates that the takings were part of one comprehensive transaction to confiscate the sole victim's property." Nordelo v. State, 603 So. 2d at 38. The Court concluded by stating:

> We note that here, the takings are not inseparably connected in every conceivable

> way. Clearly, the takings can be separated. Yet, we also note that case law and logic dictate that these takings were, in reality and by their propinquity, a continuous transaction of an armed robbery of one victim.
>
> We are also reluctant to state an absolute rule of law that becomes immutable. Thus, we stop short of ruling that in all cases, multiple takings from one victim always constitute one transaction. However, the facts of this case are reconciled along the logic of one transaction and we therefore reverse one count of armed robbery.

Nordelo, 603 So. 2d at 39.

In Fralev, the Court followed the principle set forth in Nordelo and ruled that the defendant could not be convicted of two counts of armed robbery where the defendant took money from the register and then took the clerk's personal firearm after pistol-whipping and shooting the store clerk. The Court ruled that "[b]ecause the two acts of taking 'were part of one comprehensive transaction to confiscate the sole victim's property,"' only one conviction for armed robbery could stand. Fralev, 641 So. 2d at 129. Accord Hamilton v. State, 487 So. 2d 407 (Fla. 3d DCA 1986) (dual convictions for grand theft and robbery inappropriate where defendant held up victim at gunpoint and stole victim's cash and car in one single transaction); Cobb v. State, 586 So. 2d 1298 (Fla. 2d DCA 1991) (forcibly taking car keys from victim attempting to open car door and taking car immediately thereafter constituted one robbery).

However, in Smart v. State, 652 So. 2d 448 (Fla. 3d DCA 1995), the court compared Sirmons, Fralev, and Nordelo in holding:

> Smart accosted the victim at an A.T.M. and, at gunpoint, robbed him of his jewelry

> and wallet. After an accomplice struck the victim, the defendant drove off with his car. We hold, contrary to appellant's sole contention, that under these circumstances, he was properly convicted and sentenced for both armed robbery of the personal effects under section 812.13(2)(a),(b), Florida Statutes (1993), and the armed hijacking of a different item, the vehicle which is forbidden by a different statute, section 812.133(2)(a), Florida Statutes (1993). See § 775.021, Fla. Stat. (1993).

Smart, 652 So. 2d at 448. It is unclear whether Smart's accomplice striking the victim was an intervening event separating the taking of the jewelry and wallet from the taking of the car. See Mason v. State, 665 So. 2d 328 (Fla. 5th DCA 1995) (armed robbery and carjacking were not required to be merged where defendant first took money from victim, then later and independently took car).

The taking of Mr. Goitia's car, wallet, money, and miscellaneous items in the instant case was committed during one comprehensive continuous criminal transaction. As in Fraley, Nordelo, and Castelberry, these acts were "a continuous transaction of an armed robbery of one victim," Nordelo, 603 So. 2d at 39, and precluded dual convictions. Thus, Mr. Hill's carjacking conviction and sentence must be vacated and his case remanded to the trial court for resentencing.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Appellant respectfully asks this Honorable Court to reverse Appellants case for retrial based on the Coney error, and for vacating of the carjacking conviction based on double jeopardy.

APPENDIX

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JOHNNIE E. HILL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 95-00448

Opinion filed February 21, 1997.

Appeal from the Circuit Court
for Hillsborough County;
Cynthia Holloway, Judge.

James Marion Moorman, Public Defender, Bar-tow, and Michael J.P. Baker, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Deborah F. Hogge, Assistant Attorney General, Tampa, for Appellee.

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THREADGILL, Chief Judge.

Johnnie Hill appeals judgments and sentences for robbery with a firearm and carjacking. He raises three issues on appeal. We find merit only in his claim that a public defender's lien was improperly imposed against him without notice of his right to challenge the amount of the lien, as required by Florida Rule of Criminal Procedure 3.720(d)(1). We therefore strike the lien. The trial court may again impose the lien upon proper notice. We affirm the judgments and sentences in all other respects. We join in the certified question in the concurring opinion.

Affirmed; lien stricken

QUINCE, J., Concurs.
ALTENBERND, J., Concurs specially.

ALTENBERND, Judge, Concurring.

I agree with the majority's opinion. Although I would not reverse this case, I concur separately to discuss the jury selection issue and to submit two certified questions from this panel to the supreme court.

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In Coney v. State, 653 So. 2d 1009, 1013 (Fla.), cert. denied, ___ U.S. ___, 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995), the supreme court, announcing a prospective clarification of Florida Rule of Criminal Procedure 3.180(a), held that a defendant must be "physically present at the immediate site where pretrial juror challenges are exercised," unless the defendant waives this right. It is not clear when the supreme court "announced" this prospective change in the law, or by what procedure a defendant may raise an unpreserved Coney issue. Based on the law, however, I conclude that Coney was announced before Mr. Hill's trial, but that he must raise this unpreserved Coney issue in a postconviction motion filed pursuant to rule 3.850. The two questions that I certify to the supreme court on behalf of the entire panel are:

> I. ON WHAT DATE WAS THE CONEY DECISION ANNOUNCED?
>
> II. IF A CONEY ISSUE IS NOT PRESERVED AT TRIAL, MUST A PRISONER FILE A POSTCONVICTION MOTION ALLEGING UNDER OATH THAT HE OR SHE WOULD NOT HAVE EXERCISED PEREMPTORY CHALLENGES IN THE SAME MANNER AS HIS OR HER ATTORNEY?

The state alleged that Mr. Hill committed robbery with a firearm and carjacking. The jury convicted him of these charges. The record contains nothing to suggest that he was prejudiced by any aspect of his trial. Nevertheless, the opinion in Coney announcing a prospective change in the law was issued on Thursday, January 5, 1995. This case was tried on the following Wednesday, January 11, 1995. The

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lawyers did not remind the trial judge that Mr. Hill should be present at the bench conference when they exercised peremptory challenge, and there is no question that he was absent from the conference. Both the assistant state attorney and Mr. Hill's attorney exercised peremptory challenges during the conference. Mr. Hill's attorney had peremptory challenges remaining at the end of the conference.

Coney does not apply to "cases which have been tried before the rule [was] announced." Bovett v. State, 21 Fla. L. Weekly S535 (Fla. Dec. 5, 1996).[1] The critical issue in this case is whether this procedural rule was "announced" on January 5, 1995, when the supreme court issued Coney, or on April 27, 1995, when it denied rehearing. In certifying this issue to the supreme court, the Third District held that the rule in Coney applies only to cases tried after the denial of rehearing. v . State, 679 So. 2d 805 (Fla. 3d DCA 1996). See also Cardali v. State, 21 Fla. L. Weekly D2375 (Fla. 3d DCA Nov. 6, 1996) (Coney inapplicable to case tried before decision became final). The Henderson court assumed that a rule is "announced" when the opinion becomes "final." It relied on a First District case, Caldwell v. State, 232 So. 2d 427 (Fla. 1st DCA 1970), which involved an opinion that was withdrawn on rehearing. Although a decision of an appellate court is not enforceable between the parties to the appeal until it is "final," it is not clear to me that trial courts in other cases can ignore the holding in an issued opinion until a motion for

[1] As discussed in Bovett v. State, 21 Fla. L. Weekly S535 (Fla. Dec. 5, 1996), this procedure has been modified by a change in Florida Rule of Criminal Procedure 3.180(b). Thus, actual physical presence at the bench is not a constitutional requirement, but simply a procedure created by a rule of court to assure total compliance with due process.

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rehearing is resolved. The First District has not relied upon Caldwell in this context and has at least assumed that Coney applied to a trial in late January 1995. See Mejia v. State, 675 So. 2d 996 (Fla. 1st DCA 1996).

For purposes of Florida Rule of Criminal Procedure 3.850, this court has held that the rule in Hale v. State, 630 So. 2d 521 (Fla. 1993), cert. denied, ___ U.S. ___, 115 S. Ct. 278, 130 L. Ed. 2d 195 (1994), was announced on October 14, 1993, when the opinion was issued, and not on February 9, 1994, when rehearing was denied. Sikes v. State, 683 So. 2d 599 (Fla. 2d DCA 1996). Under circumstances where prospectivity was not a factor, both this court and the Fifth District applied Pope v. State, 561 So. 2d 554 (Fla. 1990), to "pipeline" cases when Pope was still pending on rehearing in the supreme court. See, e.g., Reed v. State, 565 So. 2d 708 (Fla. 5th DCA 1990) (finding no authority to delay application of Pope); Allen v. State, 561 So. 2d 1339 (Fla. 2d DCA 1990) (same). Treating the date of issuance as the date of announcement for a prospective rule appears consistent with the discussion in Smith v. State, 598 So. 2d 1063 (Fla. 1992), but that opinion is not dispositive. In an analogous context, the supreme court chose the date its opinion in Martinez v. Scanlan, 582 So. 2d 1167 (Fla. 1991), was "filed" as the date when a statute was voided by that opinion. As such, I conclude that the Martinez opinion was "filed" before the date that rehearing was denied. See § 25.041(2), Fla. Stat. (1995).

I believe that the new procedural rule in Coney was "announced" on Thursday, January 5, 1995, when the supreme court issued its opinion. The rule was available to lawyers, judges and the public under the well-established procedures of

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the supreme court on that date. The rule was not modified on rehearing. If rehearing delayed implementation of a rule in other lawsuits, there would be a great incentive for parties to file frivolous motions for rehearing in an effort to affect the outcome in other cases. As a practical matter, determining whether a motion for rehearing has been filed and remains pending in the supreme court or a district court typically requires a telephone call to the clerk of the court. While lawyers are free to debate whether the supreme court is infallible, the simple truth is that few rules of law are significantly modified on rehearing by that court or this court. Thus, both legal and practical reasons suggest that a rule is "announced" when the opinion is issued except in the rare situation where the rule is modified on rehearing.

Although I conclude that Mr. Hill has the right to raise the Coney issue, I do not believe he has the right to raise it on direct appeal. But see Brower v. State, 21 Fla. L. Weekly D2612 (Fla. 4th DCA Dec. 11, 1996) (stating that Coney violations are fundamental errors that may be raised on direct appeal); Mejia, 675 So. 2d at 999 (same). There is nothing in this record to suggest that Mr. Hill would have taken any action at the bench that would have affected the make-up of this jury.

I will not enter the debate concerning the supreme court's reason for removing the sentence in the initial release of Coney that suggested a defendant need not or cannot preserve this issue at trial. See e.g. Mejia, 675 So. 2d at 998-99. But see Gibson v State, 661 So. 2d 288 (Fla. 1995) (Coney argument waived where defendant did not object during jury selection). I assume a prisoner can raise this issue in a postconviction motion without the need to preserve it at trial. A prisoner may

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allege that his lawyer was ineffective by failing to read the advance sheets and advise the trial court of his client's newly announced right.

On the other hand, I cannot conclude that the Coney issue is a per se error. See Scott v. State, 618 So. 2d 1386 (Fla. 2d DCA 1993) (defendant's presence by video at arraignment is not per se error). Unlike a Neil[2] issue where a jury either includes someone who should have been dismissed or excludes someone who should not have been dismissed, the Coney issue does not automatically affect the make-up of the jury. Cf. Ganyard v. State, 22 Fla. L. Weekly D92 (Fla. 1 st DCA Dec. 30, 1996) (rejecting defendant's argument that he might have exercised peremptory challenges if present at bench conference). Therefore, I conclude that Mr. Hill should be required to allege under oath and prove that he would have affected the make-up of his jury if he had been allowed to be physically present at the bench conference.

Accordingly, I concur in the affirmance, but conclude that Mr. Hill is entitled to raise this issue in a properly filed postconviction motion pursuant to rule 3.850.

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[2] State v. Neil, 457 So. 2d 481 (Fla. 1984).

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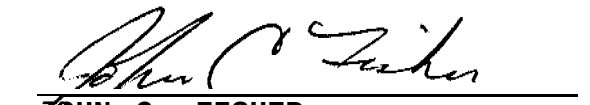
CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 4th day of April, 1997.

Respectfully submitted,



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