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IN THE SUPREME COURT OF FLORIDA

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DAVID P. CARMICHAEL,

Petitioner,

v. CASE NO. 90,811

STATE OF FLORIDA,

Respondent

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PETITIONER'S INITIAL BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

David P. Carmichael was the defendant in the trial court and was referred to as "appellant" or "defendant" in the direct appeal briefs. He shall be referred to by name or as "petitioner" herein. Petitioner shall refer to the state as either respondent, or as "the state."

TRIAL RECORD

References to the record, trial transcript, sentencing transcript, and supplemental record on appeal will be designated as "R," "T(Vol.)", "Sent.T.," and "Supp.R" respectively, followed by he page number(s) of the references.

DIRECT APPEAL RECORD

References to petitioner's First District Court of Appeal initial brief will be designated "AB," and to the state's answer brief will be "SB."References to the petitioner's reply brief will be designated "AR." References to the opinion filed by the First District Court of Appeal, from which this petition is brought shall be designated "OD."

All other references will be self-explanatory or will be explained herein.

II. STATEMENT OF THE CASE AND FACTS

Petitioner was charged with, and found guilty by a jury, of driving under the influence (DUI) of alcohol. He was adjudicated guilty of felony DUI based on a computer print-out driving record. Petitioner was sentenced to one year in the county jail, followed by 3 ½ years probation, and his license was permanently suspended. (Sent. T. 3-4).

On June 26, 1995, the jury in petitioner's trial was selected at an unreported bench conference. (T.(Vol.III)2-39). "The record was . . . supplemented with an order of the trail judge finding that [petitioner] was not physically present at the bench conference during the jury challenging procedures but that appellant was in the courtroom and had previously conferred with counsel prior to the challenging procedure."(OD.2) (Supp.R.12) (SB.3). "[T]he record fails to show that peremptory challenges were exercised by defense counsel." (OD.2).

The First District Court of Appeal (DCA) opined that because of the failure to show that peremptory challenges were exercised, even though he was not at the bench, Petitioner has failed to establish the existence of reversible error. The First DCA based its opinion upon Ganyard v. State, 686 So.2d 1361 (Fla. 1st DCA

1996), which is presently before this Court for consideration. (Fla. Supreme Court Case 89,759).

Petitioner filed for discretionary jurisdiction to be exercised by this Court based on a conflict with Ganvard under Jollie v. State, 405 So.2d 418 (Fla. 1981), and conflicts with decisions in another district. This Court has accepted jurisdiction and this petition follows.

III. SUMMARY OF THE ARGUMENT

Petitioner challenges the decision rendered by the First District Court of Appeal in his case on two grounds:

A: Relief should be granted under Coney v. State, 653 So. 2d 1009 (Fla.), cert. Denied, U.S. , *116* S.Ct. 315, 133 L.Ed.2d 218 (1995) because it makes no difference whether prospective jurors were actually dismissed through peremptory challenges or not. The "exercise" of peremptory challenges is the *decision* to strike or not to strike. Petitioner was not present where peremptories were *exercised* and he should be granted **a** new trial based on the law in effect at the time of the trial.

The trial court erred reversibly when it failed to follow the law mandated by this Court in Coney -- the law at the time of the trial. Nowhere does the record reflect that the petitioner **was** informed of his right to be present at the bench during jury selection, or that the trial court inquired or certified that his absence was voluntary, or that he ratified any peremptory strikes.

The First District erred in finding that appellant did not prove harm, where the record is unclear whether peremptory strikes were or were not exercised. Furthermore, it erred in

failing to certify this case to this Court as it did Ganyard, on the same question:

> DOES CONEY V. STATE, 653 SO.2D 1009 (FLA.), CERT. DENIED, ___ U.S. ___, 116 SO. CT. 315, 133 L. ED. 2D 218 (1995), PROVIDE A BASIS FOR REVERSAL OF A CONVICTION WHEN THE DEFENDANT'S COUNSEL EXERCISED NO PEREMPTORY CHALLENGES?

Ganyard, at 1362-1363.[1]

B: The First District held in petitioner's case: "that appellant has failed to carry his burden to establish the existence of reversible error by demonstrating, from the record, that he was not present at the bench conference during which peremptory challenges were exercised." However, it is not the burden of the defendant [petitioner] to create the physical record and transcripts on appeal or to prove the requirements of due process were not met. As the Fourth District Court of Appeals has held:

> ...it is the burden of the court, or the state, to make the record show that all requirements of due process... have been met.

Alexander v. State, 575 So.2d 1370 (Fla. 4th DCA 1991); see also, Matthews v. State, 687 So.2d 908 (Fla. 4th DCA 1997).

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[1] Arguments against the District Court's decision were presented in a well reasoned dissent to the opinion in Ganyard, which was decided in banc. Petitioner hereby incorporates the argument of the dissent in Ganvard at 1363-1366 into this brief.

Finally, here, the record appears to be incomplete and cannot be reconstructed, and it is alleged that due process has not been met, under such conditions, the defendant must be granted a new trial.

IV. ARGUMENT

DOES CONEY V, STATE, 653 SO.2D 1009 (FLA.), CERTIORARI DENIED, U.S. ___, 116 S. CT. 315, 133 L. ED.2D 218 (1995), PROVIDE A BASIS FOR REVERSAL OF A CONVICTION WHEN THE DEFENDANT'S COUNSEL EXERCISED NO PEREMPTORY CHALLENGES?

The First DCA states in its opinion, "although present in the courtroom during jury selection, [petitioner] was not physically present at a bench conference during which jury challenges were exercised." (OD.1,2). Furthermore, "the record fails to show that peremptory challenges were exercised by defense counsel." (OD.2). However, important to this issue is not only what appears on the record, as what does not appear:

- Nowhere is it reflected that the appellant was informed of his right to be present at the bench.
- Nowhere does the trial court **inquire** if the appellant's absence from the bench is voluntary.
- Nowhere does the trial court **certify** that the appellant's absence from the bench is voluntary.
- Nowhere does the trial court ask the appellant to **ratify** the choice of jurors made by his counsel.

Whether or not peremptory challenges were issued by the defense does not lift the onus from the trial court to inquire, certify, and ratify as required by this Court in Coney v. State, 653 So. 2d 1009 (Fla.), cert. Denied, U.S. , 116 S.Ct. 315, 133 L.Ed.2d 218 (1995). What was done was totally

insufficient to meet the standards under Coney. This case went to trial several months AFTER the decision in Coney, and prior to the change in Rule 3.180(a)(4), Fla. R. Crim. P., and yet the trial court simply ignored the law mandated by this Court.

Coney was originally decided January 5, 1995, and from the date rehearing was denied, April 27, 1995, until at least November 27, 1996, when the amendment to Fla. R. Crim. P. 3.180(b), became effective, Coney was the law of Florida as to *presence* of a defendant, It was within this window of time that Mr. Carmichael was tried. As this Court said in Boyett:

> 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.

Bnyett v. State, 688 So.2d 308, at 309-310 (Fla. 1996) (Emphasis in original).

It was not until December 5, 1996, in Royett, that this Court announced it was receding from Coney "to the extent that we held the new definition of 'presence' applicable to Coney himself." Id. at 310. However, this Court had already pointed out that Coney did not apply to Bovett, because Bnyett was a "pipeline" case, tried after Coney's trial, but before the

decision in Coney issued[2]. Carmichael's case, which is now before this Court, is not a pipeline case, but a post-Coney, pre-close the window case, where the rule announced in Conev applied. The rule announced by this court may not have applied to Coney or Boyett because it was "perspective," but it certainly applies to the petitioner in this case.

The actual essence of the issue now before this Court appears to be: What is meant by the phrase "***exercises*** peremptory challenges?" It is upon this phrase that the right to be present at the bench is qualified. Does the ***exercise*** of challenges mean actually asking for the removal of a juror? Or does the ***exercise*** of challenges mean being part of the process whereby one decides to challenge or not to challenge?

In the following argument, Petitioner respectfully adopts the well reasoned dissent by Judge Webster in the First District's Opinion in Ganvard v. State, 686 So.2d 1361, 1363-1366. (Fla. 1st DCA 1996). While the majority in that case held that Coney did apply because Mr. Ganyard was not present at the bench and he did not waive his presence, they found the error harmless because his attorney did not ***exercise*** peremptory

[2] Same results in Meiia v. State, 22 Fla. L. Weekly S284 (Fla. June 26, 1997).

challenges and thus, the error was harmless. Ganvard, at 1362-1363.

In Ganvard, J. Webster argued that while one might disagree with this Court's assumption that a defendant can never have any meaningful input to offer on the question of whether his counsel should exercise a particular challenge for cause in such circumstances, the majority's conclusion that harmful error can occur only when the defendant's counsel actually exercises peremptory challenges in the defendant's absence is certainly not what this Court intended.

The First DCA in the present case, as in Ganyard, focused narrowly on the words "are exercised" in the language in Coney, 653 So.2d at 1013, taking them to mean that jurors must actually be struck -- challenges must actually be made. This reasoning does not comport with the language in Francis v. State, 413 So.2d 1175, 1178-79 (Fla. 1982), where this Court said that "[t]he 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." This language indicates that it is the process, not the actual challenge to a juror which is protected. The decision NOT to

challenge a juror is as important as the decision to challenge one.

In Meiia v. State, 675 So.2d 996, 1000 (Fla. 1st DCA), (denial of relief upheld on other grounds, Mejia v. State, 22 Fla. L. Weekly S284 (Fla. June 26, 1997)), the First DCA correctly concluded "the procedural rule set out in Coney is intended to ensure the defendant's right to meaningful participation in decisions regarding the exercise of challenges, particularly peremptory challenges, is zealously protected." Yet, here, it takes the narrow view that the exercise of challenges exists only when a juror is actually challenged. Consider the times when a defendant may want his attorney to NOT challenge a juror, such as when to do so would place someone less desirable on the panel. The narrow view espoused by the First District is unreasonable.

As J. Webster pointed out in his dissent in Ganvard:

> [It is] much more plausible that, when the court used the phrase "[t]he exercise of peremptory challenges" in Francis, it intended to refer to the entire process by which one decides whether to exercise one or more peremptory challenges, rather than merely to the actual act of challenging a particular prospective juror. Likewise, I find it much more plausible that the court intended the same thing when it used similar language in Coney.

Ganvard, at 1364-1365.

The process of exercising peremptory challenges by both sides is a dynamic process, and results in a rapidly and ever changing jury panel. The process depends upon which individuals have been struck and which party exercised the strikes. It is highly fluid, requiring constant evaluation and reevaluation of who should or should not be struck as the dynamic situation unfolds.

Carmichael may have had contemporaneous input to make to counsel as to the exercise of his peremptory challenges -- because challenges are often exercised arbitrarily and capriciously, for real or imagined partiality, often on sudden impressions and unaccountable prejudices based only on bare looks or gestures. See, Francis v. State, 413 So.2d 1175-1176 (Fla. 1982). The very concept of peremptory challenges necessitates constant and contemporaneous input from the accused to counsel. See, Johnson v. Wainwrisht, 463 So.2d 207, 210-211 (Fla. 1985).

When, as here, the accused is absent from the bench, he is denied the opportunity to contemporaneously consult with counsel and to provide contemporaneous input into the decision making process as to the exercise of the precious few strikes available to the accused.

Even though counsel may have consulted with petitioner Carmichael prior to the sidebar, that is not sufficient to render the error complained of harmless. If the defendant were present and contemporaneously aware of how the situation was developing, he may have expressed additional or other preferences. He may have wished to strike others on the jury who had not been previously discussed with counsel. He may have had suggestions to strike or back strike jurors already seated, even though he had not earlier expressed any particular dislike for them, simply in order to force the seating of a juror the defendant would much more prefer. Again, peremptory challenges are often made on the sudden impressions and unaccountable prejudices.

In certain situations which cannot be foreseen, as a strategy, the accused might prefer not striking an objectionable juror, leaving that person on the jury, rather than exercising the final challenge which would result in the seating of another against whom the defendant has more vehement objections. In short, the defendant may prefer to elect to be tried by the lesser of two evils -- as he might see them.

The entire selection process is like a game of checkers or chess in that regard. It is not uncommon for a player to intentionally sacrifice a man (exercise a strike) simply in order

to force a move which is advantageous to him or disadvantageous to the opponent. That input cannot be made until the situation actively develops during the dynamic course of the challenging (or chess) process. Thus, an accused may have valuable input as to the exercise of his peremptory challenges, input which is only meaningful where it can be made contemporaneously with developments during the on-going process. He may chose to strike someone, he may chose not to strike someone, or he may chose to strike no-one. Either choice is equally important. It is his ability to contemporaneously affect the process that must be protected.

Where is 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 a prospective juror as it is that a defendant have an opportunity to offer input regarding the decision TO challenge a particular prospective juror. Yet, according to the First DCA, the former case is not harmful and the latter is harmful. However, in reality, "the fact that a

challenge **was made** in one **case** but not in the other is **a** distinction without a difference if what we are concerned about is the defendant's right to meaningful participation in the decision." Ganyard, dissent at 1365.

This Court obviously intended, or should have intended, that the rule announced should apply during the **entire process** of challenging prospective jurors. Properly read and reasoned, absent a waiver or subsequent ratification of his counsel's decisions -- which did not occur here -- Coney requires the petitioner to have been present at the bench conference when his attorney decided whether or not to issue challenges. He was not, and this was a violation of the law in effect at the time of the trial.

It is undisputed that petitioner Carmichael was not present at the bench when challenges were discussed and the decision to make or not make challenges was made by his attorney. It is also undisputed that petitioner Carmichael neither waived his right to be present nor subsequently ratified his counsel's decisions. The question remaining is: Was the trial court's failure to follow the law as espoused by this Court in Coney harmful error. There is nothing in this record to suggest that [petitioner] was even aware of his right to participate in decisions regarding the

exercise of peremptory challenges. It seems entirely plausible that, had [petitioner] been present at the bench conference, he would have insisted that counsel excuse one or more prospective jurors. However, we shall never know because the procedure mandated by Coney was not followed. See e.g., Ganvard at 1365. His absence from the bench was error.

Because there was error, the burden lies upon the state to' show beyond a reasonable doubt that the error could not in any way have affected the fairness of the trial process. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The petitioner is entitled to a new trial (even if properly admitted evidence were sufficient to support the jury verdict) where the Court cannot say beyond a reasonable doubt that this error did not affect the fairness of the trial and if the Court is unable to assess the extent of prejudice sustained by Mr. Carmichael's absence of participation in the jury selection process. This was reversible error and the error by definition harmful. State v. Lee, 531 so. 2d 133 (Fla. 1988); Francis, at 1179. Moreover, the absence of an accused at a critical stage of trial must be presumed harmful unless the state can show beyond a reasonable doubt to the contrary. The burden is on the state, as the beneficiary of the error to prove beyond a reasonable doubt that the error

complained of did not contribute to the verdict, or alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. See e.g., DiGuilio, at 1138

Finally, this Court need not consider how this Court's December 1996 decision in Boyett v. State, 688 So.2d 308 (Fla. 1996), or its decision in Hill v. State, 22 Fla. L. Weekly S561b (Fla. September 11, 1996), or even the November 1996 amendment to Fla. R. Crim. P. 3,180, affect this Court's opinion in Mr. Carmichael's case. They do not, The trial was well after Coney became final, and the later change in statute cannot be legally applied under the ex post facto provisions of the constitutions of the United States[3] or Florida[4]. Bouie v, City of Columbia, 378 U.S. 347, 353-354 (1964).

In Matthews v. State, 687 So.2d 908 (Fla. 4th DCA 1997), the court reversed Matthews' conviction and remanded the case for a new trial because Coney had not been complied with. In so doing, the court held:

> At no time did the trial court, through appropriate inquiry, certify that Matthews waived his presence during this conference. Thus the bench conference violated the dictates of Coney.

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[3] Art. I, Sect. 9.

[4] Art. I, Sect's. 9, 10.

> 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. (Citing Francis v State, 413 So.2d 1175 (Fla. 1982)).

Id. At 910.

Footnote 1, in Matthews at 909, indicates the Fourth DCA considered Bovett and the change in Fla. R. Crim. P. 3.180, and found them to have no affect on the issue. And so it should also have no effect here.

A different jury might well have reached a different verdict, As in Francis, 413 So.2d at 1179, we are unable to determine "the extent of prejudice, if any," which Mr. Carmichael may have suffered as a result of not being present at the bench during the "exercise" of peremptory challenges. As in Francis, we are unable to say, to the exclusion of all reasonable doubt, that the error was harmless.

The First DCA has laid a heavy burden on the petitioner, saying it was his responsibility to prove due process was not complied with, despite an incomplete or unclear record. Here, the First DCA has found that the petitioner has not proven that due process was not complied with, that "the record fails to show that peremptory challenges were exercised by defense counsel." OD at 2. The court goes on to opin that petitioner "failed to carry

his burden to establish the existence of reversible error . . ." OD at 2. Other courts have held differently. This is in direct conflict with the opinion of the Fourth DCA, where the Fourth finds "the burden is upon the trial court or the State to make the record show that all requirements of due process have been met." Matthews, footnote 2, at 910, citing Alexander v. State, 575 So.2d 1370 (Fla. 4th DCA 1991).

Furthermore, where, as here, the record appears incomplete and cannot be reconstructed, and it is alleged that due process has not been met, the defendant must be granted a new trial, Delap v. State, 350 So.2d 462 (Fla. 1977); v. State, 667 So.2d 207 (Fla. 1st DCA 1995).

This case should be reversed and remanded for a new trial.

V. CONCLUSION

Petitioner, David P. Carmichael, based on all of the above, respectfully requests this Court to reverse his conviction and remand the case to the lower courts for a new trial, and to grant any and all further relief as this Court may find equitable and just.

Respectfully submitted,

NANCY A. DANIELS
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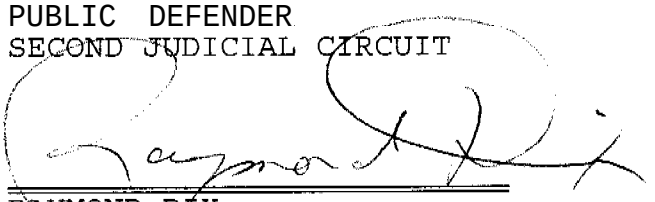
SECOND JUDICIAL CIRCUIT



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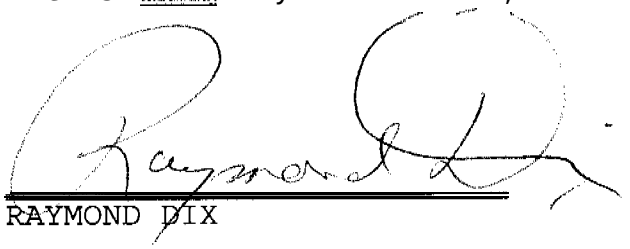
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Stephen R. White, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, on this 30th day of October, 1997.



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