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IN THE SUPREME COURT OF FLORIDA

DAVID P. CARMICHAEL,

Petitioner,

v.

CASE NO. 90,811

STATE OF FLORIDA,

Respondent.

______________________________/

PETITIONER'S REPLY BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

RAYMOND DIX
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR APPELLANT
FLA. BAR NO. 919896

TABLE OF CONTENTS

	PAGE(S)
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	3
SUMMARY OF THE ARGUMENT	4
ARGUMENT	7
DOES CONEY V. STATE, 653 SO.2D 1009 (FLA.), CERT. 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?	7
CONCLUSION	14
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

PAGE(S)

CASES

Alexander v. State, 575 So. 2d 1370 (Fla. 4th DCA 1991) 11

Alexander v. State, 575 So.2d 1370 (Fla. 4th DCA 1991) 5

Barker v. Wingo, 407 U.S. 514 (1972) 11

Butler v. State, 676 So. 2d 1034 (Fla. 1st DCA 1996) . . , 9, 10

Coney v. State, 20 Fla. Law Weekly S16
(Fla. Jan. 5, 1995) 8

Conev v. State, 653 So. 2d 1009 (Fla.),
Cert. Denied, _ U.S. ___, 116 S.Ct. 315,
133 L.Ed.2d 218 (1995) 4, 7, 8, 10-13

Ellis v. State, 22 Fla. L. Weekly D 1621
(Fla. 4th DCA July 2, 1997) 11

Francis v. State, 413 So. 2d 1175 (Fla. 1982) 13

Ganyard v. State, 686 So. 2d 1361 (Fla. 1st DCA 1997) . 5, 12, 13

Gibson v. State, 661 So. 2d 288 (Fla. 1995) 9

Matthews v. State, 687 so.2d 908 (Fla. 4th DCA 1997) . . . 5, 12

Matthews v. State, 687 So. 2d 908 (Fla. 4th DCA 1997) . . 10, 11

Meiia v. State, 675 So. 2d 996 (Fla. 1st DCA 1996)
modified 696 So. 2d 339 (Fla. 1997) 7-9

State v. DiGilio, 491 So. 2d 1129 (Fla. 1986) 12

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PETITIONER'S REPLY BRIEF ON THR 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 the page number(s) of the references.

DIRECT APPEAL RECORD

Petitioner's initial brief on the merits shall be designated "IB." followed by the appropriate page number. Respondent's answer brief shall be designated "AB." followed by the appropriate page number.

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

II. STATEMENT OF THE CASE AND FACTS

The respondent has chosen to add further facts which are acceptable to Petitioner, thus, there is agreement on the facts of the case.

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 v. State, 686 So. 2d 1361 (Fla. 1st DCA 1997) 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?

Ganvard, 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. 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. The author of the opinion in question, J. Mickle, joined J. Webster in that dissent. Petitioner hereby incorporates the argument of the dissent in Ganvard at 1363-1366 into this brief.

Finally, here, the record is 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.), CERT. 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?

Petitioner relies upon all the arguments and law presented in his initial brief and replies to the state's answer as follows:

1. Preservation

Respondent's restatement of the issue before this Court, as its argument, indicates that it refuses to accept the fact that an objection need not be made to preserve this, a fundamental right. Because it involves **a** fundamental right, neither Petitioner nor his counsel needed to object to preserve this issue for review.

This **was** pointed out in great detail by the First District Court of Appeal (DCA) in Meiia v. State, 675 So. 2d 996 (Fla. 1st DCA 1996) modified 696 So. 2d 339 (Fla. 1997), **a** case cited by the respondent (at AB. 17) but not quoted **as** to this point:

> According to the supreme court, "[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 on of the most important rights secured to a defendant." Francis v. State, 413 so. 2d 1175, 1178-79 (Fla. 1982)(citing Pointer v. United States, 151 U.S. 396, 14 S. ct. 410, 38 L. #d. 208 (1894), and Lewis v. United States, 146 U.S. 370, 13 S. Ct. 136, 36 L. 3d.

> 1011 (1892). Clearly, it is because this is considered such a critical stage of the proceedings that the court has undertaken to ensure that **a** defendant's right to meaningful participation in the decision of how peremptory challenges are to be used is assiduously protected. 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 Conev, 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.** See State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993)("for an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process"); Salcedo v. State, 497 So. 2d 1294, 1295 (Fla. 1st DCA 1986) (allegation that defendant was absent from courtroom during exercise of peremptory challenges "alleged fundamental error which no objection was necessary to preserve"), review denied, 506 So. 2d 1043 (Fla. 1987).

Mejia, at 999 **(bold** emphasis added). (Not addressed in later modification).

The state also argues that because the following sentence was deleted from the final version of Coney v. State, 653 So. 2d 1009, 1013 (Fla. 1995), this Court must have meant for the contemporaneous objection rule to apply:

> **Obviously,** no contemporaneous objection is required to preserve this issue for review....

Coney v. State, 20 Fla. Law Weekly S16, S17 (Fla. Jan. 5, 1995) **(bold** emphasis added). The First DCA rejected this argument

in Mejia, where, as here, the state argued that this deletion: "'indicates that appellant must preserve the issue.' [The First DCA was] unwilling to read so much into such a revision." Mejia, at 999. Petition argues that the reason this Court deleted the sentence is because it was, in fact, **obvious** that no objection would be required.

In Butler v. State, 676 So. 2d 1034 (Fla. 1st DCA 1996), the state (same respondent as here) argued that an objection was required to preserve error when a defendant was totally absent from the courtroom. In Butler, in Mejia, and here, that argument was based on this Court's holding in Gibson v. State, 661 So. 2d 288 (Fla. 1995)[2]. (AB.6,7,9). However, Respondent fails to mention that the First District also rejected this argument:

> The state asserts that an objection was required to preserve this issue for appeal, in accordance with Gibson v. State, 661 so. 2d 288 (Fla. 1995). But the court did not suggest in Gibson that it intended to recede from the recent ruling in Coney, which obligates the trial court to make **a** proper inquiry regarding the defendant's personal waiver or acquiescence. (Citing, Mejia). Because such personal waiver or acquiescence was not obtained in the present case, the appealed orders are reversed and the case is remanded.

Butler, at 1035.

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[2] This Court found it unnecessary to reach this particular issue in Mejia v. State, 675 So. 2d 996 (Fla. 1st DCA 1996) modified 696 So. 2d 339 (Fla. 1997).

Butler can also be seen to address the state's inference that it was unnecessary under Coney for the trial court to "sua sponte" invite Petitioner to the bench. (AB. 4). The onus is on the trial court, not the defendant, to see that due process is complied with. See Matthews v. State, 687 So. 2d 908 (Fla. 4th DCA 1997)(argued at IB.6, 18, 19).

The state's argument is implicit that "presence" during voir dire can be waived by silence.(AB.8) However, the waiver by inaction of a fundamental right or presuming waiver by a silent record is contrary to opinions of the U.S. Supreme Court. In addressing a similar waiver (of speedy trial) the Court held:

> Such an approach, by presuming waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights. The Court has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." (Cite omitted). Courts should "indulge every reasonable presumption against waiver," (Cite omitted) and "they should not presume acquiescence in the loss of fundamental rights." (Cite omitted). In Carlev v. Cochran, 369 U.S. 506, 8 L. Ed. 2d 70, 82 S. Ct. 884 (1962), we held:
>
> > :presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not waiver. Id., at 516, 8 L. Ed. 2d at 77.
>
> The Court has ruled **similarly** with respect to waiver of other rights designed to protect the accused. (Cites omitted).

Barker v. Wingo, 407 U.S. 514, 525 (1972).

If one does not know of the right, as mandated by this Court in Coney, then one cannot intelligently and knowingly waive that right, and Petitioner's absence from the bench was therefore, involuntary. Thus, the state's argument of waiver by silence fails. "[T]he more prudent approach would be to keep the burden on the trial court and the state to see that Coney requirements have been met." Ellis v. State, 22 Fla. L. Weekly D 1621 (Fla. 4th DCA July 2, 1997); citing Matthews, 687 So. 2d at 910 n.2; Alexander v. State, 575 So. 2d 1370 (Fla. 4th DCA 1991).

2. Petitioner's right exists under *Coney*.

Respondent argues that Petitioner has no rights under Coney, because he cannot prove that peremptory challenges were issued, and therefore the trial court is presumed correct on appeal. It continues: "Petitioner turns the presumption on its head by arguing that a silent record is ground for reversal." (AB. 10).

However, the argument made by the Petitioner is not that a silent record is ground for reversal, but that one need not actually use one's peremptories -- need not actually strike jurors -- in the exercise of peremptories.[3] If one need not exercise peremptories, then Petitioner's record is as complete as

[3] This is argued in full in Petitioner's initial brief on the merits and need not be fully addressed here.

need be -- he was not present at the bench and the trial court failed to do what Coney mandated it do.

Furthermore, failing to prove one used a peremptory to strike a juror is no different than failing to use any peremptories to strike jurors. Thus, this case is on the same footing as Ganvard v. State, 686 so. 2d 1361 (Fla. 1st DCA 1996) which is presently before this Court for consideration on the question posed in the issue above.(Fla. Supreme Court case number 89,759) .

Despite the state's argument to the contrary: "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 v. State, 687 So. 2d 908, 910 (Fla. 4th DCA 1997)(argued at IB.6, 18, 19). Neither did not do so here.

3. Prejudice

Respondent's argument implies that Petitioner must, but cannot prove that he was prejudiced, and moreover, he cannot prove that any prejudice was harmful. However, the burden is not upon the Petitioner to prove harm, but upon the state to prove beyond a reasonable doubt that the error complained of was harmless. State v. DiGilio, 491 So. 2d 1129 (Fla. 1986). (Argued at IB.16-20).

Respondent argues that all Petitioner could get, should relief be granted, is **a** new trial, and that Coney would longer apply. It concedes: "In essence, then, Petitioner seeks a retrial so that his jury can be selected, **without any error,** in precisely the same manner in which it **was** selected in this case." (AB. 16) **(bold** emphasis added). That is, in fact, precisely what Petitioner seeks, a retrial so that his jury can be selected -- without **any** error -- and that is what this Court should grant.

A different jury might well have reached a different verdict. As in Francis v. State, **413** so. 2d 1175, 1179 (Fla. **1982),** this Court is 'unable to **assess** the extent of prejudice, if any," Petitioner sustained **as** the result of not being at the bench conference held for the purpose of permitting the exercise of peremptory challenges. Accordingly, as in Francis, this Court is unable to **say,** to the exclusion of all reasonable doubt, that the error was harmless. **See** e.g. **Ganvard, 686 So.** 2d at **1366** (J. Webster, dissenting)[4].

Finally, the state's argument that Conev need not apply because it is no longer the **law,** is not good policy. In essence, to hold that this error is harmless now that the law has changed,

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[4] See also, IB. 19, where these words were used and inadvertently not properly cited and credited.

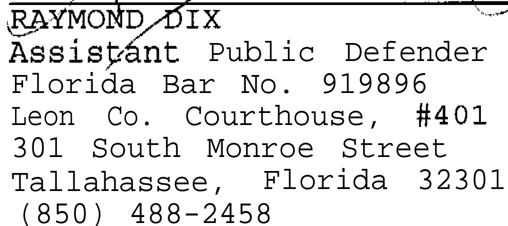
is to endorse a policy of not following the holdings of this Court, because, after all, the holding is either "not final," or if final, may someday be overruled. To allow trial courts the liberty of not following the law as it was at the time of trial, as the state's argument suggests, would be poor public policy.

V. CONCLUSION

Petitioner, David P. Carmichael, based on the above, respectfully requests this Court to reverse the holding of the First District Court of Appeal; reversing his conviction and remanding 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
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

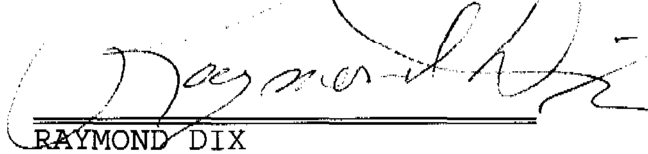


RAYMOND DIX
Assistant Public Defender
Florida Bar No. 919896
Leon Co. Courthouse, #401
301 South Monroe Street
Tallahassee, Florida 32301
(850) 488-2458

ATTORNEY FOR APPELLANT

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 15th day of December, 1997.



RAYMOND DIX