IN THE SUPREME COURT OF FLORIDA

TIMOTHY LEE,

Petitioner,

v.

910 61

CASE NO. 88,924

STATE OF FLORIDA,

Respondent.

DISCRETIONARY REVIEW OF CERTIFIED QUESTION
FROM THE DISTRICT COURT OF APPEALS
SECOND DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The Petitioner's Statement of the Case and Facts is substantially correct for the purpose of this discretionary review.

SUMMARY OF THE ARGUMENT

Under Conev v. State, 653 So.2d 1009 (Fla. 1995), *cert. denied,* *U.S.* , 116 S.Ct. 315, 133 L.Ed.2d 218 (1995), this Court held that a trial court must affirmatively inquire as to whether a defendant wishes to waive the personal right to be present at the bench during the exercise of pretrial juror challenges. In this case, there is nothing in the record to establish whether Mr. Lee was asked whether he wished to be present at the bench during four bench conferences on juror challenges. Petitioner did not ask to be present at the bench. Petitioner did not object that he was not present at the bench. Thus, it is clear that Petitioner did not make an explicit, on-the-record waiver of his right to be present at the bench. Yet, is an explicit waiver necessary when Petitioner fails to assert his rights? Does this not also constitute a waiver? In United States v. Gagnon, 470 U.S. 522, 529, 105 S.Ct. 1482, 1485, 84 L.Ed.2d 486 (1985), the Court ruled that the defendant's failure to invoke his right to be present at an in camera meeting held by the judge to determine whether an individual juror had been tainted constituted a valid waiver of that right.

Respondent asks this Court to approve Judge Altenbernd's concurring opinion in Hill v. State, 696 So.2d 798 (Fla. 2d DCA

1997), *review granted,* Hill v. State, Fla. No. 90,049 (briefs submitted awaiting opinion). Judge Quince in writing for the Second District, in the case *sub judice*, states:

> ... Judge Altenbernd in his concurring opinion stated, and we agree, that failure to obtain a "*Conney*" waiver cannot be raised on direct appeal without an objection made on the same grounds at trial. *Steinhorst v. State,* 412 So.2d 332 (Fla. 1982). We recognize that failure to obtain a *Coney* waiver has been deemed fundamental error by other district courts, *see Butler v. State,* 676 So.2d 1034 (Fla. 1st DCA *1996); Wilson v. state,* 680 So.2d *592* (Fla. 3d DCA 1996), *dismissed, 693* So.2d *33* (Fla. 1997); *Brower v. State, 684* So.2d 1378 (Fla. 4th DCA 1996), *rev. granted,* 694 So.2d 739 (Fla. 1997); however, we believe it more appropriate to raise allegations of unpreserved error in a motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. This approach to reviewing *Coney* errors gives defendants a meaningful opportunity to allege and demonstrate prejudice, and also serves to protect judicial resources.
>
> (Text of 695 So.2d at 1315)

Respondent endorses this approach. For all Respondent knows, Mr. Lee and his counsel had discussed peremptory challenges and Mr. Lee directed trial counsel to use his discretion in making challenges. Without the established facts, the state cannot urge a defense on direct review because these matters are outside the record on appeal. Just as ineffective representation

of counsel claims are resolved before the trial court in postconviction proceedings, these non-preserved "*Coney*" matters are best resolved before the **trial court.**

Whenever there are matters which must be developed outside the record, then collateral review [and not direct review] is the best course for both parties.

Petitioner raises two additional claims which were affirmed without comment in the district court. Respondent urges this Court to decline de *novo* review of these two issues. However, should this court be inclined to address the last two issues, Respondent would point out that Ms. Holmes never stated that she would give more weight to evidence from law enforcement than from another witness. The trial court did not abuse its discretion in not excusing Ms. Holmes for cause. And, Mr. Thornton was properly excused for cause.

ARGUMENT

CERTIFIED QUESTION

IF *A* CONEY ISSUE IS NOT PRESERVED *AT* TRIAL, MUST A PRISONER FILE A POSTCONVICTION MOTION ALLEGING UNDER OATH THAT HE OR SHE WOULD HAVE EXERCISED PEREMPTORY CHALLENGES IN THE SAME MANNER AS HIS OR HER ATTORNEY?

(As published by the district court[1])

This Court has for review Lee v. State, 695 So.2d 1314 (Fla. 2d DCA 1997), in which the district court certified the following question to be of great public importance:

> **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?**

(Text **of 695 So.2d at 1315)**

This Court has jurisdiction pursuant to Art. V, §3(b)(4), Fla.Const. Alternatively, the district court has acknowledged, *but not certified,* that its opinion is in conflict with decisions of other districts which hold that Coney errors are fundamental[2]. See, Butler v. State, 676 So.2d 1034 (Fla. 1st DCA 1996); Wilson

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[1]Your **undersigned has addressed the certified question as published by the district court and not the issue as re-framed by Petitioner.**

[2]**This same conflict of decisions has been acknowledged in** Neal v. State, So.2d ___, **22 Fla.Law Weekly** D1883, **1884 (Fla. 2d DCA No. 95-02792) (Opinion filed July 30, 1997).**

v. State, 680 So.2d 592, dismissed, 693 So.2d 33 (Fla. 1997); Brower v. State, 684 So.2d 1378 (Fla. 4th DCA 1996), *review granted,* 694 So.2d 739 (Fla. 1997) as cited in Lee v. State, 695 So.2d 1314, 1315 (Fla. 2d DCA 1997). This Court would have had discretionary review had the district court *certified conflict* jurisdiction pursuant to Art. V, §3(b)(4), Fla.Const. Petitioner has not perfected Art. V, §3(b)(3), Fla. Const. conflict jurisdiction. The review before this Court is limited to the district court's certified question.

Respondent sets forth the background against which *'Coney"* challenges have evolved. The petit jury is composed of local citizens who serve as triers of fact in a trial. The jury has two missions: (1) to hear the evidence presented; and, (2) to determine the consequences of that evidence. 'There is an entitlement to a jury trial. See, Art. 1, §16, Fla.Const. And, the Sixth Amendment to the United States Constitution provides that "a defendant in all criminal prosecutions is entitled to trial by an impartial jury." The selection of a jury is begun through "voir dire." The potential jurors are asked to speak the truth. This case focuses on "voir dire" procedures. In Mitchell v. State, 458 So.2d 819 (Fla. 1st DCA 1984), the court noted that the 'examination of a juror on voir dire has a dual purpose,

namely, to ascertain whether a "mere" cause for challenge exists and also determine whether prudence and good judgment suggests the exercise of a peremptory challenge." The goal of every federal and state bench and bar is to secure an "impartial jury." Both the United States of America and Florida are both multiethnic and multiracial; and, there is no question that this is an imperfect world in which the heads of bigotry and racism arise. The United States Supreme Court in Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973) held that refusal to inquire into racial basis denies a citizen a fair trial. It becomes a matter of consequence when potential jurors respond falsely rather than truthfully. One remedy for this problem is either a challenge for cause or a peremptory challenge. Traditionally, the latter did not need to be supported by a legally recognized ground. In Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), the Court defined a peremptory challenge as follows: "the essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."

That said, there now are limitations on peremptory challenges. There are checks and balances against one of the parties attempting to influence the racial/ethnic/sexual composition of a

jury. As a starting point, the Supreme Court in Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961) has addressed jurors with opinions. In Irvin, the Court teaches that 'opinion" is not a bar to due process if the juror can lay aside that opinion and decide the case on the evidence; but, such a rule does not bar inquiry. Any finding of impartiality must meet constitutional standards. Against, this background, the Court in Btson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) overruled Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) to the extent it required a defendant to show that a prosecutor exercised peremptory challenges against Blacks in case after case in order to make a prima facie case of discrimination. Under Batson, a defendant may establish a prima facie case of discrimination on the facts of his prosecution by showing he is a member of a racial group; and, that members of that racial group have been excluded from the jury. At that point, the state or federal government must step forward with a neutral explanation. The court pointed out that "neutrality" could not be established on the assumption that jurors would be partial to the defendant because of 'shared race" or by making an affirmation in individual selection.

The Court then began expansion of the Batson doctrine. In Holland v. Illinois, 493 U.S. 474, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990), the Court held that a White defendant has standing to raise a Sixth Amendment challenge to the exclusion of Blacks from the petit jury without showing that the White defendant is a member of the racial group excluded; and, in Holland, Equal Protection was neither raised nor argued. Immediately, in Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), the Court closed and addressed the Equal Protection aspect of jury composition. In Powers, the Court held that a White defendant does have standing to object to racial exclusion by peremptory challenges of jurors on Equal Protection grounds under Batson even if the White defendant is not of the same race as the challenged jurors. In other words, the White defendant has standing to assert the Equal Protection rights of the excluded juror. And, the Batson doctrine was extended to civil litigation in Edmonson v. Leesville Concrete Company, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991).

Thereafter, the Court held in Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992) that the "discrimination knife" cuts both ways. Peremptory challenges on the basis of race apply to Defendants as well as to the People. The Court has ruled

that discriminatory challenges harm both juries and the community; and, state action is involved because the **state** government allows peremptory challenges.

Two terms later in J.E.B. v. Alabama ex rel. T.B., 511 U.S. **127**, **114** S.Ct. 1419, 128 L.Ed.2d 89 (1994), the Court held that Batson and its progeny prohibit the exercise of peremptory challenges on the basis of gender; however, this line of cases does not prevent the challenge of group or class of people, such **as** nurses or members of the military, even though it: may disproportionately affect men or women. And, most recently, the Court filed a summary reversal in Puckett v. Elem, 514 U.S. 765, **115** S.Ct. 1769, 131 L.Ed.2d 834 (1995). There Jimmy Elem had been convicted of second-degree robbery in the Missouri **state** court. There **was** an objection to the state government's use of peremptory challenges to strike two black men from the jury panel. The prosecutor made the following reply:

> **"I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to not be a good juror for that fact, the fact that he had long hair hanging shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type bear. And juror number twenty-four also has a mustache and goatee type beard. Those are the only two people on the jury . . . with facial hair . . . And I don't**

> **like the way they looked, with the way the hair is cut, both of them. And the mustaches and beards look suspicious to me." App to pet for Cert A-41.**
>
> **(Text of 131 L.Ed.2d at 838)**

The state trial court overruled Mr. Elem's Batson objection without explanation; and, the case was tried resulting in a conviction. On direct appeal, Mr. Elem asserted that the trial court misapplied Batson. The state appellate court affirmed:

> **. . . The Missouri Court of Appeals affirmed, finding that the "state's explanation constituted a legitimate 'hunch"' and that " [t]he circumstances failed[ed] to raise the necessary inferences of racial discrimination." State v. Elem, 747 SW2d 772, 775 (Mo App 1988).**
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> **(Text of 131 L.Ed.2d at 838)**

At this point, Mr. Elem had exhausted his Missouri remedies on the claim; and, he sought 28 U.S.C. §2254 relief in the United States District Court. There, the federal habeas court [adopting and confirming the United States Magistrate Judge's Report and Recommendation] found that the Missouri courts' determination that there had been no purposeful discrimination was a factual finding entitled to a presumption of correctness under 28 U.S.C. §2254(d). However, the Eighth circuit reversed on collateral appeal. See,

25 F.3d 679 (8th Cir. 1994), Rehearing and suggestion for Rehearing en Banc Denied July 28, 1994. The federal appellate court held:

> **In a case such as this, where the prosecution strikes a prospective juror who is a member of the defendant's racial group, solely on the basis of factors which are facially irrelevant to the question of whether that person is qualified to serve as a juror in the particular case, the prosecution must at least articulate some plausible race-neutral reason for believing those factors will somehow affect the person's ability to perform his or her duties as a juror. In the present case, the prosecutor's comments, "I don't like the way [he] look[s], with the way the hair is cut . . . ..And the mustache[] and the bear[] look suspicious to me," do not constitute such legitimate race-neutral reasons for striking juror 22.**
>
> **(Text of 25 F.2d at 683)**

The Supreme Court, in reversing the Eighth Circuit, clarified Batson. The Batson decision describes a three (3) step process for the determination of racial discrimination in jury composition. The Court of Appeals intertwined steps two and three into a single step which was error:

> **Under our Batson jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a race-neutral**

> explanation (step 2). If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved a purposeful racial discrimination. (citations omitted) The second step of this process does not demand an explanation that is persuasive, or even plausible. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."
>
> (Text of 131 L.Ed.2d at 839)

The Court then went forward to address the "long hair" claim:

> The prosecutor's proffered explanation in this case--that he struck juror number 22 because he had long, unkempt hair, a mustache, and a beard--is race-neutral and satisfies the prosecution's step 2 burden of articulating a nondiscriminatory reason for the strike. 'The wearing of beards is not a characteristic that is peculiar to any race." EEOC v. Greyhound Lines, Inc., 635 F.2d 188, 190 n 3 (CA 3 1980). And neither is the growing of long, unkempt hair. Thus, the inquiry properly proceeded to step 3, where the state court found that the prosecutor was not motivated by discriminatory intent.
>
> (Text of 131 L.Ed.2d 840)

This Court has looked to our Florida Constitution and expanded these rights. This Court has confirmed the three step procedures to challenge a race based peremptory strike in Melbourne v. State,

679 So.2d 759 (Fla. 1996). Under Melbourne, the defendant must object to the strike on the basis of the juror's status. Then the state government must provide a race neutral reason for the strike. And, then the trial court must determine if the reason is genuine. See, Daniel v. State, ___ So.2d , 22 Fla. Law Weekly D1881 (Fla. 2d DCA No. 95-05248) (Opinion filed August 1, 1997) citing Melbourn and Hernandez v. State, 686 So.2d 735 (Fla. 2d DCA 1997).

Against this background, Respondent turns to the district court's certified question. This Court has held in Coney v. State, 653 So.2d 1009 (Fla. 1995), *cert* denied, __ U.S. ___ , 116 S.Ct. 315, 133 L.Ed.2d 218 (1995) that a criminal defendant is entitled to be asked whether he/she wishes to waive his/her right to be present at the bench during the exercise of pretrial juror challenges[3]. The second district in Hill v. State, 696 So.2d 798 (Fla. 2d DCA 1997), *review granted,* Hill v. State, Fla. No. 90,049 (briefs submitted), in a specially concurring opinion by Judge Altenbernd, has determined that a "*Coney*" issue [even though error] should not be raised on a direct appeal.

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[3]In Boyett v. State, 688 so.2d 308 (Fla. 1996), this Court receded from Conev v. State, 653 So.2d 1009 (Fla.), *cert denied,* ___ *U.S.* ___, 117 S.Ct. 315, 133 L.Ed.2d 218 (1995) to the extent that Conev required a defendant's presence at the bench during peremptory challenges.

Respondent urges that if an unpreserved "*Coney*" claim is raised on direct appeal, the district court can affirm without prejudice permitting the litigant to raise the claim in a Florida Rule of Criminal Procedure 3.850 motion. At that point, the defendant can allege facts that, if proved before the circuit court, entitle him to relief, For example, a defendant can allege facts to establish that during voir dire he/she did not have a meaningful opportunity to be heard through counsel on striking a particular juror[4]; and, that his/her counsel was ineffective for failing to urge a racial/ethnic challenge in opposition to striking a juror by the state government. A defendant in his postconviction papers can identify the juror; state the ethnic/racial basis for opposing the strike. Of course, a defendant must allege facts which are not conclusionary. And, a defendant must allege facts which are neither palpably incredible nor patently frivolous or false.

For example, if a defendant can allege facts to establish that trial counsel did not make a reasonable pretrial investigation, then a hearing will be held. If a defendant can allege facts to establish that trial counsel failed to interview or depose

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[4]The district court opinion does not address whether the January 1, 1997 amendment to Fla.R.Crim.Pr. 3.180(b) should have been applied retroactively which clarifies that a defendant is present if he or she is physically in the courtroom and has a meaningful opportunity to be heard through counsel.

identified "alibi" witnesses who would have exonerated the defendant, then a hearing will be held. This is the classic *allegata* and *probata* of ineffective assistance of counsel claims.

Whenever there are matters which must be developed outside the record, then collateral review [and not direct review] is the best course for both parties. To reverse a conviction on direct appeal because of an unpreserved "*Coney*" error is a heavy decision. As noted in Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 1721 123 L.Ed.2d 353, 372-73 (1993), the United States Supreme Court recognized that "[r]etrying defendant's whose convictions are set aside imposes significant 'social costs,' including the expenditure of additional time and resources for *all* the parties involved, the 'erosion of memory' and 'dispersion of witnesses' which accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of 'society's interest in the prompt administration of justice."' Respondent would add that fundamental error goes to the fairness of the proceedings and results in "a complete miscarriage of justice" or disregards "the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 425, 428, 82 S.Ct. 468, 471, 7 L.Ed.2d 417 (1962). An unpreserved "Coney" error can only be raised on appeal in terms of plain error. A "*Coney*" error is not 'plain," that is,

it should have been obvious to the trial court when made, and prejudicial, that is, so serious as to dictate the outcome of the trial. Respondent would urge that should any of Florida's district courts grant reversal on an unpreserved *"Coney"* error on direct review then that determination would be too projective and speculative bordering on clairvoyance. ***Again, he claim is best resolved in collateral proceedings as the ground*** embraces ***matters outside the record*** on ***appeal.***

Respondent asks this Court to answer the district court's question in the affirmative. Petitioner's conviction must be affirmed without prejudice allowing him to seek, if appropriate, postconviction relief.

PETITIONER'S ISSUE II[5]

THE TRIAL COURT ERRED IN FAILING TO EXCUSE MS. HOLMES FOR CAUSE BECAUSE MR. HOLMES' STATEMENTS INDICATED *A* BIAS IN FAVOR OF POLICE OFFICERS.

***(As** Stated by Petitioner)*

The district court affirmed this issue without comment. See, Lee v. State, 695 So.2d **1314** (Fla. 2d DCA 1997). Both the circuit court and the district court have found no error; and, Petitioner fails to establish where the two courts below erred. Respondent would urge this Court to decline a de *novo* review of the above issue. For purposes of brevity and clarity, Respondent republishes the argument made in the district court on this issue.

When voir dire began, the prosecutor informed the venire that one of the charges against Mr. Lee was escape while transporting;

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[5]Petitioner realizes that Issues II and III were not certified to this Court. The district court affirmed this claim without further discussion. Respondent would urge that the district court's disposition on Petitioner's Issues II and III is in the nature of a "per curiam" decision. See, Newmons v. Lake Worth Drainage District, 87 So.2d 49, 50 (Fla. 1956)(Traditionally it may be pointed out that a "per curiam" is the opinion of the court in which the judges are all of one mind and the question involved is so clear that it is not considered necessary to elaborate it by an extended discussion) and Whipple v. State, 431 So.2d 1011, **1012** (Fla. 2d DCA 1983), on motion for rehearing (Having concluded that appellant's conviction and sentence should be affirmed, we decided that to write an opinion in this case would merely serve to refute appellant's arguments and would not show any conflict in law which would merit an application for discretionary review to the supreme court. Furthermore, an opinion would not have been of any significant assistance to the bench or bar of this state). Respondent would urge this Court to decline de novo review of Petitioner's Issues II and III.

and, this charge would involve testimony from law enforcement officers. (Tr 7) Mrs. Holmes had disclosed she had a connection with law enforcement officers. (Tr 7) The prosecutor asked Mrs. Holmes, along with the others, if the connection she has with law enforcement officers would allow her to be fair and impartial when hearing testimony from a law enforcement officer. (Tr 7) Mrs. Holmes answered that she did not think it would sway her. (Tr 8) The prosecutor then asked if the jurors could appreciate the concept of 'reasonable doubt" and determine if the state government could meet that standard. (Tr 10-11) Mrs. Holmes answered in the affirmative. (Tr 11) Mrs. Holmes confirmed that she had no problem evaluating identification testimony given by law enforcement officers. (Tr 11-12)

The Public Defender then asked if any of the jurors had pressing problems which would prohibit them from giving 100 percent attention to this case; and, Mrs. Holmes indicated that there were no outside influences which would keep her from fulfilling her duties as a juror. (Tr 15-16) Mrs. Holmes confirmed that she presumed Petitioner to be innocent as he sat before her, (Tr 17-18)

The public defender then asked the panel if any of them held law enforcement to a higher standard of ability of human

observation. (Tr 36) Mrs. Holmes noted that law enforcement officers are capable of making mistakes; but, she answered the question posed: "...but I do believe they are trained to look for specific things where we just go throughout daily lives sometimes, where they're more trained to focus in on more detail than perhaps we are." (Tr 36) Then, the following transpired:

> MR. BRIERE: So you would agree that a police officer would be trained to focus in on detail at the time of, perhaps, an armrest?
>
> MS. HOLMES: Yes, to notice something that I wouldn't notice, perhaps.
>
> MR. BRIERE: Okay. Would you hold them to a higher standard then? When a police officer gets up there and says this is the way it is, I mean, would it--would you just--it goes back to the credibility again of their testimony. They say they saw something a certain way and somebody else, a lay witness, says, well, I saw the same thing, but that's not the way it occurred. And all things being equal, aside from the facts that one's a trained police officer and one's not, are you going to give that trained police officer's version a little more credibility?
>
> MS. HOLMES: I might be tempted, yeah.
>
> MR. BRIERE: Okay. So what you're saying is you couldn't be sure whether or not you would not, in fact, give their testimony a little greater weight than a non-police officer's testimony if all things were equal.
>
> MS. HOLMES: If all things were equal.

MR. BRIERE: All other things equal, okay, good.

Anyone else agree with Ms. Holmes?

Ms. Black?

MS. BLACK: She may have a point there, that they are trained for--to observe more details than just the average citizen out there.

(Tr 37-38)

Ms. Black concluded that "all things being equal" she didn't think she would believe the testimony of a police officer over a lay witness. (Tr 38) The Public Defender then began an inquiry as to whether the panel thought that police officers could give biased testimony or lie--at which point, the trial court made the following ruling:

THE COURT: We're way too far into getting people's opinions about matters in evidence.

MR. BRIERE: I withdraw the question.

(Tr 39)

Ms. Holmes also stated that she would not hold it against Mr. Lee if he didn't testify; and, that the state government would still be held to its burden in proving its case. (Tr 41) Then the following transpired at a bench conference:

(The following bench discussion ensued:

THE COURT: What says the State?

MR. GOMEZ: Pass.

THE COURT: What says the Defense?

MR. BRIERE: Strike Ms. Holmes for cause, Your Honor.

THE COURT: Negative. Do you want to use a peremptory on her?

MR. BRIERE: Yeah, sure.

(Tr 42)

The 'State" would urge that Ms. Holmes' responses did not establish that she had a bias toward evidence established by law enforcement. That, if all things were equal, she might be "tempted" to give more weight to a police officer's testimony did not establish that she would. Never did she say that she would, in fact, give more weight to a law enforcement officer's testimony. If Petitioner felt that there was a question as to whether Ms. Holmes could be fair and impartial, he had an opportunity to establish whether or not Ms. Holmes would give into her temptation or put her temptations behind her or ignore her temptations. Every individual has temptations each day; and, the question is whether the temptations are acted upon. This is not like Clayton v. State, 616 So.2d 615 (Fla. 4th DCA 1993) where a

juror 'expressed a steadfast and clear bias in favor of the credibility of police officers."

The "State" urges that Ms. Holmes was eligible to sit **as** a juror as a matter of law. The recognized twelve (12) grounds for a challenge for cause are set forth in §913.03, Florida Statutes (l.995) (Trial Jury: Grounds for Challenge to Individual Jurors for Cause). A challenge for cause to Mrs. Holmes may be made only on the above statutory grounds. The most common ground is "partiality of a juror". See, §913.03(10), Florida Statutes (1995) . No where in this record is it established that Ms. Holmes would have been unable to have acted in accordance with the **law.** The test is "whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." see, Lusk v. State, 446 So.2d 1038 (Fla. 1984), cert. denied, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984).

Respondent would urge that the standard on review as to whether Ms. Holmes should have been excused is whether there has been an abuse of discretion. See, Mills v. State, 462 So.2d 1075 (Fla. 1985), cert. denied, 473 U.S. 911, 105 S.Ct. 3538, 87 L.Ed.2d 661 (1985). Respondent would urge this Court to follow

the district court's determination and not disturb the discretionary ruling of the circuit court.

PETITIONER'S ISSUE III[6]

THE TRIAL COURT ERRED IN EXCUSING MR. THORNTON FOR CAUSE BECAUSE THERE WERE NO GROUNDS FOR THIS EXCUSAL.

(As Stated by Petitioner)

The district court affirmed this issue without comment. See, Lee v. State, 695 So.2d 1314 (Fla. 2d DCA 1997). Both the circuit court and the district court have found no error; and, Petitioner fails to establish where the two courts below erred. Respondent would again urge this Court to decline a de *novo* review of the above issue. For purposes of brevity and clarity, Respondent republishes the argument made in the district court on this issue.

Mr. Thornton disclosed that he himself had been accused of a crime. (Tr 46) Then the following was asked:

> MR. GOMEZ: Okay. And the fact that you--actually you've been on both sides. You've been a victim and you've been accused of a crime.
>
> Do you feel the system, the judicial system, the justice system, however you want to call it, has worked for you? Has it been fair for you, or do you feel that it hasn't?
>
> MR. THORNTON: Well, it--we have--I really can't answer that one right now.

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[6]See, Respondent's footnote 5.

MR. GOMEZ: Is there something you would feel more comfortable saying outside the presence of the other people?

MR. THORNTON: No, it's just hard to answer that question right now.

(Tr 46-47)

Mr. Thornton also opined that 'in a way" the state government could establish its case "just on verbal testimony." (Tr 48) Mr. Thornton did indicate affirmatively that he would apply the rules given by the court. (Tr 51-52) Mr. Thornton [an African-American] stated that there **was** no problem sitting as juror with Petitioner being an African-American. (Tr 52) Mr. Thornton also stated that he would be firm [stick to his guns] and not sign a verdict form he didn't believe in. (Tr 53)

The prosecution moved to strike Mr. Thornton for cause:

MR. GOMEZ: The cause is that he was not able to answer my question whether the criminal justice system was fair. Since he can't answer that question at this time, we argue he's not being forthright with the Court at this time as to his opinions as to whether or not the system has treated him fairly or not and that has a bearing upon his ability to be a fair and impartial juror in this case.

(Tr 54)

When Mr. Thornton declined to answer the prosecution's question as to whether the criminal justice system had worked for him, there was a ground for a cause challenge. (Tr 46-47) When Mr. Thornton declined to answer the prosecution's question as to whether or not the criminal justice system had been fair or not fair for him, there was a ground for cause challenge. (Tr 46-47) There is an unanswered question as to whether [because of his past experience with the criminal justice system as an accused] he now has a conscientious belief which would have precluded him from finding Petitioner guilty. As Mr. Thornton declined to answer these questions, there is a basis to question whether he could be a fair and impartial juror, In other words, because of Mr. Thornton's declination to address the questions posed, it can be concluded that there is a bias or prejudice against the criminal justice system. Regretfully, Mr. Thornton was unable to eliminate doubt as to his impartiality.

Respondent would again urge that the standard on review as to whether Ms. Holmes should have been excused is whether there has been an abuse of discretion, See, Mills v. State, 462 So.2d 1075 (Fla. 1985), *cert. denied, 473* U.S. 911, 105 S.Ct. 3538, 87 L.Ed.2d 661 (1985). Respondent would urge this Court to follow

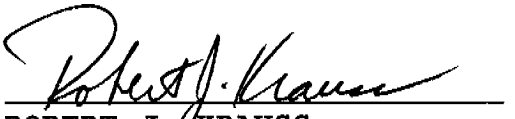
the district court's determination and not disturb the discretionary ruling of the circuit court.

CONCLUSION

Based on the foregoing facts, arguments, and authorities, the certified question must be answered in the affirmative approving the decision of the district court; and, Respondent would urge this Court to decline de *novo* review of Petitioner's Issues II and III.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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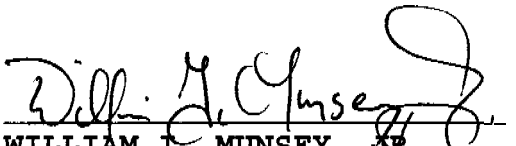

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Richard J. Sanders, Office of the Public Defender Assistant Public Defender, Pinellas Criminal Justice Center, 14250 49th Street North, Clearwater, FL 34622, on this 8th day of August, 1997.

OF COUNSEL FOR RESPONDENT