IN THE SUPREME COURT OF FLORIDA

ISIAIH NEAL,

Petitioner,

v. CASE NO. 91,249

STATE OF FLORIDA,

Respondent.

_____/

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

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The record on appeal will be referred to by (R.) followed by the appropriate page number. The supplemental record on appeal will be referred to by (S.R.) followed by the appropriate page number.

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 with the following exception:

Petitioner states as fact that he **was** not invited to the bench. As indicated by the Second District's opinion, there is nothing in the record stating that Petitioner was not present at the bench conference. (S.R. 438).

SUMMARY OF THE ARGUMENT

In this case, it is clear that Petitioner did not make an explicit, on-the-record waiver of his right to be present at the bench. Further, this issue cannot be raised on direct appeal without an objection and must be alleged in a motion for postconviction relief.

ISSUE

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?

This Court has for review Neal v. State, 697 So.2d 941 (Fla. 2d DCA 1997), in which the district court acknowledged, but not certified, that its opinion was in conflict with decisions of other districts which hold that **Coney** errors are fundamental-l

The Second District in Lee v. State, 695 So. 2d 1314 (Fla. 2d DCA 1997) 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?

This Court has held in Conev 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

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[1]See, Butler v. State, 676 So.2d 1034 (Fla. 1st DCA 1996); Wilson 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).

he/she wishes to waive his/her right to be present at the bench during the exercise of pretrial juror challenges." The Second District correctly opined that an Appellant bears the burden to establish the existence of reversible error. The record failed to show that Petitioner was not immediately present during the juror challenges. The Second District reasoned that the record actually reflected the contrary: 'the judge's failure to make a waiver inquiry and the failure of the defense to object on that ground are consistent with the possibility that Neal actually was at the bench conference."

This Court has recently held a purported Coney error waived where the defendant did not object at trial. See Cole v. State, 22 Fla. L. Weekly (S) 587, 588 (Fla. September 18, 1997), where against a challenge bench conferences were held outside his presence in the hallway, the Court held, "This claim is also procedurally barred because Cole did not make a contemporaneous objection to any bench conferences being held in the hallway or to his desire to participate in any of the conferences."

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[2]In Bovett v. State, 688 so.2d 308 (Fla. 1996), this Court receded from Coney 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 Coney required a defendant's presence at the bench during peremptory challenges.

Likewise, in the instant case, where there was no objection to the jury selection process below, any error has been waived. Nothing in the record indicates Petitioner was prevented or limited in any way from consulting with his counsel concerning the exercise of juror challenges. In fact, after the attorneys asked voir dire questions, the trial court allowed them a few minutes to consider the selections. Thus, Petitioner has failed to show any error and is asking this Court to presume error occurred.

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[3]; and, that his/her counsel was ineffective for failing to urge a racial/ethnic challenge in opposition to striking a juror by the

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[3]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.**

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.

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 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 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). In Lee, Judge Quince in writing for the Second District, states:

> ... Judge Altenbernd in his concurring opinion stated, and we agree, that failure to obtain a *'Coney"* 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.
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> Lee, 695 So.2d at 1315)

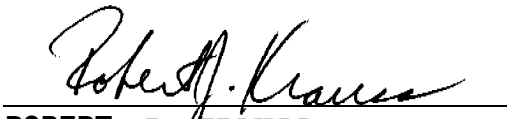
Respondent endorses this approach. For all Respondent knows, Petitioner and his counsel had discussed peremptory challenges and Petitioner directed trial counsel to use his discretion in making challenges. Without the established facts, the state cannot urge a defense on direct review because these matters 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.

CONCLUSION

Based on the foregoing facts, arguments, and authorities, the the decision of the district court must be approved.

Respectfully submitted,

ROBERT A, BUTTERWORTH
ATTORNEY GENERAL



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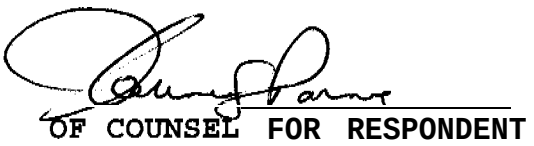
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Julius J. Aulisio, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, Polk County Courthouse, P. 0. Box 9000--Drawer PD, Bartow, Florida 33831, on this 9th day of December, 1997.



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