IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

EDDIE J. WILLIAMS,

Respondent.
_____/

CASE NO. 91 , 654
4th DCA CASE NO. 96-2526

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Respondent was a criminal defendant in the Nineteenth Judicial Circuit in and for Martin County, Florida, having been charged by Information on January 2, 1996, with trafficking of 200 or more grams of cocaine, possession of cocaine with the intent to sell, and driving with a suspended license (R 8-10). A jury convicted respondent of the trafficking and possession charges on May 2, 1996 (R 38).

Respondent was in the courtroom during voir dire, and nothing in the record indicates that he left the courtroom during jury challenges (T 113/21, 114/15). However, after voir dire questioning had ended, the trial court called the lawyers to the bench for jury challenges (T 135). After challenges for cause had been made (T 135-36), respondent's attorney apologized for having not done so earlier and told the trial court that he had discussed with respondent his right to be present during that process, and that respondent had waived that right (T 136/10-14).

On June 17, 1997, respondent filed a direct appeal (R 52) raising several issues, including alleged error by the trial court for failure to follow the procedures for obtaining a defendant's waiver of presence during jury challenges announced in *Coney v. State*, 653 So. 2d 1009 (Fla. 1995), *cert. denied*, 116 S.Ct. 315 (1995). On September 10, 1997, the Fourth District Court of Appeal filed its opinion in this matter,[1] which indicated that the only issue with merit was the *Coney* issue. The district court of appeal reversed respondent's conviction on the basis of a *Coney* violation, but certified the following question as one of great public importance:

> Whether the 1997 amendment to Florida Rule of Criminal Procedure 3.180(b) may be retroactively applied?

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[1]22 Fla. L. Weekly D2139 (Fla. 4th DCA Sept. 10, 1997).

SUMMARY OF ARGUMENT

The rule set forth in *Coney v. State*, 653 So. 2d 1009 (Fla.), *cert. denied*, 116 S. Ct. 315 (1995), is that for purposes of Fla. R. Crim. P. 3.180, a defendant's presence means at the immediate site where juror challenges are exercised. The notion that immediate site means at the bench was based on a fallacious concession of error, which was incorrectly accepted by this Court. Therefore, the only precedential value of *Coney* is that presence means at the immediate site where juror challenges are exercised. In *Boyett v. State*, 688 So. 2d 308 (Fla.1996), this Court clarified the definition of immediate site, indicating that it means physically present in the courtroom and having a meaningful opportunity to be heard through counsel. This definition was subsequently incorporated in Fla. R. Crim. P. 3.180, effective January 1, 1997. Respondent was physically present in the courtroom and had a meaningful opportunity to be heard through counsel during juror challenges. Therefore, the district court of appeal erred by reversing on the basis of *Coney*.

Since *Coney* was based on a fallacious concession of error, and due to the great expense that will be incurred to retry the many cases being reversed on this basis, this Court should specifically indicate that the definition of "immediate site" given in *Boyett* was substantive and should be retroactively applied, and that the amendment to Fla. R. Crim. P. 3.180(b) should be retroactively applied.

ARGUMENT

POINT I

THE DISTRICT COURT OF APPEAL ERRED BY RULING THAT THE TRIAL COURT'S FAILURE TO REQUIRE RESPONDENT TO EITHER BE PRESENT AT THE BENCH DURING JURY CHALLENGES OR TO PROPERLY WAIVE HIS PRESENCE CONSTITUTES REVERSIBLE ERROR.

Fla. R. Crim. P. 3.180(a)(4) requires a defendant's presence at the beginning of a trial during the examination, challenging, impanelling, and swearing of the jury. In *Coney v. State*, 653 So. 2d 1009 (Fla.), *cert. denied*, 116 S. Ct. 315 (1995), this Court held for the first time that under Fla. R. Crim. P. 3.180, a defendant's right to be physically present where juror challenges are exercised means at the immediate site where they are exercised. Also in *Coney*, the State conceded that defendant's absence from the bench during peremptory challenges was error[2], and this Court accepted that concession. It should be noted that but for the State's concession, the definition of presence provided in *Coney* was merely "immediate site where the challenges are exercised."

In *Boyett v. State*, 688 So. 2d 308 (Fla.1996), the opinion of which was issued on December 5, 1996, this Court stated that, "It was incorrect for us to accept the state's concession of error. Because the definition of 'presence' had not yet been clarified, there was no error in failing to ensure Coney was at the immediate site." *Id.* at 310. This Court then receded from *Coney* to the extent that it held the new definition of presence applicable to Coney himself. This Court further stated that such clarification as to what "immediate site" means was being provided

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[2]This concession was therefore that if peremptory challenges are made at the bench, immediate site means at the bench.

in an approved amendment to Fla. R. Crim. P. 3.180(b), which reads, "A defendant is present for purposes of this rule if the defendant is physically present in attendance for the courtroom proceeding, and has a meaningful opportunity to be heard through counsel on the issues being discussed. *Id.* This rule was amended effective January 1, 1997. *Amendments to the Florida Rules of Criminal Procedure*, 685 So. 2d 1253 (Fla. 1996).

When the State concedes error in an appellate proceeding, it does so believing that the law of this state is adverse to its position in regard to the pertinent issue. If an appellate court agrees, it accepts the State's concession. But with some frequency, the appellate courts of this state interpret the law differently from the State and refuse to accept its concession. What this Court essentially stated in *Boyett*, was that it incorrectly accepted the State's concession in *Coney*, because the concession was not *stare decisis* in the State of Florida. The definition of "presence" and "immediate site" had not yet been clarified in *Coney*, other than presence meant at the immediate site where challenges are exercised. The definition of "immediate site" was not clarified until the *Boyett* opinion and the amendment to the rule of procedure.

The point is that if this Court accepted a fallacious concession of error, then that concession is not law and has never been law. Therefore, the precedential value of *Coney*, is that under rule 3.180, a defendant has a right to be physically present at the immediate site where challenges are exercised, whatever that means. We now know, due to *Boyett* and the amendment to the rule, that it means in the courtroom with a meaningful opportunity to be heard through counsel. Nonetheless, when this matter was tried the definition of presence was being at the immediate site, and respondent was at the immediate site.

POINT II

BOTH *BOYETT* AND THE 1997 AMENDMENT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.180(b) SHOULD HAVE BEEN RETROACTIVELY APPLIED BY THE DISTRICT COURT OF APPEAL.

Boyett overruled *Coney* in regard to its application of the new definition of presence. In other words, *Boyett* at the very least holds that immediate site does not mean "at the bench." Therefore, as of December 5, 1996, when the *Boyett* opinion was issued, the rule of law concerning presence was either that a defendant has a right to be physically present at the immediate site where jury challenges are exercised (without the *Coney* concession that immediate site means at the bench), or it meant in the courtroom and having a meaningful opportunity to be heard through counsel, which has now been clarified.

Either way, any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final. *Smith v. State*, 598 So. 2d 1063 (Fla. 1992). Since this appeal was pending when *Boyett* was issued, the Fourth District Court of Appeal should have applied this new rule of law announced therein to this case. However, the Fourth District Court of Appeal improperly applied the expanded definition of presence, which was derived from this Courts incorrect acceptance of the state's fallacious concession of error in *Coney*.

Furthermore, the amendment to Fla. R. Crim. P. 3.180(b), which was effective January 1, 1997, should also have been retrospectively applied to this pending case. Granted, unless otherwise specifically provided by this Court, rules are prospective only in effect. *Tucker v.*

State, 357 So. 2d 719 (Fla. 1978). However, considering that this *Coney* issue was originally based on a fallacious concession of error and the enormous amount of resources that will be expended on retrials due to *Coney* error, this Court should specifically provide that the definition of "immediate site" given in *Boyett* was substantive and should be retroactively applied, and the amendment to Fla. R. Crim. P. 3.180 (b) should be retroactively applied, in an effort to correct something that was wrong from the beginning at the lowest possible expense.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities cited herein, the State respectfully requests that this Honorable Court reverse the decision of the district court of appeal and affirm respondent's conviction.

Respectfully submitted,

ROBERT BUTTERWORTH
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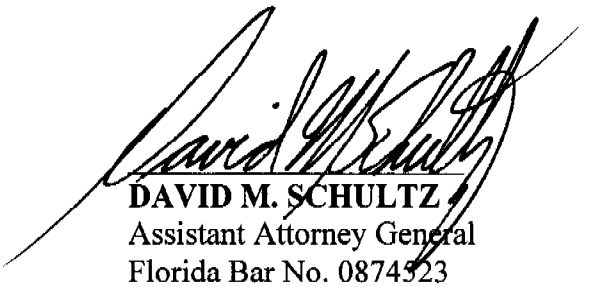
Tallahassee, Florida



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by courier to Margaret Good-Earnest, Assistant Public Defender, Counsel for Respondent, at 421 3rd Street, 6th Floor, West Palm Beach, FL 33401 this 26th day of January, 1998.

DAVID M. SCHULTZ
Of Counsel