IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA

ANTHONY LOPEZ,

Petitioner,

v. **CASE NO. 92, 292**

STATE OF FLORIDA,

Respondent.
_____/

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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ANGELA D. McCRAVY
Assistant Attorney General
Florida Bar No. 983391
Westwood Center
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The record on appeal will be referred to by the symbol (R) followed by the appropriate page number. The transcript of the trial and the sentencing hearing will be referred to by the symbol (T) followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case and facts is substantially accurate for the purpose of this appeal, with the following additions and corrections:

Counsel for Respondent wishes to draw this Court's attention to the first paragraph of page two of Petitioner's brief, beginning, "Defense counsel stated. . . ." All the factual allegations in that paragraph were merely assertions made by defense counsel during that pretrial hearing. They did not come from any testimonial evidence whatsoever. The trial court's concern about Detective Baker lying was based solely on defense counsel's unsupported factual assertions. These factual assertions regarding eyewitness identifications were contradicted by the substantive testimony of witnesses at trial, which will be discussed in Issue II, *infra*.

Eyewitness Daniel Deitrich testified that all the lights in the restaurant were on at the time of the robbery. (T114) As Petitioner pushed Deitrich and Barry Mitchell back inside the KFC while waving the Uzi, Petitioner was yelling "give me the 'f'n' money, give me the 'f'n' night deposit, 'f'n' this, 'f'n' that. You're a stupid mother 'f'r.'" (T118)

While Deputy Booth did testify that Mitchell had told Booth that both of the robbers had curly hair (T184), Mitchell denied that he had ever told a deputy that the gunman (Petitioner) had

curly hair. (T206) Deputy Booth did not interview the other victims at the scene, because they left before he had a chance to talk to them. (T184) However Deputy Booth was merely the initial responding deputy. (T182) These other witnesses were later located and interviewed by Detective Anthony Baker, who was assigned to do the follow-up investigation of the robbery. (T264-65) However the whereabouts of victim Youssey El-Shammaa was not determined as of the time of trial. (T220-21)

A total of $2,219.05 was taken in the robbery (T207), as well as the purse of Jamilla Dickenson which contained a necklace bearing a name plate that said "Jamilla", a heart that said "Sweet 16", a money bag charm that said "1,000 lbs.", and some ball-shaped earrings. (T217-18)

Codefendant Juan Delgado testified that on the afternoon of the robbery he was at the Cue Club with three girls: his girlfriend Maria Pena, Avia McFarlane, and Sara Dehkharghani. (T235)(T266) All five of them left the Club together in Petitioner's car. (T237)

Petitioner's apartment was located a mere several hundred yards from the KFC he and Delgado robbed. (T238)(T268)

Counsel for Petitioner erroneously and misleadingly states on page 19 of his brief that "Mr. Delgado denied knowing John (Jackie) Roman." Counsel implies that "John" and "Jackie Roman" are the same person. In fact, the evidence showed that it was

defense witness Amin Mahsel who was also known as John. (T355) Mahsel testified on direct examination that Delgado had bonded him out of jail on the day of the robbery. (T356-57)[1] On cross-examination of Mahsel the prosecutor elicited that it was in fact Jackie Roman, not Delgado, who had bonded him out of jail. (T359)

Maria Pena testified that after Petitioner and Delgado had counted and separated the money on the bathroom floor (T308), Petitioner wanted to leave the apartment. Pena, Avia McFarlane, and Sara Dehkharghani went outside to check out the area but did not see anything suspicious. (T309) Shortly thereafter the three of them plus Petitioner, his wife Michelle and Delgado all got into Petitioner's car. (T309) Michelle drove, and they went to a Holiday Inn near a causeway. (T310) Once they arrived at the hotel, Delgado told Pena that he and Petitioner had robbed the KFC. (T323)

Dawn Meads testified that after the robbery Petitioner had bragged about it "[e]veryday, all the time." (T334)

Rosalie Russeff testified that the gun Petitioner wanted to bury in her backyard looked like a small Uzi. (T338)

Amin Mahsel testified that he had met Petitioner in jail, and Petitioner had asked Mahsel to testify for him. (T359)

---

[1]Of course this could not possibly have occurred, since the robbery happened after 10:00 p.m. In closing argument, defense counsel erroneously argued to the jury that Mahsel had testified that Delgado bonded him out on the day *after* the robbery. (T400)

Michelle Lopez testified that she and Petitioner were walking on the beach at the time the robbery occurred. (T369)[2] She also testified that it was Petitioner, not she, who had driven to the hotel. (T370)[3]

In its rebuttal case the State recalled Rosalie Russeff. She testified that about a week and a half before trial Michelle admitted to her that Petitioner had robbed the KFC. (T386)

The State also recalled Dawn Meads as a rebuttal witness. Meads testified that Michelle had given Meads' daughter a handful of jewelry, one of which was a chain necklace with a heart that said "Sweet 16." (T387-88) Michelle had told Meads on more than one occasion that Michelle would not be the one to put her husband away. (T388)

Petitioner was 36 years of age at the time of the KFC robbery. (T451)

Additional facts pertaining to allegedly improper admission of collateral crime evidence, the exclusion of defense witness Sonja Santiago, and Petitioner's participation in jury selection will be discussed under the analysis of each of those respective issues, *infra*.

---

[2]At the time Petitioner was arrested, Lopez had told Det. Anthony Baker that she had been home at the time of the robbery. (T273)

[3]Michelle Lopez later told her mother Rosalie Russeff that it was she who drove to the hotel, and she was scared when she had to drive through some roadblocks to get there. (T377-78)

SUMMARY OF THE ARGUMENT

Issue I: This issue has not been preserved for appellate review. Alternatively, any failure to follow the **Coney** rule was at most harmless error.

Issue II: The trial court properly denied Petitioner's motion for mistrial, because defense counsel invited any error. Petitioner may not complain about allegedly improper collateral crimes evidence, because defense counsel himself was guilty of repeatedly attempting to elicit improper collateral crimes evidence. Alternatively, Mead's mention of the alleged sexual assault committed by Petitioner upon her daughter was at most harmless error.

Issue III: The trial court properly excluded potential defense witness Sonja Santiago, because her testimony would not have impeached the testimony of State witness Maria Pena. Alternatively, the refusal to admit Santiago's testimony was at most harmless error.

ARGUMENT

ISSUE I

NO REVERSIBLE ERROR HAS BEEN SHOWN IN PETITIONER'S ABSENCE FROM BENCH CONFERENCES AT WHICH PEREMPTORY STRIKES WERE EXERCISED. (Restated).

A. Relevant Facts:

At the conclusion of the initial voir dire questioning by both the prosecutor and defense counsel, the following exchange occurred:

> [DEFENSE COUNSEL]: If I may just have a moment with my client, Your Honor.
>
> (The attorney and defendant confer at counsel table.)
>
> [DEFENSE COUNSEL]: No further questions at this time, Your Honor.
>
> THE COURT: Okay. Counsel approach the bench please, when you're ready. (T40)

At the bench conference the prosecutor and defense counsel each exercised one strike for cause. (T40) Defense counsel then exercised three peremptory strikes. (T40-41)

Five more potential jurors were then called up for questioning. (T41) At the conclusion of additional questioning by the prosecutor and defense counsel, the following exchange occurred:

> [DEFENSE COUNSEL]: Just a moment,

Your Honor.

(The attorney and defendant confer at counsel table.)

THE COURT: Okay. Approach the bench, please. (T59)

At the bench conference defense counsel exercised five more peremptory strikes. (T59) Five more potential jurors were called up for questioning. (T60) At the conclusion of additional questioning the following exchange occurred:

[DEFENSE COUNSEL]: If I may have a moment, Your Honor.

THE COURT: Okay.

[PROSECUTOR]: Judge, can I ask one question to follow-up?

THE COURT: No, save it. (T73)

During the bench conference that followed the State exercised two peremptory strikes, and two more prospective jurors were called for questioning. (T74)

Thereafter both the prosecutor and defense counsel engaged in additional voir dire questioning. At the conclusion of that questioning both sides accepted the panel. (T87)

B. Legal Analysis:

In **Coney v. State**, 653 So. 2d 1009 (Fla. 1995), **cert. denied**, _____ U.S. _____, 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995), the Florida Supreme Court held that a defendant has a right to be physically present at the immediate site where

pretrial juror challenges are exercised. The court further held that a defendant can waive that right, or can ratify strikes made outside his presence if the court through proper inquiry certifies that the waiver is knowing, intelligent and voluntary. The State acknowledges that no such waiver inquiry was made in the instant case.[4]

1. This issue has not been preserved for appellate review:

Both the first and third districts have held that a violation of the **Coney** rule constitutes fundamental error which may be raised for the first time on appeal, notwithstanding the lack of a contemporaneous objection. **Mejia v. State**, 675 So. 2d 996 (Fla. 1st DCA 1996), **modified**, 696 So. 2d 339 (Fla. 1997); **Wilson v. State**, 680 So. 2d 592 (Fla. 3d DCA 1996), **appeal dism.**, 693 So. 2d 33 (Fla. 1997). However this Court has not followed the first and third districts and has recently certified the following question to the Florida Supreme Court:

> IF A CONEY ISSUE IS NOT PRESERVED AT TRIAL, MUST A PRISONER FILE A POSTCONVICTION MOTION ALLEGING

---

[4]In **Boyett v. State**, 688 So. 2d 308 (Fla. 1996), the Florida Supreme Court stated in a footnote that the definition of "presence" would change as of January 1, 1997. On that date the amendment to Rule 3.180 (b) would become effective. The new rule reads: "A defendant is present for purposes of this rule if the defendant is physically in attendance for the courtroom proceeding, and has a meaningful opportunity to be heard through counsel on the issue being discussed." Petitioner's trial began September 11, 1995. Therefore the amendment to the rule was not in effect yet and does not apply to him.

UNDER OATH THAT HE OR SHE WOULD NOT HAVE EXERCISED PEREMPTORY CHALLENGES IN THE SAME MANNER AS HIS OR HER ATTORNEY?

Hill v. State, 696 So. 2d 798 (Fla. 2d DCA 1997). Although this question was certified by Judge Altenbernd in his concurring opinion in **Hill**, the majority joined in the certified question. In deciding **Hill**, this Court found that **Coney** did not even apply to the facts of that case, and therefore declined to address the certified question. **Hill v. State**, 700 So. 2d 646 (Fla. 1997). *See also* **Ross v. State**, 696 So. 2d 831 (Fla. 2d DCA 1997)("[W]e question whether the defendant should be required to raise this issue in a postconviction motion") **cert. denied**, ____ U.S. ____, 118 S. Ct. 112, 139 L.Ed. 2d 65 (1997). It is this question of great public importance which the second district has again certified in the instant case.

It is the position of Respondent that this Court should not follow the first and third districts and should answer the certified question in the affirmative, for the reasons explained as follows:

The purpose of a postconviction motion under **Florida Rule of Criminal Procedure 3.850** is to inquire into alleged constitutional infirmities of a judgment or sentence, not to review ordinary trial errors which are cognizable on direct appeal. **McCrae v. State**, 437 So. 2d 1388 (Fla. 1983). Matters

which could have or should have been raised on direct appeal are not cognizable in **a rule 3.850 motion. Id.** It has been held that an attorney's failure to object to reversible error may constitute ineffective assistance of counsel, which must be raised in a motion for postconviction relief under **rule 3.850,** not on direct appeal. *See,* **e.g., Davis v. State, 648 So.** 2d 1249 (Fla. 4th DCA 1995), **appeal after remand, 683 So. 2d 572** (Fla. 4th DCA 1996).

Respondent contends that postconviction review is necessary in a case such as this one, because the record does not show whether Petitioner was, in fact, at the bench conference, or whether he ever conferred with his attorney about the jury strikes. Postconviction review of factual evidence not in the record is permitted because there can be no practical determination on the basis of the record provided for direct appeal. **Brown v. State, 633 So.** 2d 112, 116 (Fla. 2d DCA 1994)(Altenbernd, J., concurring). **See State v. Callaway, 658 so.** 2d 983 (Fla. 1995)(issue should be dealt with under **rule** 3.850 which provides for an evidentiary hearing when issue is not pure question of law, but depends upon resolution of factual evidence); **see** *also* **Mitchell v. State, 309** So. 2d 558 (Fla. 2d DCA 1975)(where record is insufficient to permit a review of alleged noncompliance with statutory notice required when a minor

is charged with a crime, relief is properly sought under **Fla. R. Crim. P.** 3.850; therefore, orders appealed were affirmed without prejudice to Petitioner to raise the issue in a postconviction motion). These types of questions are best handled by means of a postconviction proceeding, with its built-in provision for an evidentiary hearing.

In his concurring opinion in **Ganyard v. State**, 686 So. 2d 1361 (Fla. 1st DCA 1996), **aff'd**, 23 Fla. L. Weekly S65 (Fla. January 29, 1998), Judge Lawrence noted that ethical rules require a defense attorney to consult with and inform his client about his right to have input during the selection of the jury, and if the attorney fails to do this, the defendant may bring it to the trial court's attention. Moreover, if he is not aware of his rights, he may bring his claim in postconviction proceedings under **Florida Rule of Criminal Procedure** 3.850. **Id.** Similarly, in his concurring opinion in **Hill**, Judge Altenbernd stated that a defendant who has not preserved a claim under **Coney** must bring his claim in a motion for postconviction relief under **rule** 3.850 in which he must swear that he would have done something differently during the selection of his jurors. **Hill v. State**, **696 So.** 2d 798 (Fla. 2d DCA 1997)(Altenbernd, J., concurring). The oath requirement arose from a concern about the use of false allegations in postconviction motions. **Gorham v. State**, **494 So.**

2d 211 (Fla. 1986). **See** *also* **Brown v. State**, 633 So. 2d 112, 116 (Fla. 2d DCA 1994) (Altenbernd, J., concurring) ("To avoid abuse, the **rule [3.850]** requires sworn allegations of the critical facts that are outside the record.")

The need for this requirement is exemplified by the decision in **Dorsey v. State**, 684 So. 2d 880 (Fla. 4th DCA 1996), in which the Fourth District refused to find harmless error with respect to a **Coney** violation on the basis that the defendant's participation in jury selection might have resulted in different jurors deciding the case. The holding in **Dorsey** is at odds with the decision in **Ganvard v. State**, 686 So. 2d 1361 (Fla. 1st DCA 1996), in which the First District found harmless error where a defendant did not participate in a bench conference because no peremptories were exercised at all. Under the reasoning of **Dorsey**, who could say what might have happened if the defendant had been involved in the bench conference? After all, he *might* have stricken one of the panel members who ultimately served.

Respondent submits that the thrust of the issue should not be something so speculative. Rather, the issue is whether the defendant's right to a fair trial was violated because he would have selected or not selected specific jurors for specific reasons if he had participated. In other words, he cannot make the bare conclusory allegation without providing specific facts to back it up.

Requiring a factually detailed and sworn postconviction motion comports with the requirements for relief with respect to other types of errors. For example, in **Sorgman v. State,** **549 so.** 2d 686 (Fla. 1st DCA 1989), the First District held that a motion for postconviction relief alleging ineffective assistance of counsel for failure to interview and call witnesses must apprise the trial court of the names of the witnesses, substance of their testimony, and how the omission prejudiced the outcome of the defendant's trial. Likewise, in **State v. Beach,** 592 So. 2d 237 (Fla. 1992), **on remand,** *600* So. 2d 1212 (Fla. 1st DCA 1992), this Court stated that a defendant who challenges the validity of using his prior convictions on a guidelines scoresheet on the basis that they were obtained without benefit of counsel has to swear that (1) the offense involved was punishable by more than six months of imprisonment or that he was actually imprisoned on that charge; (2) he was entitled to court-appointed counsel because he was indigent; (3) no counsel was appointed for him; and (4) he did not waive his right to counsel. *Cf.* **Hill v. Lockhart,** *474* U.S. 52, 106 S. Ct. *366, 88* L. Ed. 2d 203 (1985)(when a defendant challenges his conviction following entry of a guilty plea, that defendant must show that there was reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to

trial) .[5]

Alternatively, Respondent addresses this issue as follows:

2. Anv failure to follow the Conevrule was at most harmless error:

Regardless of whether this issue is fundamental, it is still subject to a harmless error analysis. **Meiia v. State,** 675 So. 2d 996, 1000 (Fla. 1st DCA 1996), **modified on other grounds, 696 So.** 2d 339 (Fla. 1997). If it can be shown 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, then the conviction must be upheld. **State v. DiGuilio, 491 So.** 2d 1129 (Fla. 1986).

> It seems relatively clear that the procedural rule set out in **Conev** is intended to ensure that a defendant's right to meaningful

---

[5]Respondent notes that the First District has chosen a different approach. In **Golden v. State, 688** So. 2d 419 (Fla. 1st DCA 1997)(on rehearing), **rev. denied,** 698 So. 2d 543 (Fla. 1997), the district court relinquished jurisdiction to the trial court so that the record could be supplemented with a reconstruction of the bench conference proceedings since the trial transcript did not show whether the defendant was physically present at the bench conferences or whether he conferred with his attorney about the peremptory challenges. After the record was supplemented with affidavits by the attorneys and an order from the trial court, the First District resumed its review. Even though the affidavits showed that the defendant had not been present at the bench conference where the peremptories were exercised, the district court found the error was harmless since the record showed that the defendant had consulted with counsel before the challenges, "thus, had the opportunity to participate in a meaningful way in the selection of the jury." Id. Respondent suggests that this is an unnecessary and burdensome procedure.

> participation in decisions regarding the exercise of challenges, particularly peremptory challenges, is zealously protected. [] It is equally apparent that appellant's counsel consistently consulted with appellant regarding the exercise of peremptory challenges. Accordingly, there can be no question but that, although he was not 'physically present at the immediate site where pretrial juror challenges [were] exercised' [] -- i.e., at the bench -- appellant did participate in a meaningful way in the decisions regarding the exercise of peremptory challenges. Thus, it would seem that the important right which the **Coney** decision was intended to protect was not impaired in any way.

Mejia, 675 So. 2d at 1000. **See also Turner v. State, 530** So. 2d **45,** 49 (Fla. 1987)(holding that defendant did not waive right to be present during exercise of juror challenges, or constructively ratify counsel's actions; but that, notwithstanding absence when challenges were actually exercised, error was harmless because defendant "had an opportunity to participate in choosing which jurors would be stricken"), **cert. denied, 489** U.S. 1040, 109 S. Ct. 1175, 103 L. Ed. 2d 237 (1989); **Ross v. State, 696 So.** 2d 831 (Fla. 2d DCA 1997)(no **Coney** error occurred because the record establishes that defense counsel consulted with the defendant during the jury selection process), **cert. denied**, _____ U.S. **----**, 118 S. Ct. 112, 139 L. Ed. 2d 65 (1997); **Anderson v.**

State, 697 So. 2d 878 (Fla. 5th DCA 1997)(Defendant not prejudiced when he was in the courtroom throughout the juror questioning and heard all the responses. "He could just as well make his wishes known to his attorney during the privacy of a recess as well as he could at sidebar." It is irrelevant that the record does not conclusively establish that the attorney in fact discussed the issue of jury selection with the defendant).

The record in the instant case clearly reflects that defense counsel consulted with Petitioner prior to each and every bench conference at which strikes were exercised. The only time the record fails to reflect such a consultation was before the last bench conference at which no further strikes were exercised and both sides accepted the panel. Pursuant to **Meiia, Turner, Ross,** and **Anderson,** no reversible error has been shown.

ISSUE II

THE TRIAL COURT PROPERLY DENIED PETITIONER'S MOTION FOR MISTRIAL, BECAUSE DEFENSE COUNSEL INVITED ANY ERROR.

A. Relevant Facts:

Prior to trial the prosecutor indicated that the State would not present evidence of any of Petitioner's prior sexual batteries. (T96)

Petitioner's sister-in-law Dawn Meads was called as a State witness. (T326) During cross-examination of Meads by defense counsel, the following exchange occurred:

> [DEFENSE COUNSEL]: Ms. Meads, if there could be one word that would sum up your feelings about Anthony Lopez, hate would be a good word?
>
> [MEADS]: Asshole would be a better one.
>
> [DEFENSE COUNSEL]: Okay. Asshole. And hate, good enough?
>
> [MEADS]: Yeah.
>
> [DEFENSE COUNSEL]: And you have this hate for Anthony Lopez today as you speak in this courtroom?
>
> [PROSECUTOR]: Judge, may we approach?
>
> THE COURT: Overruled.
>
> * * *
>
> [MEADS]: I'm very upset with him.
>
> [DEFENSE COUNSEL]: And on June 3,

1994, you hated Anthony Lopez?

[MEADS]: Since I found out he molested my daughter, I hated him.

[DEFENSE COUNSEL]: I would ask for an instruction and move for a mistrial.

* * *

THE COURT: Okay. The jury will disregard that remark. Go ahead.

[MEADS]: But that has nothing to do with this evidence I was shown. It has nothing to do with what I was shown. I can't make that up sir.

[DEFENSE COUNSEL]: [] Your Honor, may we approach?

THE COURT: No. Go ahead. You opened the door.

[DEFENSE COUNSEL]: You have hated this man for some time, correct?

[MEADS]: Do you want me to tell you why I've hated him?

[DEFENSE COUNSEL]: No, ma'am.

[MEADS]: Then that's irrelevant, sir, I would think.

[DEFENSE COUNSEL]: I'm just saying your feelings about this individual, you have hated him for a number of months, have you not?

THE COURT: That's enough of that. You can't do any better than that. Let's go onto something else. (T331-333)

The State rested at the conclusion of Meads' testimony.

(T340) At that time the following exchange occurred:

> [DEFENSE COUNSEL]: Your Honor, let me put on the record I again am strenuously asking this Court to grant a mistrial. At no time did defense counsel open the door, in the questions that I asked Ms. Meads. The question was simply asked, and I want this for the record, do you hate Mr. Lopez now and did you hate Mr. Lopez back on June 3rd, 1994. That is all counsel said. I did not open the door to any type of explanation, and I strenuously move for a mistrial.
>
> THE COURT: Do you want to say anything about it?
>
> [PROSECUTOR]: Yes, I do. He kept going on, you hate him, you hate him, and she wanted to explain why, and I think he opened the door. He did it again on this witness. [] Your Honor, he was asking her for a date, you may have offered the date of the crime, but she was answering the question about the date, how she came up with that answer, the date that she started hating Mr. Lopez. (T340-41)

The trial court again denied the motion for mistrial.

B. Legal Analysis:

1. Any error in the admission of the collateral crime evidence was invited by defense counsel:

"Under the invited-error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal." **Czubak v. State,** 570 so. 2d 925, 928 (Fla. 1990),

awweal after remand, 644 So. 2d 93 (Fla. 2d DCA 1994). The defendant can not take advantage on appeal of a situation he created at trial. **White v. State, 446 So.** 2d 1031, 1036 (Fla. 1984), **cited** *in* **Ashley v. State, 642 So.** 2d 837 (Fla. 3d DCA 1994).

In the instant case, it was defense counsel who kept hounding Meads about her hatred for Petitioner, thereby inviting the response of which he now complains. The prosecutor could see what was coming and asked to approach the bench, without success. Defense counsel asked the witness whether she hated Petitioner at the time of trial, and whether she hated Petitioner at the time of the offense. Clearly the import of defense counsel's questions was to determine the time span through which Meads has hated Petitioner. The implication of defense counsel's question was that Meads began hating Petitioner on the date the crime occurred -- perhaps *because* the crime occurred. Meads simply answered his question: she has hated Petitioner not since the time of the robbery, but since the time he molested her daughter. Any alleged error in this case was invited by defense counsel, and therefore may not constitute a basis for relief.

2. Petitioner may not complain about allegedly improper collateral crimes evidence, because defense counsel himself was auiltv of repeatedly attempting to elicit improper collateral crimes evidence:

During the cross-examination of codefendant and State witness

Juanito Delgado, the following exchange occurred:

> [DEFENSE COUNSEL]: Since you've been out on the street pending your present lock-up and between your sentence, have you robbed -- were you involved in a robbery of the Causeway Inn?
>
> [DELGADO]: No.
>
> [PROSECUTOR]: I'm objecting, Judge, relevancy.
>
> THE COURT: Sustained. (T254)

At a later point in the cross-examination of Delgado, the following exchange occurred:

> [DEFENSE COUNSEL]: Mr. Delgado, isn't it true that you have been for sometime now a member of the Folk Nation Gang?
>
> [PROSECUTOR] : Objection, relevancy.
>
> [DELGADO]: No, sir.
>
> THE COURT: Sustained. (T259)

During the cross-examination of State witness Maria Pena, the following exchange occurred:

> [DEFENSE COUNSEL]: Is this Casey a friend of Juanito's?
>
> [PENA]: Yes.
>
> [DEFENSE COUNSEL]: Do you know if they've done crimes together?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.

[DEFENSE COUNSEL]: Were you a member of the Folk --

[PROSECUTOR]: Objection to relevancy.

* * *

THE COURT: Well, sustained. (T324)

Later during Pena's cross-examination, the following exchange occurred:

[DEFENSE COUNSEL]: Are you a runaway, Maria?

[PROSECUTOR]: Objection to relevancy.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Are you a runaway?

THE COURT: Sustained. (T314)

Clearly defense counsel was underhandedly attempting to elicit prohibited collateral crimes evidence pertaining to State witnesses over and over again despite the trial court's repeated sustaining of the State's objections. Petitioner will not now be heard to complain on appeal that collateral crimes evidence was improperly admitted against Petitioner.

Alternatively, Respondent addresses Issue II as follows:

3. Meads' mention of the alleged sexual assault committed by Petitioner upon her daughter was at most harmless error:

If it can be shown 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, then the conviction must be upheld. **State v. DiGuilio, 491 So. 2d 1129** (Fla. 1986). Counsel for Petitioner argues that any error as to Issue I cannot be harmless, because the identifications of Petitioner by eyewitnesses were "challenged." Counsel for Respondent addresses this two fold:

a. The identification of Petitioner as the gunman by eyewitnesses was very strong:

All the lights were on inside the restaurant at the time of the robbery. (T114) Victim Daniel Deitrich testified that just prior to the robbery Petitioner was tugging at the locked door, and Deitrich signaled to Petitioner that the restaurant was closed. (T136) At that time Deitrich observed Petitioner's face for about ten seconds. (T136) Several minutes later when the robbery began (T136), Deitrich was within 1 ½ - 2 feet of Petitioner (T144), and he saw his face for about another ten seconds at the time he pushed his way into the restaurant brandishing the Uzi. (T115-116)(T136-137)(T160)

Deitrich testified that prior to viewing the photopak containing Petitioner's picture, he told Detective Baker that he was not sure he would be able to identify the gunman. (T168)(T176-77) Detective Baker testified that he did not recall Deitrich making such a statement. (T284) Detective Baker then

showed the photopak containing Petitioner's photograph to Deitrich on June 22, 1994. (T269) Deitrich testified that he picked out Petitioner's photograph. Though Deitrich was not quite sure about the hair, "I was definite about the face because the face stuck out in my mind." (T141)(T176-77)(T270)

During defense counsel's cross-examination of Detective Baker, the following exchange occurred:

> [DEFENSE COUNSEL]: And he tells you, did he not, I think it looks like him, but the hair is different; he tells you that, doesn't he?
>
> [BAKER]: No, sir. I think he looks at me and tells me it's No. 5. (T294)

Baker denied that he told Deitrich to flip the picture over and sign it even though Deitrich was supposedly not sure about the identification. (T294)

Eyewitness and victim Barry Mitchell was shown the photopak containing Petitioner's picture on either June 17 or 18, 1994. (T269)(T277) He was not able to pick anyone out as the gunman. (T207-08)(T269) However in court Mitchell was able to positively identify Petitioner as one of the robbers. (T208-09)

b. <u>There was substantial evidence of Petitioner's guilt other than the evewitness identifications</u>:

Contrary to counsel for Petitioner's argument, there was overwhelming evidence of Petitioner's guilt apart from the eyewitness identifications. Probably the most important evidence

against Petitioner was the testimony of codefendant and State witness Juanito Delgado, who testified that he participated in the robbery with Petitioner, and that Petitioner was the gunman. (T239)(T241-44) According to Delgado, Petitioner threatened to kill Delgado just after the robbery for taking some of the money. (T245)

A bag similar to the one used to haul the money away in the robbery was confiscated from Petitioner's apartment. (T271-72) The State also presented the testimony of Delgado's girlfriend Maria Pena. Pena testified that Delgado and Petitioner had left Petitioner's apartment around the time of the robbery with a dark bag. (T306-07) When they came back to the apartment 30 - 55 minutes later (T307), the two men were hysterical (T307) and the bag was full of money. (T308) Petitioner threw a gun on the couch. (T317) Pena again saw Petitioner examining the money in the bag in his hotel room later that night. (T310-11)

The State also presented the testimony of Petitioner's sister-in-law Dawn Meads, who testified that Petitioner admitted to her that he had robbed the KFC. (T327) Petitioner made this statement to Meads on the same day that Meads saw Petitioner in possession of "a little mini machine gun" at Rosalie Russeff's house beside a chair in a grocery bag. (T326-27) Petitioner asked Russeff if he could bury it in her backyard, but she declined. (T337) Petitioner further told Meads that he had done

the robbery with another boy about 15 - 16 years of age. (T330)[6] Petitioner also told Meads that he had made everyone get down on the floor during the robbery. (T330) According to Meads, Petitioner bragged about the robbery "[e]veryday, all the time." (T334)

On top of all this evidence, the State presented the testimony of Petitioner's mother-in-law Rosalie Russeff. Russeff testified that about a week and a half before trial, Petitioner's wife and Russeff's daughter, Michelle Lopez, told her that Petitioner had robbed the KFC. (T386)

Clearly the evidence against Petitioner was overwhelming. There is simply no reasonable possibility that the brief allegation by Meads that Petitioner had sexually abused her daughter contributed to Petitioner's conviction for armed robbery in the instant case.

Issue II is without merit.

---

[6]Delgado was 17 years old at the time of the robbery. (R11)

ISSUE III

THE TRIAL COURT PROPERLY EXCLUDED POTENTIAL DEFENSE WITNESS SONJA SANTIAGO, BECAUSE HER TESTIMONY WOULD NOT HAVE IMPEACHED THE TESTIMONY OF STATE WITNESS MARIA PENA. (Restated).

A. Relevant Facts:

Prior to the beginning of trial defense counsel indicated that it wished to call Petitioner's mother Violet Chacon and Petitioner's former attorney Rick Escobar as defense rebuttal witnesses. (T88-89) The trial court denied the request. (T95)

Defense counsel made the following assertion during his opening statement to the jury:

> I believe you will hear from another witness that Maria Pena is a liar; she's a chronic liar and will lie when she wants to. You' 11 hear that from her mother, Sonja Santiago. (T110)

During defense counsel's cross-examination of State witness Maria Pena, Pena admitted that she had not told Detective Baker everything she knew about the crime when he interviewed her. (T313) Defense counsel also pointed out that in her pretrial deposition, she had stated that she lied to Detective' Baker "in a way" because she was mad. (T319) She also plainly admitted that she lies often. (T314) Defense counsel continued during his cross-examination of Pena:

> [DEFENSE COUNSEL]: Does she know about you and your reputation for

truthfulness?

[PROSECUTOR]: Objection.

THE COURT: Sustained. This was covered in the pretrial, wasn't it?

[DEFENSE COUNSEL]: No, sir, I don't believe so.

THE COURT: It better not have been.

[DEFENSE COUNSEL]: I don't believe so.

THE COURT: Okay. Go ahead. (T321)

On page 40 of Petitioner's brief, counsel for Petitioner erroneously states:

> During cross-examination of Maria Pena, the State objected when defense counsel asked if Ms. Pena's mother knew about Ms. Pena's reputation for truthfulness (v4:T321). The trial court sustained the objection, believing this matter had been covered in pretrial, despite defense counsel's assertion that it had not been covered in pretrial (v4:T321).

As shown *supra,* this assertion is baldly false. The trial court overruled the State's objection and told defense counsel he could go ahead with his questioning. Despite the trial court's ruling, defense counsel voluntarily elected not to continue that line of questioning and switched to an entirely different line of questioning. (T321)

After the State rested, the following exchange occurred:

[PROSECUTOR]: [Defense counsel is] going to call Maria Pena's mother just for the fact to say that she lies to her all the time, which you sustained the objection to.

THE COURT: We already talked about that at pretrial.

[PROSECUTOR]: I don't want her called to the stand.

[DEFENSE COUNSEL]: Let me put it on the record then without the presence of the jury.

* * *

THE COURT: I've already ruled.

[DEFENSE COUNSEL]: I don't believe you have. [] Let me put forth on the record the purpose of Sonja Santiago. She knows her daughter to be in a Folk Nation gang. She knows her to be in that gang with Juanito. She knows her daughter to be a chronic liar. She knows her daughter would lie for Juanito and has lied in the past. And she knows her reputation, at least the question is, does she know her reputation in the community for truthfulness, and she would say that reputation is bad.

THE COURT: Okay. It's on the record. Objection sustained. (T342-43)

During his closing argument defense counsel made the following statement:

I asked Maria Pena, are you a chronic liar? Go by what you understood. I thought she said yes. I asked her did you lie a

lot? I think she said yes. (T403)

B. Legal Analysis:

1. Santiauo's testimony was not admissible to impeach Pena.

Florida Statutes Ch. 90.609 (1993) provides that a party may attack the credibility of a witness by evidence in the form of reputation, except that: 1) the evidence may refer only to character relating to truthfulness, and 2) evidence of **a** truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence. Testimony with regard to reputation for truth and veracity generally must be bottomed upon the reputation in the person's community of residence and neighborhood. **Florida East Coast Railwav Co. v. Hunt, 322 So.** 2d 68 (Fla. 1975), cert. **denied, 336 So.** 2d 600 (Fla. 1976). Rulings on matters pertaining to reputation for truth and veracity are within the sound discretion of the trial judge and will not be reversed absent a showing of abuse of discretion which resulted in prejudice. **New England Oyster House of North Miami, Inc. v. Yuhas,** 294 So. 2d 99 (Fla. 3d DCA 1974), **cert. denied,** 303 So. 2d 333 (Fla. 1974).

The purpose of presenting proof of a witness' bad reputation for truth and veracity is to impeach the witness. **See Mall Motel Corp. v. Wayside Restaurants, Inc., 377 So.** 2d 41 (Fla. 3d DCA 1979). State witness Pena testified that she had not told the whole truth, and that she lies often. The testimony of defense

witness Santiago which the defense sought to introduce would have only served to confirm and bolster Pena's testimony, not impeach it. Therefore it was inadmissible. Admittedly the trial court's ruling was not based upon this reasoning. However, an appellate court is required to affirm a defendant's conviction when the ruling of the trial court is correct, albeit for the wrong reasons. **Belvin v. State, 585 So.** 2d 1103 (Fla. 2d DCA 1991).

Alternatively, Respondent addresses Issue III as follows:

2. Refusal to admit Santiago's testimonv was at most harmless error:

If it can be shown 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, then the conviction must be upheld. **State v. DiGuilio, 491** So. 2d 1129 (Fla. 1986). This issue is subject to harmless error review. **See Larzelere v, State,** 676 So. 2d 394 (Fla. 1996), **cert. denied, - - U.S.** 117 S. ct. 615, 136 L. Ed. 2d 539 (1996).

As noted under the harmless error analysis of Issue II *supra,* there was overwhelming evidence of Petitioner's guilt apart from the eyewitness identifications. Probably the most important evidence against Petitioner was the testimony of codefendant and State witness Juanito Delgado, who testified that he participated in the robbery with Petitioner, and that

Petitioner was the gunman. (T239)(T241-44) Reference is made to the harmless error analysis of Issue II for the remainder of the evidence adduced at trial which overwhelmingly showed Petitioner's guilt. It simply cannot be said that the exclusion of a single witness who would allegedly have testified that a State witness had a bad reputation for truthfulness was reversible error, when that State witness already admitted she lies often.

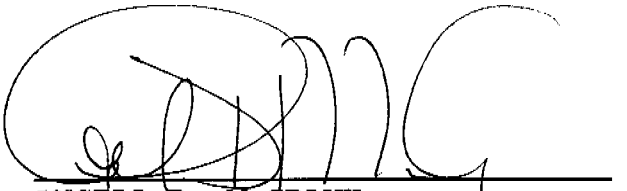
This issue is without merit.

CONCLUSION

Based upon the foregoing reasons, arguments, and citations to authority, the judgment and sentence should be affirmed, and the certified question should be answered in the affirmative.

Respectfully submitted,

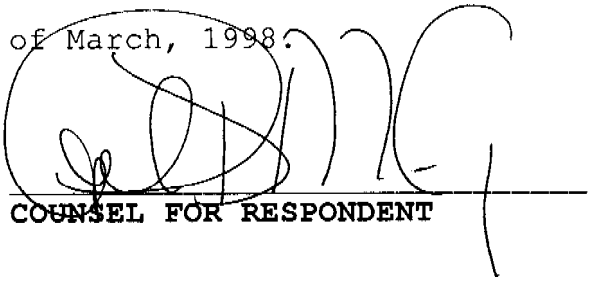
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



ANGELA D. McCRAVY
Assistant Attorney General
Florida Bar No. 983391
Westwood Center, Suite 700
2002 North Lois Avenue
Tampa, Florida 33607-2366
(813) 873-4739
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. regular mail to John C. Fisher, Assistant Public Defender, Polk County Courthouse, Post Office Box 9000 - Drawer PD, Bartow, FL 33831 on this 9 day of March, 1998.



COUNSEL FOR RESPONDENT