IN THE SUPREME COURT OF FLORIDA

ANTHONY LOPEZ,

Petitioner,

vs. Case No. 92,292

STATE OF FLORIDA,

Respondent.

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

JOHN C. FISHER
Assistant Public Defender
FLORIDA BAR NUMBER 0999865

Public Defender's Office
Polk County Courthouse
P. 0. Box 9000--Drawer PD
Bartow, FL 33831
(941) 534-4200

ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

STATEMENT OF THE CASE

On July 15, 1994, the State Attorney in Hillsborough County filed an information charging the Appellant, Anthony Lopez, and Juan Delgado[1] with robbery with a firearm of more than $300.00, in violation of section 812.13(1) and (2)(A), Florida Statutes (1993) (v.1:R1, 14-16). On January 6, 1995, the State filed notice that it sought a habitual violent felony offender sentence (v.1:R4, 21).

On February 23, 1995, the defense filed a motion in limine and/or a motion to suppress identification evidence (v.1:R22-25). The motion asserted that the procedure and the photo-packs used in the out of court identifications were so suggestive as to taint the identifications (v.1:R4, 22-25).

On March 24, 1995, a hearing was held before the Honorable Cynthia Holloway on the defense motion (v.1:R5; v7:T478-514). Defense counsel asserted the photo-packs did not include similar looking persons (v.7:T484-485). After Mr. Dietrich chose a dark complected Hispanic, Juan Delgado, from one of the photo-packs, the detective told Mr. Dietrich he chose someone under investigation, which counsel asserted tainted prospective in-court identification by Mr. Dietrich (v.7:T486).

---

[1] On February 27, 1995, Juan Delgado entered a best interest guilty plea to the robbery charge (v.1:R5). He was sentenced to two years community control followed by five years probation (v.1:R4). On August 8, 1995, Mr. Delgado admitted violating his community control (v.1:R8). On September 18, 1995, subsequent to testifying at Mr. Lopez' trial, Mr. Delgado was again sentenced to two years community control followed by five years probation (v.1:R10).

Defense counsel stated Mr. Dietrich told Detective Baker he was uncertain whether he could identify the second robber (v.7:-T485). Detective Baker told Mr. Dietrich the second photo-pack contained someone he was investigating (v.7:T487). Mr. Dietrich examined the photo-pack for two minutes, then said one individual looked like the second robber, but the hair was different (v.7:-T487). Detective Baker told Mr. Dietrich the picture was two years old, knowing this was false because it was a 1994 arrest photograph, then congratulated Mr. Dietrich for choosing the individuals he was investigating for the robbery (v.7:T487-488). Detective Baker wrote 100% sure on the form concerning the identification (v.7:T500-501). Counsel asserted that Detective Baker tainted the prospective in-court identification of Mr. Lopez by Mr. Dietrich (v.7:T489-490).

The State argued the issue was about weight, not admissibility, of the evidence (v.7:T493-500). The trial court reserved ruling until it had an opportunity to look at the photo-packs and read the depositions (v.1:R5; v.7:T501-502, 513). The trial court was disturbed by the actions of the Detective Baker in lying (v.7:T503-504).

At the same hearing, the State sought a continuance because of new witnesses, Mr. Lopez's mother-in-law and sister-in-law (v.7:T504-512). When the prosecutor returned a call to the mother-in-law on the previous evening, the mother-in-law wanted to talk about a "sex case" or "indecent case" which had never been filed (v.7:T511). The prosecutor told her he would meet with her, "but

we will not discuss the sex case." (v.7:T511). The continuance was granted (v.7:T512-513).

On April 3, 1995, a hearing was held before Cynthia Holloway (v.1:R6; supp.:T560-571). The photo packs were submitted to the trial court (v.1:R6; supp.:T565-566). Defense counsel again argued that only two persons in Mr. Lopez's photo pack were olive skinned Hispanic individuals as had been described by the witness and only two or three olive skinned individuals in the other photo pack (supp.:T567-568). Defense counsel also argued Detective Baker's statements tainted the identification by Mr. Dietrich (supp.:T569). The trial court held Mr. Lopez's photo pack was not suggestive and the motion to suppress was denied (v.1:R6; supp.:568-569). At a subsequent hearing, held before Cynthia Holloway on September 8, 1995, a defense motion to reconsider the motion to suppress identification was denied (v.1:R9; v.7:T545).

A jury trial was held on September 11 and 12, 1995, before the Honorable J. Rogers Padgett (v.1:R9, 39-42; v.2-5:T1-433). The jury **was** selected on September 11, 1995 (v.1:R9, 39; v.2:T1-74). While defense counsel was conducting voir dire of the panel, the following occurred:

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

(v.2:T40-41). A bench conference followed (v.2:T40). The State struck one juror for cause (v.2:T40). Defense counsel struck one juror for cause and exercised three peremptory strikes (v.2:T40-41). Mr. Lopez did not participate in this bench conference (v.2:T40-41).

While defense counsel conducted further voir dire of the panel, the following occurred:

> MR. FERNANDEZ: Just a moment, Your Honor.
> [The attorney and defendant confer at counsel table.]
> MR. FERNANDEZ: No further questions at this time your Honor.
> THE COURT: Okay. Approach the bench, please.

(v.2:T59). A bench conference followed (v.2:T59). Defense counsel exercised three peremptory strikes (v.2:T59). Mr. Lopez did not participate in this bench conference (v.2:T59).

While defense counsel conducted further voir dire of the panel, the following occurred:

> MR. FERNANDEZ: If I may have a moment, Your Honor.
> THE COURT: Okay.
> MS. BOSSIE [the prosecutor]: Judge can I ask one question to follow up?
> THE COURT: No, save it.

(v.2:T73). A bench conference followed (v.2:T73). The State exercised two peremptory strikes (v.2:T73). Mr. Lopez did not participate in this bench conference (v.2:T73). After a lunch break, the following exchange occurred:

> MS. BOSSIE: Ms. Hill, good afternoon.
> MS. HILL: Hi.
> MS. BOSSIE: Are you married, and do you have any children?

MS. HILL: No.

MS. BOSSIE: Okay. You' ve indicated that, from your slip, that you've been a victim of crime. What type of crime was that?

MS. HILL: My sister's been missing for like a year and they haven't found anything, and also my car has been stolen.

MS. BOSSIE: Ms. Rivers, I apologize, I could not hear you.

MS. HILL: My sister has been missing for a year and they haven't found any clues or anything, and also my car has been stolen.

MS. BOSSIE: Okay. You weren't present when your car was stolen?

MS. HILL: No, I didn't see it get stolen. A lot of cars were stolen that same day.

MS. BOSSIE: Do you have any -- because of the situation you are in regarding your sister, do you have any feelings that you may not feel comfortable as a juror in any type of case, or would you be able to set that aside and just weigh the facts of this case because that's kind of a unique situation.

MS. HILL: I would probably be able to set it aside.

MS. BOSSIE: I want you to clarify what you say about, clarify any feelings you have toward law enforcement or personally because that's a very traumatic event for you based on that situation. So if that is going to come into play if you're chosen as a juror --

MS. HILL: No.

MS. BOSSIE: You would be able to set that aside, listen to the facts of this case and come up with a verdict?

MS. HILL: Yes.

MR. FERNANDEZ: And the fact, Ms. Hill that a member of your family has been the victim of crime, you would be able to keep that out of your deliberation?

MS. HILL: Yes.

(v.3:T79-80, 87). The trial court asked counsel to the bench for a final conference at which the jury was accepted without further strikes (v.3:T87). Mr. Lopez did not participate in this bench conference (v.2:T87). The jurors chosen were Hill, Green, Gonzalez, Kroll, Fowler, and Kline (v.1:R39; v.5:T430-431). With

the exception of Hill and Kroll, each member of the panel who witnessed or was a victim of crime **was** stricken (v2.:T15-23, 26-28, 42-48, 58, 60-66; v.3:T79-80, 87).

Motions were considered before the trial (v.3:T88-97). Defense counsel requested that he be allowed to call Mr. Lopez's mother and his former attorney as witnesses (v.3:T88-89). They had not been listed as defense witnesses (v.3:T89-90). Defense counsel asserted the potential need for their testimony became known after defense counsel reviewed with Mr. Lopez the depositions of two State's witnesses taken one week earlier (v.3:T89, 91). The trial court denied the request to allow the defense to present these new witnesses (v.3:T95). The State **was** granted a motion in limine concerning past cocaine use by a State's witness and the State said it would not bring out testimony from this witness concerning sexual batteries (v.3:T95-96).

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).

Defense counsel began cross-examination of Ms. Meads, Mr. Lopez's sister-in-law, as follows:

> BY MR. FERNANDEZ:
> Q. Ms. Meads, if there could be one word that would sum up your feelings about Mr. Lopez, hate would be a good word?
> A. Asshole would be **a** better one.

Q. Okay. Asshole. And hate, good enough?

A. Yeah.

Q. And you have this hate for Anthony Lopez today as you speak in this courtroom?

MS. BOSSIE [prosecutor]: Judge, may we approach?

THE COURT: Overruled.

BY MR. FERNANDEZ:

Q. Correct?

A. I'm very upset with him.

Q. Okay. And on June 3rd, 1994, you hated Anthony Lopez?

A. Since I found out he molested my daughter, I hated him.

MR. FERNANDEZ: I would ask for an instruction and move for mistrial.

THE DEFENDANT: That's it right there.

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

Go ahead.

THE WITNESS: 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.

Q. You've --

MR. FERNANDEZ: Your Honor, may we approach?

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

(v.4:T331-332). When the State rested, the following occurred:

MR. FERNANDEZ: Your Honor, let me put on the record that I am strenuously asking this Court to grant a mistrial. At no time did defense counsel open the door, in the questions 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?

MS. BOSSIE: 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.

THE COURT: My recollection is that you were in effect asking her for a date on which this hate started.

MR. FERNANDEZ: No, I said on the date of the crime.

MS. BOSSIE: 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.

MR. FERNANDEZ: I just want the record to be clear.

MS. BOSSIE: One moment Mr. Fernandez.

Judge, obviously I think he has standard motions, but he's going to call Maria Pena's mother just for the fact to say that she lies to her all the time, which you sustained an objection to.

THE COURT: We already talked about that at pretrial.

MS. BOSSIE: I don't want her called to the stand.

MR. FERNANDEZ: Let me put it on the record, because my client definitely wants me to call her, and then the Court can make its rulings.

THE COURT: I've already ruled.

MR. FERNANDEZ: I don't believe you have.

MS. BOSSIE: He solely wants to call her mom to say she's in a gang and she lies to me, and I think that's totally irrelevant to the questions. You've ruled and sustained my objections in my case.

MR. FERNANDEZ: 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 a gang with Juanito. She knows her daughter to be a chronic liar. She knows her daughter would lie for Juanito and has done so in the past. And she knows her reputation, at least the question is, does she know her reputation in the community and she would say that reputation is bad.

THE COURT: Okay. It's on the record. Objection sustained.

(v.4:T340-343).

Defense counsel's motions for judgment of acquittal were denied (v.4:T343; v.5:T383). Mr. Lopez was found guilty as charged (v.1:R9, 41, 61; v.6:T430-431).

On October 16, 1995, a sentencing proceeding was held (v.1:R10; v.6:T434-477). Defense counsel noted Mr. Lopez was once offered twelve years imprisonment on this charge and the co-defendant was sentenced to two years community control (v.6:T440, 447). Mr. Lopez asserted his innocence, stated the trial had been unfair, and stated the evidence established a plastic gun was used in the incident (v.6:T450-455, 473-474). Mr. Lopez asked for help (v.6:T450, 454-455). The defense requested a guidelines sentence and drug treatment (v.1:T441, 456, 471).

Mr. Lopez was adjudicated guilty of armed robbery and he was sentenced to imprisonment for a term natural life as a habitual violent felony offender, with concurrent 3 and 15 year minimums (v.1:R10, 65, 68-69, 72; v.6:T474). He was also sentenced to a concurrent 15 year sentence for violating his probation from a 1990 case (v.6:T475-476).

On October 19, 1995, the defense filed a motion for new trial, asserting, among other grounds that Mr. Lopez was prejudiced by exclusion of witnesses and the trial court erred in failing to grant a mistrial due to comments of a State witness (v.1:R75-76). The motion was denied (v.1:T76). A timely notice of appeal was filed on October 19, 1995 (v.1:R77).

The Second District Court of Appeal affirmed Mr. Lopez's conviction, holding that "failure to obtain a Coney waiver cannot

be raised on direct appeal without an objection made on the same grounds at trial." Lopez v. State, 23 Fla. L. Weekly D176 (Fla. 2d DCA Jan. 9, 1998) (quoting Lee v. State, 695 So. 2d 1314, 131.5 (Fla. 2d DCA 1997). The court certified the following 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 NOT HAVE EXERCISED PEREMPTORY CHALLENGES IN THE SAME MANNER AS HIS OR HER ATTORNEY?

Lopez, 23 Fla. L. Weekly at D176. The court acknowledged interdistrict conflict, citing 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), review granted, 694 So. 2d 739 (Fla. 1997). Lopez, 23 FLW at D176.

STATEMENT OF THE FACTS

Assistant manager Barry Mitchell, Daniel Dietrich, Jamilla Dickenson, Phillip King, and Youssey El-Shammaa were working the evening shift at a Kentucky Fried Chicken in Hillsborough County on June 3, 1994 (v.3:T112-113, 195-196, 214, 220). After closing at 11:00 P.M., the employees cleaned the store (v.3:T113, 196, 220). A man tried to enter the locked doors (v.3:T136, 200). Mr. Dietrich signalled to him that the store was closed (v.3:T136). Mr. Dietrich saw the man's face briefly, perhaps ten seconds (v.3:-T136, 160). Between 11:30 and 12:00, Mr. Dietrich, who wanted to leave, was escorted by the assistant manager, Mr. Mitchell, to the front door (v.3:T113-114, 196-197, 214-215).

As Mr. Dietrich stepped out of the door, a man quickly approached, put a gun in his face, and ordered him back into the store (v.3:T114-115, 143-144, 197-198, 215). The gun looked like an Uzi, but Mr. Dietrich stated it may have been a toy gun (v.3:T117, 143, 205). Mr. Dietrich saw the man's face briefly, perhaps ten seconds (v.3:T115-116, 160). Mr. Mitchell also saw the man's face for a few seconds (v.3:T199). It was the **same** man who approached the door earlier (v.3:T136, 199-200). They entered the store and the gunman grabbed Mr. Mitchell who was recognizable as the manager by the color of his shirt (v.3:T116, 128). The gunman yelled for Mr. Mitchell to give him the night deposit (v.3:T118, 200). They walked to the back of the store (v.3:T117, 147, 198). Another man ran into the store and followed them (v.3:T117, 123, 128, 150).

While the gunmen entered, Ms. Dickenson ran to back of the store, tried to dial 911, then locked herself and Mr. El-Shammaa in a bathroom (v.3:T215-216). She did not see the robbery and had not seen the robbers' faces (v.3:T216-217, 219).

The gunman ordered the employees to raise their hands, pay attention, and do not do anything stupid (v.3:T123) He then ordered Mr. Dietrich and Mr. King to get down on the ground, keep their faces on the ground, and not look at the robbers (v.3:T123, 200-201, 221). Mr. King did not get a good look at the gunman, but thought the shorter, older, and possibly darker man held the gun (v.3:T222-224). Mr. Mitchell took the gunman to the safe (v.3:-T124, 200). The safe was in the employee break room adjacent to the office (v.3:T121, 126, 130). The other robber kept moving around and yelling for employees not to look at him (v.3:T124-125, 165-166). This man had a dark duffle bag strapped over his shoulder (v.3:T124, 151-152, 164-165, 205). This man appeared to have a gun, but Dietrich saw no gun (v.3:T125, 166).

The gunman ordered Mr. Mitchell to open the safe and give him all of the money (v.3:T125-126, 201). Mr. Mitchell saw the gunman again while at the safe (v.3:T209). The gunman made a clicking sound with the top of the gun (v.3:T202, 204-205). The gunman called the second robber into the office (v.3:T125-126). Mr. Mitchell then saw the second robber (v.3:T201). Mr. Mitchell gave the night deposit to the gunman, as he ordered (v.3:T202). The gunman pulled other money from the safe (v.3:T202-203). The robbers forced Mr. Mitchell to the floor (v.3:T203). The man with

the bag left the office and, obviously scared, yelled "Let's get out of here, let's go." (v.3:T126). Both robbers then ran out the front door (v.3:T127, 165, 204-205).

Mr. Dietrich hit the alarm button in the office (v.3:T127). He told Ms. Dickenson and Mr. El-Shammaa to come out of the manager's rest room (v.3:T128, 218). Police arrived in a few minutes (v.3:T137). The robbery occurred in three to five minutes (v.3:T160-164). $2,219.05 was taken (v.3:T207). Ms. Dickenson's purse, containing her jewelry which included a chain with a heart that said "sweet 16," was also taken from on top of the safe (v.3:T218).

Around midnight, Deputy Booth arrived at the restaurant (v.3:T179-180, 218). Deputy Booth interviewed the manager, Mr. Mitchell, and put out a radio alert based on Mr. Mitchell's description of the robbers (v.3:T181-183). Mr. Mitchell said both men had curly hair (v.3:T184). Mr. King told police he could not identify the robbers (v.3:T222-223). Deputy Booth never interviewed the other employees (v.3:T182-183, 218). K-9 units were brought to the scene, but they had no success (v.3:T181). A crime scene technician unsuccessfully processed coin trays and the safe for fingerprints (v.3:T188-189, 191-193).

Mr. Dietrich described the gunman as 5'9" to 5'11" tall, weighing at least 175 pounds, with an olive complexion, short dark receding hair combed straight back, a few days growth of facial hair, and appearing to be Hispanic (v.3:T132-134, 147, 154). Mr. Dietrich described the second man as 5'11" to 6' tall, very skinny,

with a very dark complexion, curly stringy hair shaved on the sides of his head, sparse facial hair, and appearing to be Hispanic (v.3:T134-135). Mr. Dietrich thought the second man looked familiar (v.3:T135, 149). In court, Mr. Dietrich identified Mr. Lopez as the gunman (v.3:T137).

Mr. Mitchell described the gunman as 5'9" to 5'10" tall, weighing at least 175 pounds, with a dark complexion, short dark hair combed straight back, a few days growth of facial hair, and a Hispanic accent (v.3:T205-207, 211-212). Mr. Mitchell described the second man as younger, and the same height, but skinnier than the first man, with a very dark complexion (v.3:T207, 212). In court, Mr. Mitchell identified Mr. Lopez as the gunman (v.3:T208-209, 212).

Detective Baker conducted the follow-up investigation of the robbery (v.4:T264). Detective Baker unsuccessfully attempted to do a composite with Mr. Mitchell (v.4:T280-282). Deputy Baker had no information about the color of the eyes of the suspects (v.4:T279). Another officer gave him the names of some juveniles, including a runaway, Maria Pena (v.4:T265-266, 276).

Baker interviewed Ms. Pena on June 14, 1994 (v.4:T265-267, 285-286, 311-312). Ms. Pena was then fourteen years old (v.4:-T315). Ms. Pena told Detective Baker that Juan Delgado and Anthony Lopez robbed the Kentucky Fried Chicken restaurant on the night of June 3, 1994 (v.4:T266-267, 311-312). Ms. Pena showed Detective Baker where Mr. Lopez lived (v.4:T267). Ms. Pena mentioned something about a Holiday Inn in Clearwater (v.4:T290). Ms. Pena

refused to provide a written statement (v.4:T286). Ms. Pena testified she gave Detective Baker only half of the story of that night (v.4:T313).

Detective Baker made photo-packs containing photographs of Mr. Lopez and Mr. Delgado (v.4:T268-269, 290-292). On June 17, 1994, Detective Baker showed Mr. Mitchell two photo-packs, but Mr. Mitchell was unable to make an identification (v.3:T208-211; v.4:T265, 269, 277).

Detective Baker showed also Mr. Dietrich two photo-packs (v.3:T138-142, 167-176 v.4:T265, 269-270). Detective Baker said he had some good leads (v.3:T166-167; v.4:T293). Mr. Dietrich saw the dark man with the bag for about two and one half minutes (v.3:T164, 167). Mr. Dietrich quickly identified #5, Mr. Delgado, from the first photo-pack he examined (v.3:T140, 167, 170; v.4:T270, 293).

Mr. Dietrich testified he saw the gunman's face twice, briefly, perhaps ten seconds each time (v.3:160). Although he was initially unsure if he would be able to make an identification of the gunman, Mr. Dietrich also identified #5, Mr. Lopez, from the second photo-pack he examined (v.3:T140-141, 168-170, 176-177; v.4:T270, 293-294). It took Mr. Dietrich one or two minutes to make this identification (v.3:T170-172: v.4:T293-294). Mr. Dietrich testified he told Detective Baker the hair was different on #5 in the second photo-pack he inspected, but he was sure of the face (v.3:T141, 172). Detective Baker denied Mr. Dietrich made this statement (v.4:T294). Mr. Dietrich said Detective Baker told him the photograph might be a couple of years old (v.3:T172).

Detective Baker denied making this statement, but said he told Mr. Dietrich to look carefully at the photographs which may not look like a suspect and which may be several years old (v.4:T295). Mr. Dietrich said Detective Baker told him he did **a** good job and he chose someone who was being investigated (v.3:T169, 173, 176-177).

Detective Baker went to Mr. Lopez's apartment to arrest him (v.4:T271). Detective Baker also took a bag found in Mr. Lopez's apartment into evidence (v.4:T271-273, 298). Baker testified Mr. Lopez's wife said she was at home on the night of June 3, 1994 (v.4:T273).

Juanito Delgado testified he had already entered an open guilty plea on this armed robbery and **was** sentenced to two years house arrest followed by five years probation (v.4:T233-234, 249-250, 261). Mr. Delgado denied making a deal for this sentence (v.4:T250). The judge told him he would have to give truthful testimony in this case (v.4:T250-251). He was in jail at the time of trial for violating his community control, twenty five days after the sentence was imposed, for failing to report to the probation office (v.4:T234, 251-252). Mr. Delgado denied absconding (v.4:T251-252). Mr. Delgado stated his probation officer recommended six-and-one-half years imprisonment (v.4:T252). He said had been promised nothing regarding his violation of probation and expected nothing for his testimony (v.4:T247, 253). Mr. Delgado was eighteen years old at the time of trial (v.4:T233, 247).

Mr. Delgado testified he went to the Cue Club to shoot pool with his girlfriend, Maria Pena, and two other girls on June 3, 1994 (v.4:T235). Mr. Delgado **was** then employed at his step-father's car dealership and attended night school (v.4:T260). Mr. Lopez, who Delgado knew through his cousin, entered the Cue Club (v.4:T233, 235). Mr. Lopez invited Mr. Delgado to accompany him to pick up his wife from work and go to his apartment (v.4:T236). Mr. Lopez dropped Ms. Pena's girlfriends off at his apartment (v.4:-T236). Mr. Lopez, Mr. Delgado, and Ms. Pena went in Mr. Lopez's blue Thunderbird to the nursery at which Mr. Lopez's wife worked (v.4:T237, 254). They all then went to Mr. Lopez's studio apartment (v.4:T238-239). Everyone drank beer (v.4:T239). Mr. Delgado **was** drunk (v.4:T261).

Mr. Delgado testified that 11:00 P.M., he and Mr. Lopez went to the Kentucky Fried Chicken which was within walking distance (v.4:T238-239). Ms. Lopez, Ms. Pena, and Ms. Pena's girlfriends remained in the apartment (v.4:T240). Mr. Lopez carried a blue bag, which **was** like a school bag (v.4:T240, 261-262). Mr. Delgado believed the bag had no strap (v.4:T258). Mr. Lopez knocked on the door, but the manager said the restaurant was closed (v.4:T240). As they walked away, the manager opened the door (v.4:T240). Mr. Lopez put on a multi-colored hat, handed the bag to Mr. Delgado, and pulled out a large gun (v.4:T241, 255-256). Mr. Delgado did not know if the gun was a toy (v.5:T262). Neither Mr. Delgado nor Mr. Lopez wore gloves (v.4:T260-261).

Mr. Delgado testified Mr. Lopez grabbed the manager by the collar, then Mr. Lopez and Mr. Delgado entered the store ((v.4:-T242). Mr. Delgado claimed he did not know a robbery would occur (v.4:T248-249). Mr. Lopez ordered the employees to lay down (v.4:-T243). Mr. Delgado stood near the kitchen (v.4:T242). Mr. Delgado recognized Mr. Dietrich, who was on the floor, from school (v.4:T243, 248). When Mr. Dietrich said "don't hurt me," Mr. Delgado realized he had been recognized and told him to shut up (v.4:T243, 248-249, 258). Mr. Delgado claimed he threatened no one, yelled at no one, spoke only to Mr. Dietrich, and had no gun (v.4:T248, 256, 258, 260-262). Mr. Lopez stood near the office (v.4:T242). Mr. Lopez called Mr. Delgado to him and Mr. Lopez loaded the money into the bag held by Mr. Delgado (v.4:T243, 259). Mr. Lopez asked if they had any purses or wallets (v.4:T243-244). Mr. Delgado announced he was leaving, then he left (v.4:T244). Mr. Lopez ran out after Mr. Delgado (v.4:T244).

Mr. Delgado testified Mr. Lopez accused Mr. Delgado of stealing his money (v.4:T244). Mr. Lopez searched Mr. Delgado (v.4:T244). Mr. Delgado gave Mr. Lopez the bag (v.4:T244). They ran back to Mr. Lopez's apartment (v.4:T244). Mr. Lopez and Mr. Delgado entered the bathroom (v.4:T244). Mr. Lopez made Mr. Delgado strip, in order to search him for money (v.4:T245). Mr. Lopez ordered everyone into his car (v.4:T245). Ms. Lopez's wife drove (v.4:T245). Mr. Lopez carried the bag (v.4:T245). Mr. Delgado, Ms. Pena, and Ms. Pena's girlfriends rode in the back seat

(v.4:T246). Mr. Delgado and Ms. Pena kept their heads down (v.4:-T246). They drove to a hotel (v.4:T246).

Mr. Delgado testified that he entered Mr. Lopez's room (v.4:T246). Mr. Lopez **was** counting the money (v.4:T246). Mr. Lopez said to relax, tell no one, and everything will be okay (v.4:T246-247). Mr. Lopez **gave** Delgado $200 (v.4:T259-260). Mr. Lopez told Mr. Delgado to return to Ms. Pena in the other room and have fun (v.4:T247). The next day Mr. Lopez dropped them off at the Cue Club (v.4:T247). He stayed in the house of a friend, Jason, that day (v.4:T257). Mr. Delgado denied going to the beach with someone named John (v.4:T258).

Mr. Delgado denied knowing John (Jackie) Roman (v.4:T253). He denied bonding John, or any other person, out of jail (v.4:T253, 259). He denied telling Ms. Pena, his mother, John, or any other person, about the robbery (v.4:T256-258). Mr. Delgado denied involvement in another robbery while on community control (v.4:T254). Mr. Delgado denied threatening to kill Ms. Pena for snitching on him (v.4:T260).

Maria Pena testified she **was** fifteen years old (v.4:T300). June 3, 1994 was her last day of school (v.4:T301). She and a friend, Avia, went to the Cue Club to play pool (v.4:T301). The Cue Club served beer and wine (v.4:T321). Mr. Delgado, who was her boyfriend of the day, entered the Cue Club, then Mr. Lopez entered (v.4:T301, 312). She and her friends, Avia and Sara, went with Mr. Delgado and Mr. Lopez in Mr. Lopez's blue Thunderbird (v.4:T302). They went to Mr. Lopez's apartment (v.4:T302). Thirty minutes

later, Mr. Lopez, Mr. Delgado, and Ms. Pena went to pick up Mr. Lopez's wife from her job at a day care center (v.4:T303-304, 315-316). Ms. Pena's girlfriends remained at the apartment (v.4:T318). They returned to Mr. Lopez's studio apartment (v.4:T304-305). Mr. Delgado drank and had a "buzz", but Ms. Pena did not drink (v.4:T307, 315).

Ms. Pena testified that later the women went to McDonald's, leaving Mr. Lopez and Mr. Delgado at the apartment (v.4:T306). When they returned, Mr. Lopez said they were going hunting (v.4:T306). Mr. Lopez put on black Army boots and carried a blue or black bag (v.4:T306-307, 316). Mr. Delgado wore a black cloth visor, a Flintstones "Yabba Dabba Doo" shirt, white shorts, and black shoes (v.4:T316-317). Mr. Lopez and Mr. Delgado left on foot and returned thirty to fifty-five minutes later (v.4:T307). Mr. Lopez and Mr. Delgado were hysterical (v.4:T308). Mr. Lopez threw a gun on the couch (v.4:T317). She could not tell if the gun was real (v.4:T317-318). Ms. Pena followed Mr. Lopez and Mr. Delgado into the bathroom and saw them count money from a bag full of money (v.4:T308). Mr. Lopez and Delgado changed clothes (v.4:T309).

Ms. Pena testified that Mr. Lopez, Ms. Lopez, Mr. Delgado, Ms. Pena, and Ms. Pena's girlfriends drove to a Holiday Inn (v.4:309-310, 318-319). Mr. Lopez rented two rooms (v.4:T210). Ms. Pena entered and saw Mr. Lopez and Mr. Delgado dividing the money (v.4:-T311). Mr. Delgado told her they had robbed a Kentucky Fried Chicken (v.4:T323). The next day they left the hotel and went to a grocery, then to the apartment of a friend (v.4:T311, 324). Mr.

Delgado has a dark complected friend named John who looks Mexican (v.4:T324). After Ms. Pena talked to police, she heard Mr. Delgado was going to beat her, but she was not scared (v.4:T320). Ms. Pena admitted that she lied often, but stated she was testifying truthfully at trial (v.4:T314, 320).

Dawn Meads, Mr. Lopez's sister-in-law, testified she hated Mr. Lopez, whom she accused of raping her child (v.4:T331-332). Ms. Meads said that while at her mother's home in the summer of 1994, she saw Mr. Lopez with a mini machine gun (v.4:T325-328). Mr. Lopez said the gun was fake, but Ms. Meads thought it looked and felt heavy (v.4:T333-334).

Ms. Meads testified Mr. Lopez showed her a wad of money and said he had robbed a Kentucky Fried Chicken with a fifteen or sixteen year old boy (v.4:T327-330). She said Mr. Lopez said he had ordered everyone to the floor during the robbery and he demonstrated how he wore a pantyhose mask (v.4:T329-330, 334). Ms. Meads testified that in the summer of 1994, Ms. Lopez gave Ms. Meads' daughter a handful of jewelry including "sweet 16" necklace, a bracelet, and a ring with an initial "J" (v.5:T387-388). Ms. Meads testified that Ms. Lopez said she did not want to put Mr. Lopez away (v.5:T388-389).

Rosalie Russeff, Mr. Lopez's mother-in-law, testified she hates Mr. Lopez (v.4:T339-340). She said she **saw** Mr. Lopez with a machine gun in the summer of 1994 (v.4:T335-336). She ordered him to take it out of her house and denied his request to bury it in her yard (v.4:T337-338). Mr. Lopez placed the gun in the trunk of

his car (v.4.:T338). A few days later, Ms. Lopez told Ms. Russeff that Mr. Lopez threw the gun in the river (v.5:T384). shortly before the trial, Ms. Lopez told Ms. Russef that Mr. Lopez robbed the Kentucky Fried Chicken and they went through a roadblock (v.5:T385-386).

Amin "John" Mahsel, an Afgani, testified Mr. Delgado or Jackie Roman posted $250 bond to get him out of jail on June 4, 1994 (v.5:T356-357, 539). Mr. Mahsel, Mr. Delgado, and some friends spent that day at the beach (v.5:T357). The following day Mr. Delgado told him about robbing a restaurant with some kids (v.5:T357-362). Mr. Delgado did not mention Mr. Lopez (v.5:T359). Mr. Mahsel had been convicted of six felonies (v.5:T359).

Michelle Lopez, the wife of the Appellant, testified she worked as a teacher's aid for ten years, and worked there on June 3, 1994, until 6:00 P.M. (v.5:T363). Mr. and Ms. Lopez owned a blue Thunderbird (v.5:T367-368). Mr. Lopez frequented the Cue Club and he knew Mr. Delgado from the Cue Club (v.5:T376).

Ms. Lopez testified Mr. Lopez visited her at noon in order to cash her paycheck of $423.69 and to eat lunch with her (v.5:T364-365). Mr. Lopez returned alone at 6:00 P.M. (v.5:T365-366, 368) . They stopped at a grocery, then went home alone for a big dinner (v.5:T366, 368). They lived in a studio apartment a half block from a Kentucky Fried Chicken restaurant (v.5:T375-376).

Ms. Lopez testified they later they went to the beach for a walk, then checked into a hotel (v.5:T368-369). They were alone (v.5:T370). They did this every two weeks, trying to conceive a

child (v.5:T370). Ms. Lopez miscarried with twins two years earlier (v.5:T368, 370). They returned home around 11:30 the next morning (v.5:T371).

Ms. Lopez testified that on June 25, Mr. Lopez was arrested (v.5:T371). They awoke to a bang on the door (v.5:T371). Ms. Lopez asked to see a paper, but the police just came in (v.5:T371-372). Mr. Lopez was naked (v.5:T371, 380). The police put Mr. Lopez outside and an officer pulled a gun on Ms. Lopez (v.5:T372-373, 380). Police went through her purse and took her black duffle bag which bore a red and white Winston logo on each side (v.5:T373). Ms. Lopez did not tell police or the State Attorney's Office that Mr. Lopez was with her in a hotel on the night of the robbery (v.5:T379-380). Ms. Lopez was reluctant to speak to them because they treated her like a suspect (v.5:T380-381).

Ms. Lopez testified that Mr. Lopez never told her about the robbery (v.5:T377). Mr. Lopez told her only that his lawyer would help him (v.5:T377). Ms. Lopez once discussed the case with her mother, but never told her mother that Mr. Lopez threw the gun in the river or that he committed the robbery (v.5:T374, 377-379). Ms. Lopez never gave her niece a "Sweet 16" gold heart pendant (v.5:T378). Ms. Lopez never told her sister she did not want to be the one to put Mr. Lopez away (v.5:T378). Her sister never liked Mr. Lopez because he was Latin and because he was a hairdresser (v.5:T382).

SUMMARY OF THE ARGUMENT

The Appellant was absent during the side bar conferences at which the jury was selected. Conducting critical stages of Appellant's trial in his absence violated his Florida and United States constitutional rights to counsel and due process. The trial court failed to certify through proper inquiries that Appellant waived his right to be effectively present at the selection of his jury where fundamental fairness **may** have been thwarted by his absence. The cause should be reversed for a new trial.

The trial court erroneously denied a motion for mistrial. The State's witness, on cross-examination, made **an** extremely prejudicial hearsay statement about the Appellant. The trial court instructed the jury to disregard the statement, but the statement was so prejudicial that **a** curative instruction could not be effective. The trial court denied the defense's motion for mistrial. The cause must be reversed for a new trial.

The trial court improperly excluded a defense witness. This witness was offered to impeach the testimony of a key State's witness. This cause should be reversed for a new trial.

ARGUMENT

ISSUE I

THE ABSENCE OF APPELLANT FROM THE BENCH CONFERENCES DURING VOIR DIRE REQUIRES REVERSAL OF HIS CONVICTION.

A defendant has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence. Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982); Snyder v. Massachusetts, 291U.S. 97 (1934); U.S. Const. Amends. VI and XIV; Fla. Const. Art. I §§ 9 and 16. Florida Rule of Criminal Procedure 3.180(a)(4) recognizes that a defendant's presence is mandated "[a]t the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury."

"The exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant." Francis, 413 So. 2d at 1178 (citing Pointer v. United States, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed.208 (1894)). An accused has a constitutional right to assistance of counsel in making his defense. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Myles v. State, 602 So. 2d 1278, 1280 (Fla. 1992); U.S. Const. Amends. VI and XIV; Fla. Const. Art. I § 16.

In Coney v. State, 653 So. 2d 1009 (Fla. 1995), this Court held that a defendant who is present in the courtroom at counsel table is not present for the purposes of jury challenges made at the bench. This Court held:

> The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised. [Citation deleted.] Where this is impractical, such as where a bench conference is required, the defendant can waive this right and exercise constructive presence through counsel. In such a case, the court must certify through proper inquiry that the waiver is knowing, intelligent, and voluntary. Alternatively, the defendant can ratify strikes made outside his presence by acquiescing in the strikes after they are made. [Citation deleted.1 Again, the court must certify the defendant's approval of the strikes through proper inquiry-

Coney, 653 So. 2d 1009 (Fla. 1995).

The jury was selected on September 11, 1995 (v.1:R9, 39; v.2:T1-74). While defense counsel was conducting voir dire of the panel, the following occurred:

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

(v.2:T40-41). A bench conference followed (v.2:T40). The State struck one juror for cause (v.2:T40). Defense counsel struck one juror for cause and exercised three peremptory strikes (v.2:T40-41). Mr. Lopez did not participate in this bench conference (v.2:T40-41).

While defense counsel conducted further voir dire of the panel, the following occurred:

> MR. FERNANDEZ: Just a moment, Your Honor.

[The attorney and defendant confer at counsel table.]
MR. FERNANDEZ: No further questions at this time your Honor.
THE COURT: Okay. Approach the bench, please.

(v.2:T59). A bench conference followed (v.2:T59). Defense counsel exercised three peremptory strikes (v.2:T59). Mr. Lopez did not participate in this bench conference (v.2:T59).

While defense counsel conducted further voir dire of the panel, the following occurred:

MR. FERNANDEZ: If I may have a moment, Your Honor.
THE COURT: Okay.
MS. BOSSIE [the prosecutor]: Judge can I ask one question to follow up?
THE COURT: No, save it.

(v.2:T73). A bench conference followed (v.2:T73). The State exercised two peremptory strikes (v.2:T73). Mr. Lopez did not participate in this bench conference (v.2:T73). The trial court later asked counsel to the bench for a final conference at which the jury was accepted without further strikes (v.3:T87). Mr. Lopez did not participate in this bench conference (v.3:T87).

At the onset of each bench conference during voir dire, the trial court specifically requested counsel, but not Mr. Lopez, to approach the bench. The court's requests for counsel to approach the bench indicate that Mr. Lopez was not present during the bench conferences. See Wilson v. State, 680 so. 2d 592, 593 (Fla. 3d DCA 1996) (State's suggestion of presence refuted by the trial judge stating "The attorneys will come up here and we'll decide who the jury will be in this case.").

Mr. Lopez's attorney did not waive Mr. Lopez's presence. The record does not indicate Mr. Lopez was aware of his right to participate in jury selection. Defense counsel did not consult with Mr. Lopez before each bench conference. Although the record indicates Mr. Lopez and his attorney conferred prior to the first two bench conferences, it is not clear what was discussed. These discussions may have been about whether to ask further questions of the panel. The remaining bench conferences were not preceded by a conference between Mr. Lopez and his counsel. No inquiry was made as to whether Mr. Lopez acquiesced in the strikes made by his attorney. See Zanders v. State, 698 So. 2d 282 (Fla. 3d DCA 1997) ("Because the record is void of any evidentiary showing that the defendant had an opportunity to discuss jury selection with his attorney, we reverse and remand for a new trial.").

The fact that the record indicates Mr. Lopez was absent from proceedings at which the jury was selected and no finding **was** made that Mr. Lopez acquiesced in the strikes made by his attorney should be sufficient to require reversal. Even if the record failed to establish conclusively that Mr. Lopez was not present at the sidebar conferences, the trial court and the State needed to establish that all due process requirements had been met. Chavez v. State, 698 So. 2d 284 (Fla. 3d DCA 1997) ("Here the record does not reflect whether the defendant was present at the sidebar conference. Nevertheless, the court or the State needed to establish that all due process requirements had been met."); Ellis v. State, 696 So. 2d 904 (Fla. 4th DCA 1997) ("Since the burden is

upon the trial court or the State to make the record show all requirements of due process have been met, we hold the burden is on the trial court or the State to make the record show that the dictates of Coney have been complied with.").

The record in the instant case fails to establish a waiver of presence or a ratification of strikes exercised by counsel **and** therefore the cause must be reversed and remanded for a new trial. Butler v. State, 676 So. 2d 1034, 1035 (Fla. 1st DCA 1996) ("Because such personal waiver or acquiescence **was** not obtained in the present case, the appealed orders are reversed and the case is remanded."); Lewek v. State, 22 Fla. L. Weekly D2471 (Fla. 4th DCA October 22, 1997) ("Although defense counsel waived the Defendant's right to be present at the bench conference during which peremptories strikes were exercised, the trial court failed to obtain the Defendant's certification of the jury panel on the record, as required by Coney."); Williams v. State, 22 Fla. L. Weekly D2139 (Fla. 4th DCA Sept. 10, 1997) ("During voir dire, appellant's counsel told the judge that appellant waived his right to be present at the exercise of peremptory challenges. However, the trial court did not certify whether appellant knowingly, intelligently, and voluntarily waived that right. Therefore, based on the authority of Coney, we reverse and remand for a new trial.") . No objection was made at trial to the absence of Mr. Lopez during the bench conferences, but no objection is necessary to preserve this issue.") ; Anderson v. State, 697 So. 2d 878, 879 (Fla. 5th DCA 1997) ("The rule announced in Coney required the trial judge either

to certify through proper inquiry that the defendant made a knowing, intelligent and voluntary waiver of his right to be present at the bench during the challenging of the jury or that he acquiesced in the strikes after they were made."); Wilson, 680 So. 2d at 593-594 ("Thus we conclude that the trial court reversibly erred where Wilson was not present at sidebar for the exercise of peremptory challenges and there was no affirmative showing on the record by the trial court that Wilson either expressly waived his presence or that he ratified the peremptory challenges made by his counsel.").

"[I]t is clear that violating a defendant's right to be present at the time of peremptory challenges is fundamental error that may be raised for the first time on motion for new trial or on appeal." Brower v. State, 684 So. 2d 1378, 1380 (Fla. 4th DCA 1996) ("Patently, the procedure the Coney court prescribed in order for a defendant to waive his presence would be superfluous if the simple failure to make a timely objection had the same result."). Wilson, 680 So. 2d at 593 ("Where peremptory challenges are used, the trial court's failure to comply with the requirements of Coney constitutes fundamental error which may be raised for the first time on appeal."), dismissed, 693 So. 2d 33 (Fla. 1997); Dorsey v. State, 684 So. 2d 880 (Fla. 4th DCA 1996) (no objection necessary to preserve Coney issue because that would make meaningless the Coney requirement that the trial court certify waiver of presence or ratification of counsel's strikes).

It is impossible to show that Mr. Lopez's absence from the bench conferences during jury selection was harmless. Chapman v. California, 386 U.S. 18 (1967) (the burden is on the State as the beneficiary of error to establish there was no reasonable possibility that the error contributed to the conviction). The nature and purpose of peremptory challenges makes impossible assessment of the prejudice caused when a defendant is not present to consult with counsel during the exercise of the challenges. Francis, 413 so. 2d at 1179; Walker v. State, 438 So. 2d 969, 970 (Fla. 2d DCA 1983). See Dorsey, 684 So. 2d at 881 ("If defendant had participated in the exercising of peremptory strikes, it may have resulted in different jurors deciding his guilt or innocence. We cannot, under those circumstances, conclude beyond a reasonable doubt that the error did not affect the verdict.").

In Brower, 684 So. 2d at 1381, the court held:

> [T]he record of the hearing on the motion for new trial indicates there were no conferences between Appellant and his counsel while the peremptories were exercised. While neither he nor his counsel objected to the procedure, and his counsel expressly approved it, it is impossible to determine the extent of the prejudice Appellant suffered, if any, as a result, and therefore we are obliged to reverse for a new trial.

In the instant case, the jury was selected, with both cause and peremptory strikes exercised, at bench conferences in Mr. Lopez's absence. As in Brower, harmless error analysis is inapplicable because it is impossible to determine the extent of the prejudice Mr. Lopez suffered, and therefore this Court is obliged to reverse for a new trial.

Mr. Lopez does not believe that Coney may only be raised in a post-conviction motion accompanied by the defendant's sworn statement concerning jury selection. The Second District Court of Appeal's requirement of a sworn statement in a post conviction motion in order to raise a Coney issue may result in the denial of claims of inarticulate pro se movants. This Court should answer in the negative the certified question of the Second District Court of Appeal:

> 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?

Requiring defendants to file a sworn statement about what they would have done during incidents from which they were excluded has inherent problems. What one would have done, based on memories of feelings and appearances, had a procedure been conducted differently in the past is not a matter which susceptible to articulation in a sworn statement. Defendants may not remember what occurred during voir dire with sufficient clarity to support an attestation. A defendant swearing he would have chosen a different jury would be entitled to a hearing on his or her motion while a defendant admitting confusion or lack of clear memories may be denied a hearing. Some records, such as the record in the instant case, may indicate a juror whose responses may be sufficiently troubling that a peremptory strike may have been appropriate. [A juror, Ms. Hill, was disturbed by the fact that her sister had been missing for a year as a result of suspected foul play (v.1:R39; v.3:T79-80, 87

v.5:T430-431)]. Other records may contain no such indications, and appellants asserting that a different jury may have been chosen may have to rely on memories about feelings or appearances.

Indeed, jury challenges are "often exercised on the basis of sudden impressions and unaccountable prejudices based only on bare looks **and** gestures of another or upon a juror's habits and associations." Matthews v. State, 687 So. 2d 908, 910 (Fla. 4th DCA 1997) (citing Francis, 413 So. 2d at 1179). The exercise of jury challenges "may involve the formulation of on-the-spot strategy decisions which may be influenced by the actions of the state at the time." Matthews, 687 So. 2d at 909 (citing Walker v. State, 438 So. 2d 969 (Fla. 2d DCA 1983)). Mr. Lopez, who was not present at the bench conferences, could not aid his counsel in making on the spot decisions of whether or not to challenge jurors for cause or to react to the actions of the State at those conferences.

> While there are many facets to the right to assistance of counsel, there can be no doubt that a core element is ready access to and communication with counsel during trial.
>
> . . .
>
> Any delay in communication between defendant and defense counsel obviously will chill this constitutional right. Communication between defendant and defense counsel must be immediate during the often fast-paced setting of a criminal trial.

Myles, 602 So. 2d at 1280.

Violating a defendant's right to be present during the exercise of jury challenges is fundamental error that may be raised for the first time on direct appeal. See, Francis, 413 So. 2d at

1177-1179. As noted by the Second District Court of Appeal, the First (Butler; Rogers; Allen v. State, 698 So. 2d 1364 (Fla. 1st DCA 1997); Vann v. State, 686 So. 2d 851 (Fla. 1st DCA 1997), rev. denied 697 So. 2d 1218 (Fla. 1997)), Third (Wilson; Chavez; Zanders), and Fourth (Dorsey; Brower; Ellis; Williams; Lewek; Moise v. State, 700 so. 2d 438 (Fla. 4th DCA 1997)) District Courts of Appeal have reversed and remanded for new trial based on a Coney error without requiring a sworn statement from the defendant.

After the Lopez opinion was issued, the Fifth District Court of Appeal has also found the failure to have a defendant present during a sidebar conference concerning the selection of jurors constituted fundamental error. Darden v. State, 23 Fla. L. Weekly D224 (Fla. 5th DCA Jan. 16, 1998) (citing Anderson v. State, 697 so. 2d 878 (Fla. 5th DCA 1997)). The Darden court certified conflict with the Second District Court of Appeal.

The failure to comply with Coney constitutes fundamental error. Conducting critical stages of Mr. Lopez's trial in his absence violated his Florida and United States constitutional rights to counsel and due process. See Lewek, 22 Fla. L. Weekly at D2471 ("Because the Defendant's due process right to participate in all pertinent aspects of trial was violated, the Defendant is entitled to a new trial."). The trial court failed to certify through proper inquiries that Mr. Lopez waived his right to be effectively present at the selection of his jury where fundamental fairness may have been thwarted by his absence. This cause should be reversed and remanded for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL[2].

Granting a motion for mistrial is within the discretion of the trial court and should be granted when necessary to ensure that the defendant receives a fair trial. Marek v. State 492 So. 2d 1055, 1057 (Fla. 1986). In the instant case, the trial court committed reversible error in denying the motion for mistrial. The curative instruction which was offered by the trial court was ineffective because the Mr. Lopez's cause suffered prejudice which could not be undone.

Defense counsel began cross-examination of Ms. Meads as follows:

> BY MR. FERNANDEZ:
> **Q.** Ms. Meads, if there could be one word that would sum up your feelings about Mr. Lopez, hate would be a good word?
> A. Asshole would be a better one.
> Q. Okay. Asshole. And hate, good enough?
> A. Yeah.
> **Q.** And you have this hate for Anthony Lopez today as you speak in this courtroom?
> MS. BOSSIE [prosecutor]: Judge, may we approach?
> THE COURT: Overruled.
> BY MR. FERNANDEZ:
> Q. Correct?
> A. I'm very upset with him.

---

[2] This issue was affirmed by the district court without discussion. However, this Court may consider this issue. Kennedy v. Kennedy, 303 So. 2d 629 (Fla. 1974) ("In acquiring jurisdiction of a case, our Court has appropriate authority to dispose of all contested issues."); Atlas Properties, Inc. v. Didich, 226 So. 2d 684, 685 (Fla. 1969) ("Florida Supreme Court has the power "to explore the entire record to see if the proper result has been reached in both the trial and District Courts.") .

Q. Okay. And on June 3rd, 1994, you hated Anthony Lopez?

A. Since I found out he molested my daughter, I hated him.

MR. FERNANDEZ: I would ask for an instruction and move for mistrial.

THE DEFENDANT: That's it right there.

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

Go ahead.

THE WITNESS: 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.

Q. You've --

MR. FERNANDEZ: Your Honor, may we approach?

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

(v.4:T331-332). When the State rested, the following occurred:

MR. FERNANDEZ: Your Honor, let me put on the record that I am strenuously asking this Court to grant a mistrial. At no time did defense counsel open the door, in the questions 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?

MS. BOSSIE: 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.

THE COURT: My recollection is that you were in effect asking her for a date on which this hate started.

MR. FERNANDEZ: No, I said on the date of the crime.

(v.4:T340-341). The defense was entitled to establish the bias of Ms. Meads. The specific question asked of Ms. Meads, "And on June 3rd, 1994 [the date of the incident], you hated Anthony Lopez?"

(v.4:T331-332) did not open the door to testimony about an alleged prior rape of a child.

In Simmons v. State, 139 Fla. 645, 190 So. 756 (Fla. 1939), the Court held that where the prosecutor intimated to the jury that the defendant committed rape in the past and there was no support in the record for this argument, it constituted error.

> It is fair to say that the average juror will regard the crime of rape as no less heinous than the most cold-blooded murder, and, being so, it is doubtful if the sinister influence of the remarks made to the jury in this case, which we do not take time and space to relate, could be erased by withdrawal or any admonition the court could give. In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence.

Simmons, 190 So. at 758, Ms. Meads' statement that Mr. Lopez had raped her daughter was also so prejudicial that an instruction to the jury to disregard the statement could not remove the sinister influence.

In McClain v. State, 516 So. 2d 53 (Fla. 2d DCA 1987), this Court held that it was reasonably possible that the jury was affected by a statement of an alleged sexual battery victim (the fourteen-year-old baby sitter of the defendant's step-children) that the defendant had probably also committed sexual battery on his five-year-old stepdaughter. A new trial was warranted where the verdict was based on belief of the victim's testimony over the defendant's. See Roman v. State, 438 So. 2d 487 (Fla. 3d DCA 1983) (the trial court committed reversible error in denying the defendant's timely motion for mistrial after a police officer testified

that the defendant was involved in a crime for which he was not, charged).

The verdict in the instant case was based on the identification of Mr. Lopez as one of the robbers. Two witnesses to the robbery saw the robbers. One witness **was** unable to identify the robbers from **a** photo-pack, but claimed to be able to identify Mr Lopez at trial, one and one half years after the robbery. Another witness made an out-of court and in-court identification which was strongly challenged at trial as tainted by an overly suggestive out-of court identification procedure. Juan Delgado pled guilty in a separate proceeding and testified that he committed the crime with Mr. Lopez, but Mr. Delgado had pled to the crime and may have hoped to curry favor for sentencing. Also, another witness, Amin "John" Mahsel, testified that shortly after the robbery Mr. Delgado spoke of committing a restaurant robbery with other kids (v.5:T357-362). Mr. Delgado's girlfriend, Maria Pena, an admitted liar (v.4:T314), also implicated Mr. Lopez, but she also may have hoped to curry favor for Juanito's sentencing. Mr. Lopez's mother-in-law and sister-in-law provided damaging testimony, but both admitted they hated Mr. Lopez (v.4:T325-340; v.5:T384-389). The testimony of Mr. Lopez's wife provided an alibi and refuted the testimony of his mother-in-law and sister-in-law (v.5:T363-382). A primary issue in this case, in light of the challenged identifications, was whether the defense witnesses or the State's witness were telling the truth. Ms. Meads unsolicited and prejudicial statement unfairly discredited the defense.

The instruction to the jury to simply disregard the previous statement was also insufficient to cure the extremely inflammatory nature of the Ms. Meads' remark[3]. See Elliott v. State, 590 So. 2d 538 (Fla. 2d DCA 1991) ("A cautionary instruction was insufficient to overcome the incurable effect of the witness' prejudicial comment" - a spontaneous comment that appellant had a history of dealing drugs); Finklea v. State, 471 So. 2d 596 (Fla. 1st DCA 1985) ("Despite cautionary instructions, the introduction of a prior unrelated criminal act is too prejudicial for the jury to disregard.").

"If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful." State v. Lee, 531 So. 2d 133, 136 (Fla. 1988), citing State v. Diquilio, 491 So. 2d 1129 (Fla. 1986). There was a credibility contest as to whether Mr. Lopez was involved in the robbery. Therefore, the erroneous denial of the motion for mistrial was not harmless. The cause should be reversed.

---

[3] "[Yo]u can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn't do any good." Walt Disney World Co. v. Blalock, 640 So. 2d 1156, 1158 n.1 (Fla. 5th DCA 1994) (quoting O'Rear v. Fruehuf Corp., 554 F.2d 1304, 1309 (5th Cir. 1977)).

ISSUE III

THE TRIAL COURT IMPROPERLY EXCLUDED A DEFENSE WITNESS[4].

> The Sixth Amendment, as incorporated into the Fourteenth Amendment, guarantees a defendant in a state criminal prosecution the right to a full and fair opportunity to cross-examine prosecution witnesses in order to show their bias or motive to be untruthful. Olden v. Kentucky, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988); Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); Mosley v. State, 616 so. 2d 1129 (Fla. 3d DCA 1993); Caton v. State, 597 So. 2d 412 (Fla. 4th DCA 1992). And a defendant also has the right to offer additional evidence to show the bias of prosecution witnesses. See § 90.608(2), Fla. Stat. (1993); see also Diaz v. State, 597 So. 2d 368 (Fla. 3d DCA 1992).

Chadwick v. State, 680 So.2d 567, 568 (Fla. 1st DCA 1996).

The trial court in this case excluded a defense witness who was offered to impeach the reputation for truth and veracity of a key State's witness, Maria Pena. 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).

---

[4] This issue was affirmed by the district court without discussion. However, this Court may consider this issue. Kennedy v. Kennedy, 303 So. 2d 629 (Fla. 1974) ("In acquiring jurisdiction of a case, our Court has appropriate authority to dispose of all contested issues."); Atlas Properties, Inc. v. Didich, 226 So. 2d 684, 685 (Fla. 1969) ("Florida Supreme Court has the power "to explore the entire record to see if the proper result has been reached in both the trial and District Courts.").

After the State rested, the following occurred:

> MS. BOSSIE: One moment Mr. Fernandez. Judge, obviously I think he has standard motions, but he's going to call Maria Pena's mother just for the fact to say that she lies to her all the time, which you sustained an objection to.
>
> THE COURT: We already talked about that at pretrial.
>
> MS. BOSSIE: I don't want her called to the stand.
>
> MR. FERNANDEZ: Let me put it on the record, because my client definitely wants me to call her, and then the Court can make its rulings.
>
> THE COURT: I've already ruled.
>
> MR. FERNANDEZ: I don't believe you have.
>
> MS. BOSSIE: He solely wants to call her mom to say she's in a gang and she lies to me, and I think that's totally irrelevant to the questions. You've ruled and sustained my objections in my case.
>
> MR. FERNANDEZ: 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 a gang with Juanito. She knows her daughter to be a chronic liar. She knows her daughter would lie for Juanito and has done so in the past. And she knows her reputation, at least the question is, does she know her reputation in the community and she would say that reputation is bad.
>
> THE COURT: Okay. It's on the record. Objection sustained.

(v.4:T341-343).

The trial court was mistaken in believing it ruled adversely to the defense at a pretrial hearing as to witness Sonja Santiago. The pretrial ruling by Judge Padgett concerned only Mr. Lopez's mother and his former attorney who were offered as not previously listed witnesses (v.3:T88-91). There was no other pre-trial hearing in this case concerning the admissibility of proposed defense testimony.

> The rule in regard to the impeachment of the credibility of a witness was laid down in Nelson v. State, 99 Fla. 1032, 128 So. 1 (1930) where it was stated:
>
> > When the character of a witness is gone into, the only proper object of inquiry is as to his reputation for truth and veracity. . . .
>
> The court below did not permit the appellant to inquire into Deputy DeAngelis' reputation for truth and veracity on the ground that a proper predicate had not been laid. This error **was** compounded by the fact that the appellant was also denied the right to attempt to satisfy the court's objection to admitting the testimony.
>
> For the foregoing reasons the judgment and sentence is reversed and the cause remanded for **a** new trial.

Dowling v. State, 268 So. 2d 386, 386-387 (Fla. 2d DCA 1972).

Defense counsel proffered that Ms. Pena's mother would testify she knew Ms. Pena's reputation for veracity in the community and that reputation is bad (v.4:T343). The proposed impeachment of Ms. Pena with her reputation for truth and veracity was improperly excluded. Ms. Pena's testimony, which corroborated the testimony of Juanito Delgado, was key to the State's case. Ms. Pena admitted that she lied often, but stated she was testifying truthfully at trial (v.4:T314, 320). The trial court's mistaken belief that Ms. Pena's mother had been previously excluded prevented the trial court from properly evaluating the admissibility of the witness's testimony.

> Because this case involved a classic swearing match between the deputies and the defense witnesses, we cannot say that the improper exclusion of the impeachment evidence was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Chadwick, 680 So. 2d at 568. This case involved a swearing match between the State's witnesses and the defense witnesses. (Please see Issue II.) Thus, the error in excluding Ms. Pena's mother as a witness was not harmless. The cause should be reversed for a new trial.

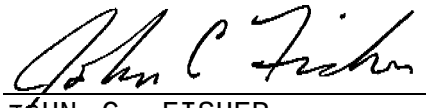
CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Appellant respectfully asks this Honorable Court to answer the Second District Court of Appeal's certified question in the negative, and reverse this case for a new trial. Appellant respectfully asks this Honorable Court to exercise its discretion to review the other issues of this case and to reverse for this case for a new trial.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Angela D. McCravy, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 26th day of February, 1998.

Respectfully submitted,



JOHN C. FISHER
Assistant Public Defender
Florida Bar Number 0999865
P. 0. Box 9000 - Drawer PD
Bartow, FL 33831

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

/jcf