IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

WILLIAM DARDEN, JR.,

Respondent.

CASE NO. 92,317

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL AND
THE NINTH JUDICIAL CIRCUIT IN AND
FOR ST. JOHNS COUNTY, FLORIDA

AMENDED MERIT BRIEF OF RESPONDENT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Respondent generally accepts Petitioner's Statement of the Case.

STATEMENT OF THE FACTS

Respondent generally accepts Petitioner's Statement of the Facts, subject to the following additions and corrections:

The trial court stated to defense counsel at the conclusion of the jury voir dire questioning:

> Thank you, Mrs. Peshet. Whenever you are ready, you may approach. (Whereupon the following proceedings were had at the sidebar:)

The jury was then selected by the prosecutor and the defense counsel at the sidebar conference with the trial court. (T 32-33, Vol. I). Defense counsel exercised peremptory and cause challenges without the Respondent being present during the sidebar conference. (T 32-33, Vol I) The jurors were then called by name, seated, and the trial court asked the defense counsel and the prosecutor "... is the jury seated the jury selected. (T 34) Defense counsel responded affirmatively. (T 34, Vol. I)

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal correctly held that fundamental error under **Coney v. State, 653 So.** 2d 1009 (Fla. 1995) resulted when the trial court conducted a sidebar conference to select Respondent's jury, which included peremptory challenges, without the Respondent being present and without the Ressondent affirmativelv waiving on the record his constitutional right to be present at the "immediate site" of where the jury selection took place. The Fifth District's holding is in complete conformity with this Court's holding in **Coney v. State, 653 So.** 2d 1009 (Fla. 1995) The instant record clearly demonstrates that the Respondent was not present at the immediate site where the jury selection took place during a sidebar conference attended only by the prosecutor, defense counsel, and the trial court. Moreover, the record conclusively establishes that the trial court did not obtain any type of affirmative waiver from the Respondent of his constitutionally protected right under Florida Rule of Criminal Procedure 3.180, as outlined by this Court in Coney, to be present at the immediate site of jury selection and to participate in the jury selection.

The trial court's denial of Respondent's substantive constitutional right to be present at the immediate site of jury selection, as defined in this Court's Coney decision, consequently amounted to fundamental error irrespective of no

objection being raised before the trial court. Nor can such fundamental error be categorized as "harmless" since the record below, as acknowledged by the Fifth District, does not reflect whether the Respondent was consulted about any of the peremptory juror challenges exercised by his defense counsel OK whether he acquiesced in his trial counsel's challenges. Thus, Petitioner's assertion that "... a **Coney** error is not fundamental and the failure to object to jury selection procedures . . . waives appellate review of the issue" is incorrect.

Finally, Petitioner's assertion that "[a] reversal of [Respondent's] conviction, for the alleged infringement of a procedural right to which he is no longer entitled, would be a useless act . .." is also incorrect. The subsequent amendment to Florida Rule of Criminal Procedure 3.180, which effectively redefines "actual presence" of an accused during jury selection, is inapplicable to the appellate issue under **Coney**, supra, being considered sub judice which concerns such a substantive fundamental right. This is because Respondent's fundamental constitutional right to be present at the "immediate site" of jury selection under **Coney** was still applicable at the time when Respondent's trial took place. Accordingly, this Court should affirm the Fifth District's decision in this cause.

ARGUMENT

POINT I

THE CONEY ERROR WHICH OCCURRED SUB JUDICE AMOUNTED TO FUNDAMENTAL ERROR.

Petitioner initially asserts that the Fifth District's holding that fundamental error under **Coney** occurred in the instant case was incorrect. (Petitioner's brief, Page 5) Specifically, Petitioner maintains that "... while a defendant may have a constitutional right to be 'present' at jury selection, the manner in which the defendant's presence is achieved is a matter of procedure and **Coney's** interpretation of the definition of 'presence' under rule 3.180 can only be procedural." (Petitioner's initial brief, page 9)

As authority for this proposition, Petitioner cites to this Court's decisions in **Bovett v. State,** 688 So. 2d 308 (Fla. 1996) and **Hill v. State, 700 So.** 2d 646 (Fla. 1997). (Petitioner's initial brief, pages 8-10) Those decisions, however, are inapplicable to this case since this Court expressly stated in both of those cases that a Conev error was only to be applied prospectively from the date when this Court's **Coney** decision became final. Thus, due to the alleged **Conev** errors in both **Boyett** and **Hill** occurring before this Court's decision in **Coney** was even issued, this Court held that the **Coney** issues raised in **Boyett** and **Hill** were not cognizable on appeal in those cases.

Clearly, the Respondent's jury selection on May 13, 1996, occurred subseauent to this Court's decision in **Conev** becoming final in April of 1995. (T **1-34,** Vol. I) **See also Henderson v. state,** 698 So.2d **1205** (Fla. 1997)

Petitioner also cites to the decisions of **Neal v. State, 697 so.** 2d 941 (Fla. 2nd DCA 1997) and **Lee v. State, 695 So.** 2d 1314 (Fla. 2nd DCA 1997). (Petitioner's initial brief, page 10) To begin with, in **Neal; supra,** the second District expressly found that "the record does not disclose whether Neal attended the sidebar conference." **Id** at 942. Although Petitioner argues that in the instant case "[t]he record does not reflect whether Respondent was present at the bench where preemptory strikes were exercised..." this assertion is not supported by the record.' (Petitioner's initial brief, page 10) (T 32-33, Vol. I) To the contrary, the Fifth District expressly found below that the Respondent was not present during the sidebar conference concerning jury selection. **Darden** v. **State,** 23 Fla. L. Weekly D 224 (Fla. 5th DCA, January 16, 1998). Further, as for **Lee; supra,** Respondent would respectfully submit that the Second District has in that case misinterrepted this Court's decision in

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' Specifically, the instant record indicates that the trial court directly asked defense counsel to approach for the sidebar conference, not the Respondent, during which only the prosecutor, the trial court, and defense counsel selected the jury. (T **32-33**)

Conev; supra.

In **Coney, supra**, this Court held that "the defendant has a right to be physically present at the immediate site where potential juror challenges are exercised". 653 So. 2d at 1013. The facts in **Conev** were as follows:

> Juror challenges in the present case were exercised on two occasions: first, during a brief bench conference after prospective jurors had been polled concerning their willingness to impose death, and second, during a lengthy proceeding at the conclusion of voir dire. Coney was not present at the sidebar where the initial challenges were made, and the record fails to show that he waived his presence or ratified the strikes.

Id.

This Court further adopted in **Conev** the following rules of law:

> As to Coney's absence from the bench conference, this Court ruled:
>
> [The accused] has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence. Florida Rule of Criminal Procedure 3.180 (a)(4) recognizes the challenging of jurors as one of the essential stages of a criminal trial where a defendant's presence is mandated. Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982) (citations omitted). Florida Rule of Criminal Procedure 3.180 provides:
>
> (a) Presence of the Defendant.
>
> In all prosecution for crime the defendant shall be present:
>
> (4) at the-beginning of the

> trial during the . . . challenging... of the jury.
> Fla. R. Crim. P. 3.180 **(a).**
>
> We conclude that the rule means just what it says: The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised. See Francis. 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, voluntary, and intelligent. Alternatively, a defendant can ratify strikes made outside his presence by acquiescing in the strikes after they are made. See State v. Melendez, 244 So. 2d 137 (Fla. 1971). Again, the court must certify the defendant's approval of the strikes through proper inquiry.

Conev at 1013.

The District Courts in the First, Third, Fourth and Fifth have held that **Conev** violations are fundamental error:

> According to the supreme court, "[t]he 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." [Citations omitted] Clearly, it is because this is considered such a critical stage of the proceedings that the court has undertaken to ensure that a defendant's right to meaningful participation in the decision of how peremptory challenges are to be used is assiduously protected. If a contemporaneous objection were required to preserve for appeal the issue of deprivation of that right, it seems to us that as a practical matter, the right would be rendered meaningless. Accordingly, to ensure the viability of the rule laid down (or "clarified") by the supreme court in Coney,

> we conclude that a violation of that rule constitutes fundamental error....

Meiia v. State, 675 So. 2d 996, 999 (Fla. 1st DCA 1996), rev, on other grounds, **State v. Mejia, 696 So.** 2d 339 (Fla. 1997). **See also, Brower v. State, 684 So.** 2d 1378, 1379 (Fla. 4th DCA 1996) ("the procedure the **Conev** court prescribed in order for a defendant to waive his presence or ratify jury selection in the defendant's absence would be superfluous if the simple failure to make a timely objection had the same result"); **Wilson v. State, 680 so.** 2d 592 (Fla. 3d DCA 1996); and Anderson, 697 so. 2d 878 (Fla. 5th DCA 1997)

As these cases make clear, only the defendant himself can waive his right to be present for juror challenges, and that waiver must be express and knowing; mere silence (i.e., failure to object) is insufficient. See also **Garcia v. State, 492 So.** 2d **360, 363** (Fla. 1986) ("counsel's waiver of a defendant's absence at a crucial stage of a trial, without acquiescence or ratification by the defendant, is error"). Thus, **Conev** violations are fundamental error and the interdistrict conflict must be resolved by this Court on that basis. In fact, this Court's very language employed in **Conev** that "...the court must certify the defendant's approval of the strikes throuah proper inquiry" clearly affirms that fundamental error results when the trial court fails to make such an inquiry on the record. [Emphasis added] **Id** at 1013.

No such inquiry was made by the trial court of the Respondent in the instant case. (T 31-35, Vol. I) Most importantly, as noted by the Fourth District in **Ellis v. State**, 696 So. 2d 904, 905 (Fla. 4th DCA 1997):

> A defendant has a due process right to be present at the site where peremptory challenges are exercised. [Citations omitted] Since the burden is upon the trial court or the State to make the record show that all of the requirements of due process have been met, we hold that the burden is on the trial court or the State to make the record show that the dictates of **Conev** have been complied with...[Citations omitted]
>
> * * *
>
> We find that the more prudent approach would be to keep the burden on the trial court and the State to show that the **Conev** requirements have been met." {Citations omitted]

Id at 905. Accordingly, the decision of the Fifth District should be affirmed by this Court because fundamental error resulted during the trial below under Conev.

POINT II

THE CONEY ERROR IN THE INSTANT CASE IS NOT HARMLESS.

Petitioner next argues that even if the **Coney v. State**, **653 so.** 2d 1009 (1995) error in the instant case amounts to fundamental error, it is harmless. (Petitioner's initial brief, pages 13-17) In support of this assertion, Petitioner first argues that the **Coney** error in the instant case would not, upon remand for a new trial, would not entitle Respondent to be physically present at the bench while peremptory strikes are exercised, specifically citing to the amended reversion of Florida Rule of Criminal Procedure 3.180 (b), effective in January of 1997. (Petitioner's initial brief, pages 13-16)

Respondent would first point out that the resulting harm due to a **Conev** violation pertains to an accused's absence from the immediate site of where the accused's previous iurv selection took place. Id, 1013. Consequently, the prejudice caused to the Respondent resulted from his not being physically present when the jury, which was to decide his guilt or innocence, was picked and his being denied the opportunity to actively participate in the jury selection process involving peremptory challenges, absent a specific showinu on the record that the Respondent, upon a wrower inquiry by the trial court, waived his presence or ratified the strikes. Id, 1013. As noted by the Fifth District,

"[the Respondent] was not present during a sidebar conference concerning the selection of jurors...", which included peremptory challenges. **Darden v. State, 23** Fla. L. Weekly D 224 (Fla. 5th DCA, January 16, 1998). (T 32-34, Vol. I) Further, the Fifth District stated that nothing in the instant record reflected whether the Respondent "... was consulted about any of the juror challenges or whether he acquiesced in his counsel's challenges." **Id**. Finally, the record conclusively establishes that the trial court failed to conduct any inquiry of the Respondent as to whether he approved of the strikes made by his defense counsel in accordance with the express requirements of **Conev v. State, 653** So. 2d 1009 (Fla. 1995). (T 34, Vol. I) Neither did the trial court "... certify through proper inquiry,..." that the Respondent knowingly, intelligently, and voluntarily, waived his right to be present at the immediate site of jury selection as is also mandated by **Conev. Id**, 1013. (T 32-33, Vol. I) Similarly, the Fourth District explained in **Matthews v. State, 687 So.** 2d 908, 909-910 (Fla. 4th DCA 1997),:

....

> The exercise of jury challenges by a defendant is not necessarily a mere mechanical function. It may involve the formation of on-the-spot strategy decisions which may be influenced by the actions of the state at the time. [Citations omitted]

....

> 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 [v. State, 413 So. 2d 1175], 1178-1179, (Fla. 1982) It is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another or upon a juror's habits and associations. [Francis,] at 1179. Id. At 910.

Even where the record is silent as to whether the requirements of **Conev** have been met, the Fourth District concluded in **Ellis v. State, 696 So. 2d 904, 905 (Fla. 4th DCA 1997),** the following:

> ... We find that the more prudent approach would be to keep the burden on the trial court and the State to show that the Coney requirements have been met. [Citations omitted].

Just as when the record establishes in the case sub iudice that the Respondent was not present during the side bar jury selection where peremptory challenges were made, the Fourth District also found in **Dorsey v. State**, 684 So. 2d 880 (Fla. 4th DCA), that if there is no inquiry made by the trial court, there is no waiver. Nor did the defendant's silence in **Dorsey** amount to a ratification or waiver, because, as reasoned by the Fourth District, "... if that were the rule it would make the . . . quoted language [in **Conev]** meaningless." **Id.** at 881. Thus, the Fourth

District concluded, if the defendant had participated in the exercising of the peremptory jury strikes in **Dorsey** that, it may have resulted in different jurors deciding his guilt or innocence. **Id.** At 881. Under such circumstances, the Fourth District determined that such a Coney error could not be deemed harmless. Id, 881.

In addition, Respondent disagrees with Petitioner's further assertion that, upon a reviewing court remanding a **Coney** error for retrial, the accused would not be entitled to the application of the pre-amended version of Rule 3.180 encompassing this Court's prospective requirement in **Conev** of "actual presence" during peremptory juror challenges. (Petitioner's initial brief, Pages 15-17) Respondent's trial began on May 13, 1996, while the amendment to Rule 3.180 (b) was made effective on January 1, 1997. See Amends to Fla. Rules of Crim. Proced., 685 So. 2d 1253, 1255 (Fla. 1996) Where an explicit effective date for rule changes exits, this Court has previously found a rule amendment improperly applied retroactively. **Cernialia v. Cernialia, 679 So.** 2d 1160, 1164 (Fla. 1996); **Mendez-Perez v. Perez, 656 So.** 2d 458, 459-460 (Fla. 1995) Moreover, although the disposition of a case on appeal is generally made on the basis of the law in effect at the time of the appellate court's decision, this rule does not apply where a substantive legal right is altered. **State v. Lavazzoli**, 434 So. 2d 321, 323 (Fla. 1983).

The Third District, likewise, in **Chavez v. State**, 698 So. 2d 284 (Fla. 3d DCA 1997), analyzed the application of the amended Rule 3.180 (b) to a retrial due to a **Coney** error as follows:

> The State concludes that the trial's result on remand would be identical to the first trial, because the court would be required to conduct the second trial exactly /as it did during the first trial. Thus, the defendant would not gain any new rights or benefits at a subsequent trial.
>
> However, this does not change the immutable fact that when the case was tried, the defendant's rights were violated under existing law. Because the trial took place before amended Rule 3.180 (b) became effective on January 1, 1997, at 12:01 a.m., the defendant is entitled to a new trial under Conev. [Citations omitted] Any other interpretation of the rule will result in a retroactive application of this law. **Id.** At 285-286.

Finally, Petitioner maintains that the Conev error found by the Fifth District in this cause was harmless because, based on Petitioner's interpretation of the record, "Respondent was afforded the opportunity to participate [in jury selection] in a meaningful way." (Petitioner's brief, Pages 13-17) Respondent would disagree that the instant record supports this assertion. Simply by the trial court stating to defense counsel, immediately after the jury voir dire examination by defense counsel had concluded, "Thank you, Mrs. Peshek. Whenever you are ready, you may approach," does not establish that the Respondent was given an opportunity to participate in the jury selection which

followed at the side bar conference. (T **32,** Vol. I) Most importantly, the record does reflect that the trial court failed to make any inquiry, before or after the side bar conference had occurred, of the Respondent as to whether he acquiesced in the juror strikes made by his defense counsel or as to whether he was waiving his right under **Coney** to be present at the immediate site of the sidebar jury selection and to personally participate in that selection. (T **32-34,** Vol I) Further, as mentioned previously, the Fifth District specifically noted that the record in this cause does not reflect whether the Respondent was consulted about any of the juror challenges OK whether he acquiesced in his counsel's challenges, **Darden, supra.** Accordingly, Petitioner's assertion that the **Coney** error, which occurred in the case sub iudice, is harmless is without merit. The Fifth District's decision in this cause should, therefore, be affirmed by this court.

CONCLUSION

For the reasons expressed herein, Respondent respectfully requests that this Honorable Court affirm the decision of the District Court of Appeal, Fifth District, and remand this case for a new trial.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Susan A. Fagan[1]

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., 5th FL, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to: Mr. William Darden, Jr., DC # V 01092, St. Johns County Detention Center, 3955 Lewis Speedway, St. Augustine, FL 32095-8611, on this 3rd day of April, 1998.

Susan A. Fagan

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 92,317
	)	
WILLIAM DARDEN, JR.,	)	
	)	
Respondent.	)	

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL AND
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A P P E N D I X

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that a child must be placed within 5 days, unless the department requests and obtains a court approved extension. The purpose of such extension is to receive the necessary time for appropriate residential placement, not to maximize punishment. The court in ordering 15 days "max time" in detention did not indicate that this time was necessary for placement in an appropriate residential facility.

Because a court may only extend detention beyond 5 days pending a juvenile's placement in a moderate risk facility if the department shows that it is necessary for placement purposes, we grant the petition and direct that the juveniles remaining in secure detention be released.

PETITION GRANTED. (HARRIS and THOMPSON, JJ., concur.)

* * *

Criminal law-Appeals-Jurors-Selection-Absence of defendant-Failure to obtain waiver of defendant's presence at sidebar conference concerning selection of jurors was fundamental error which may be raised on direct appeal absent objection in trial court-Conflict certified

WILLIAM DARDEN, JR., Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 96-2552. Opinion Filed January 16, 1998. Appeal from the Circuit Court for St. Johns County. Charles J. Tinlin, Acting Circuit, Judge. Counsel: James B. Gibson, Public Defender, and Susan Fagan, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterwotth, Attorney General, Tallahassee, and Roberta J. Tylke, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) William Darden was found guilty by a jury in May, 1996 and convicted of burglary of a dwelling, burglary of a conveyance, possession of burglary tools and felony petit theft.

Darden was not present during a sidebar conference concerning the selection of jurors. His attorney exercised two peremptory strikes and asked *to* dismiss one juror for cause. The record does not reflect whether Darden was consulted about any of the juror challenges or whether he acquiesced in his counsel's challenges.

We vacate the convictions because we are bound by our previous decision of August 5, 1997, in Anderson v. *State*, 697 So. 2d 878 (Fla. 5th DCA 1997), that followed Coney v. *State*, 653 So. 2d 1009 (Fla.). *cert.* denied, 116 S. Ct. 315 (1995). In so doing, we certify conflict with the second district.

In July of this year, two panels of the second district aligned themselves with a position first asserted by Judge Altenbemd in his concurring opinion in ***Hill*** v. ***State.*** 696 So. 2d 798 (Fla. 2d DCA 1997), *affirmed,* 22 Fla. Law Weekly S561 (Fla. Sep. 11, 1997). See, Lee v. *State*, 695 So. 2d 1314 (Fla. 2d DCA 1997), rev. ***granted,*** 697 So. 2d 942 (Fla. 1997); ***Neal v. State, 697 So.*** 2d 941 (Fla. 2d DCA), ***rev. granted,*** Westlaw Table, No. 91,249 (Fla. Oct. 29, 1997). The second district has declared that a Coney error cannot be raised on direct appeal without an objection having been made on the same grounds at trial. The decision in Anderson aligned this court with the first, third and fourth districts, which have expressly found that a failure to obtain a Coney waiver constitutes fundamental error.'

We vacate the judgments and sentences and remand for a new trial.

JUDGMENTS VACATED; REMANDED. (GOSHORN and PETERSON, JJ., concur. HARRIS, J., dissents, without opinion.)

'Of the cases finding such error, the supreme court has granted review to ***Brower v. State, 684 So.*** 2d ***1378*** **(Fla. 4th** DCA **1996),** ***rev. granted, 694 So.*** **2d 739 (Fla. 1997).**

* * *

Criminal law-Indecent assault upon child under age sixteen—Attempted sexual battery on child under age twelve—Sentencing-Restitution-Error to direct defendant to pay for victim's renewed psychological therapy where record did not contain evidence establishing that victim's current need for therapy was directly or indirectly related to defendant's criminal conduct

RONALD L. PETERS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 97-0558. Opinion filed January 16, 1998. Appeal from the Circuit Court for Citrus County, J. Michael Blackstone, Judge. Counsel: James B. Gibson, Public Defender, and Rebecca M. Becker, Assistant public Defender, Daytona Beach. for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Maximillian J. Changus, Assistant Attorney General, Daytona Beach, for Appellee.

(ANTOON, J.) Ronald L. Peters (defendant) appeals the restitution order entered by the trial court which directs him to pay for the victim's psychological therapy. We must reverse because the record does not contain evidence establishing that the victim's need for psychological therapy is directly or indirectly related to the defendant's criminal conduct.

In 1991, after entering guilty pleas to one count of indecent assault upon a child under sixteen years of age and two counts of attempted sexual battery on a child under twelve years of age, the defendant was sentenced to a term of nine years in prison followed by six years' probation. The plea agreement and the probation order provided that the defendant would pay restitution for the victim's medical and psychological treatment.

The seven-year-old victim received psychological therapy for two years after the crimes were committed. Her treatment was concluded when it appeared that therapy was no longer helpful.

Thereafter, in February 1997, a restitution hearing was held during which the trial court considered the question of whether the defendant should be required to pay for the victim's further psychological treatment. The only witness called to testify was the victim's mother. When asked why the counseling was necessary, the mother stated that the victim, now age 13, had become sexually active and difficult to control. The mother conceded that there had been disruption in the family as a result of financial difficulties, a move, and the mother's illness. The requested treatment required an up-front payment of $75 followed by a weekly payment of $60 for each week the victim received therapy. The treatment was planned to take three months and further therapy was to be considered at the end of the three-month period. Defense counsel suggested that the court allow the state to present evidence from the treating physician as to what necessitated the victim's planned therapy. However, the trial court rejected the suggestion, stating that the defendant could not state that his criminal conduct was not the cause of the victim's behavioral problems. The court then entered an order directing the defendant to pay the victim restitution in the amount of $795, and reserving jurisdiction to determine future restitution.

Section 775.089(1)(a), Florida Statutes (1991), provided in relevant part that:

> In addition to any punishment, the court shall order the defendant to make restitution to the victim for damage or'loss caused directly or indirectly by the defendant's offense, unless it finds clear and compelling reasons not to order such restitution.

Thus, the 1991 statute authorized the trial court to award restitution to the victim so long as the damages sustained were either directly or indirectly caused by the defendant's criminal conduct.' However, the state failed to submit any evidence establishing that the victim's current psychological problems are related, directly or indirectly, to the defendant's crimes. In this regard, although the defendant's criminal conduct may well be the cause of the victim's current behavioral problems, there is no record evidence to support this theory. While it is entirely plausible that the victim's psychological therapy was necessitated by the defendant's criminal abuse, it was the slate's obligation to make such a showing. Absent such a showing, an award of restitution is improper. ***See Strickland v. State, 685*** So.2d 1365 (Fla. 2d DCA 1996).

In closing we note that, if on remand the trial court receives evidence demonstrating that the victim's present need for psychological therapy was caused by the defendant's criminal acts, a