IN THE SUPREME COURT OF FLORIDA

WARFIELD RAYMOND WIKE,

Appellant,

vs. Case No. SC00-2141

STATE OF FLORIDA,

Appellee.
_____/

AMENDED REPLY BRIEF OF APPELLANT

ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, IN AND FOR SANTA ROSA COUNTY, FLORIDA

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PRELIMINARY STATEMENT

The citations to the record on appeal will be noted as they were in the appellant's Initial Brief. The state's Answer Brief will be referenced as "SA" followed by an appropriate page number.

AS TO THE STATE'S STATEMENT OF THE CASE AND OF THE FACTS

For the purpose of the resolution of the issues on the appeal from the trial court's order of September 27, 2000 denying Wike's 3.850 motion, the defendant does not take issue with the statement of the case and of the facts as set forth on pages 2-40 in the state's Answer Brief.

AS TO THE STATE'S SUMMARY OF THE ARGUMENT

Due to the page limitations allowed for this Reply Brief, and because each of the state's arguments are addressed individually below, Wike will not reply to the summary of the argument set forth on pages 40 and 41 of the state's Answer Brief.

ARGUMENT

Issue I: As to the state's argument that the trial court properly denied Wike's claim that his trial counsel was ineffective for failing to move for a change of venue.

The state argues that Wike's trial counsel (then Assistant Public Defender, now Circuit Judge, Terry Terrell) was not ineffective for failing to move for a change of venue because, according to Judge Terrell's testimony at the evidentiary hearing, Wike advised him that he (Wike) wanted the case tried in Santa Rosa County and that no change of venue motion was to be filed. At the evidentiary hearing, Wike denied making statements to Judge Terrell to that effect. Even so, Judge Terrell's representation was ineffective and fell below the objective standard of reasonably competent counsel within the context of Strickland v. Washington, 466 U.S. 668 (1984).

The essence of the state's argument is that because a criminal defendant has a right under the Florida Constitution to be tried in the county in which the crime occurred, Judge Terrell cannot be faulted for honoring his client's wishes. The state relies on Sailor v. State, 733 So. 2d 1057 (Fla. 1st DCA 1999), for the proposition that the Florida Constitution[1] guarantees a criminal defendant the right

[1] Article I, Section 16 of the Florida Constitution vests a criminal defendant with the right to be tried in the county where the crime occurred. However, that "portion of the Sixth Amendment requiring that a case be tried in the state and district where the crime was committed applies to federal prosecutions only and is not applicable to proceedings in state court." Sailor, 733 So. 2d at 1062.

to be tried in the county in which the crime occurred and Nixon v. State, 758 So. 2d 618 (Fla. 2000), to support its contention that "the Supreme Court has made it clear that the defendant, not the attorney, is the captain of the ship." Id. at 625. Although the quotes and general principles extracted from these two cases are correct, the state's reliance on them is misplaced.

Although Sailor confirms that the defendant has a right pursuant to Article I, Section 16(a) of the Florida Constitution to be tried in the county where the crime was committed, the court made this determination when considering whether the trial court erred in changing the venue upon the state's motion. Sailor, 733 So. 2d at 1058. While recognizing that the defendant can waive his right to be tried in the county where the crime was committed in order to secure a fair and impartial trial, the court noted that these "constitutional guarantees are for the protection of the accused; they do not secure any rights to the state." Id. at 1062. In addition, the court held that, "[t]he provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place." Id. at 1062.

Thus, the state seems to suggest that Article I, Section 16(a) of the Florida Constitution is a sword which requires that all criminal cases be tried in the county where the crime occurred, when the actual purpose of that constitutional provision is to serve as a shield to prevent the state from trying the defendant in a foreign

venue when that would be detrimental to the defendant. In addition, simply because Wike had a right to be tried in Santa Rosa County did not mean that his counsel therefore had no obligation to make sure that the client could get a fair trial by an impartial jury there. On the contrary, defense counsel was still obligated to consult with Wike, explain the nature and extent of the adverse pretrial publicity, advise the client of his right to a venue change and attempt to convince him that a venue change under these circumstances was necessary. To allow the state to exonerate counsel's conduct regarding the venue issue by claiming that it was the defendant's right to remain in county where the crime was committed "would be to imprison a man in his privileges and call it the Constitution." Adams v. United States ex rel. McCann, 317 U.S. 269, 280 (1942).

Judge Terrell testified during the evidentiary hearing that he and Wike first discussed venue on March 23, 1989[2]. (EH 134) However, no decision whether to file the motion was made at that meeting. (EH 134) Judge Terrell added that

> [i]n another interview on May, of 1999[3] (sic) quoting from my Client Contact Notes Mr. Wike, quote, wants to waive venue. Has something up his sleeve that organizations are going to get LEO -- which means law enforcement. And then a further comment that he could not go into what he is going to do with me or Mr. Etheridge. And I took that to conclude or be an assertion by him that he did not want to waive venue. (EH 134)

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[2] Judge Terrell mistakenly refers to "March 23, 1999" as the date he met with Wike, when he obviously meant March 23, 1989. (EH 134)

[3] Again we note that Terrell mistakenly referred to "1999" rather than "1989."

Judge Terrell's notes reflected (as explained through Judge Terrell's testimony) that he had another interview with Wike on June 2, 1989 at which time they reviewed the decision whether to change venue, and Wike again told him not to change the venue. (EH 134) Judge Terrell testified that "based on my client's direction and response to the discussion to the change of venue I concluded that he did not wish to pursue that avenue, and based on that decision and consultation with counsel the decision was made not to pursue that issue." (EH 134) However, when questioned on cross-examination about the specifics of his conferences with Wike regarding venue, Judge Terrell acknowledged that, "I do not recall in my notes specific reference to counseling him against making that decision." (EH 154) Then asked what Wike had "up his sleeve", Judge Terrell stated that,

> [w]ell, the only thing that I can conclude is that interview was on May 18. And on May 25 he filed a Motion to Discharge. I do not know what else he had up his sleeve.

(EH 155) Based on defense counsel's testimony, it is apparent that he made, at best, only a very cursory effort to attempt to convince Wike that he was making a mistake by refusing to change the venue. This is so because he never attempted to discover what reasons Wike had for wanting to keep the case in Santa Rosa County.

The American Bar Association ("ABA") Standards for Criminal Justice ("Defense Function Standard") 4-5.2 (3d ed. 1992) sets forth the proper standard

that a criminal defense attorney should follow on matters relating to the control and direction of the case. In this regard, it is noted that courts have viewed the ABA standards as guides for determining whether defense counsel's performance was reasonable when examining a claim of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 688 (1984). See also United States v. Teague, 953 F.2d 1525 (11th Cir. 1992) where the court used the ABA Standards for Criminal Justice 4-5.2(a) and the ABA Model Rule of Professional Conduct 1.2(a) as an example of "generally accepted" practices to determine whether defense counsel was ineffective; Cottle v. State, 733 So. 2d 963 (Fla. 1999) (recognizing that many courts have used the ABA Standards for Criminal Justice as a guide when examining whether defense counsel's conduct fell below professional standards).

The ABA Standards for Criminal Justice, Defense Function § 4-5.2 (3d ed. 1993) provides that

> (a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:
>
> (i) what pleas to enter;
>
> (ii) whether to accept a plea agreement;
>
> (iii) whether to waive jury trial;
>
> (iv) whether to testify in his or her own behalf; and

(v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include . . . what trial motions should be made, and what evidence should be introduced . . . . (Emphasis supplied.)

Thus, ultimately, the decision whether or not to change venue was counsel's, and Judge Terrell, through his inaction, rendered ineffective assistance to Wike by not seeking a venue change. This is clear because Judge Terrell acknowledged that there was a significant amount of community animosity against Wike in Santa Rosa County. (EH 133, 149) He further stated that had Wike not advised him that he did not want to change venue, he would have made every effort to obtain a venue change under those dire circumstances. (EH 150, 152)

In Sanborn v. State, 474 So. 2d 309 (Fla. 3d DCA 1985), the court, although admittedly addressing a different issue, held:

> Rubin [Sanborn's trial attorney] should disregard any instructions from the defendant concerning trial strategy and tactics if Rubin should determine that following the instructions would be either contrary to the defendant's best interest or contrary to Rubin's ethical obligations as an attorney.

Id. at 313. Thus, it follows that defense counsel should have insisted that Wike take his advice that a venue change was absolutely necessary if he was to stand any chance of seating fair and impartial jurors. At the very least, he should have fully advised Wike of the consequences of not seeking a venue change. A client can

only make important decisions "after full consultation with counsel." ABA Stds. for Crim. Just., § 4-5.2(a) (3d ed. 1993). As noted above, Judge Terrell's conversations with Wike regarding the need to change the venue failed to meet that minimum standard. Thus, Wike's defense counsel was ineffective regardless of whether the decision on a venue change was his or Wike's.

The Supreme Court decision in Strickland v. Washington, 466 U. S. 668 (1984) also requires a showing of prejudice where ineffective assistance of counsel is asserted in a postconviction proceeding. The state argues that Wike is not entitled to relief because Wike "failed to demonstrate either a deficient performance by counsel or the probability of a different outcome based on this alleged deficiency." (SA 46) In Meeks v. Moore, 216 F.3d 951 (11th Cir. 2000), the court noted that:

> [t]he law on pretrial publicity as it relates to the necessity for a change of venue is clear. The standards governing this area 'derive from the Fourteenth Amendment's due process clause, which safeguards a defendant's Sixth Amendment right to be tried by a panel of impartial indifferent jurors. The trial court may be unable to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere. In such a case, due process requires the trial court to grant defendant's motion for a change of venue. . . .'

citing from Coleman v. Kemp, 778 F.2d at 1489 (11th Cir. 1985). The Meeks court then stated at 961:

> In order to satisfy the prejudice prong of Stickland's ineffective assistance analysis, Meeks must establish that there is a reasonable probability that, but for his counsel's failure to move the court for a change of venue, the result of the proceeding would have been different. This requires, at a minimum, that Meeks bring forth evidence demonstrating that there is a reasonable probability that the trial court would have, or at least should have, granted a motion for change of venue if Meeks had presented such a motion to the court.

The decision in Meeks makes it clear that the test is not whether, had trial counsel filed a motion to change the venue and been granted one, the jury would have recommended a life sentence for Wike and the trial court would have concurred in the advisory recommendation. That would be pure speculation and impossible to prove one way or the other. Instead, the test in this case is, had trial counsel sought a venue change, is there a "reasonable probability that the trial court would have, or at least should have, granted" such a motion? Meeks, 216 F.3d at 961.

In the case at bar, it is undisputed that well prior to trial, Judge Terrell believed that a venue change was clearly necessary. (EH 133-155) The state's argument that grounds for a venue change did not exist and that Wike suffered no prejudice as a result of defense counsel's failure to seek a venue change is in direct conflict with Judge Terrell's testimony at the 3.850 evidentiary hearing. It is noteworthy to point out that the state relies on virtually every portion of Judge Terrell's testimony that is favorable to the state, but ignores his statements that he

believed that grounds for a change of venue existed. In fact, Judge Terrell believed this to be true so much so that he prepared a motion to change the venue, saved all the inflammatory newspaper articles regarding the case, and collected some 50 affidavits from citizens of the county expressing the opinion that Wike could not get a fair trial in Santa Rosa County. (EH 133) Therefore, the prejudice prong of Strickland has been established and the court below erred in not granting Wike's 3.850 motion on this ground alone.

Issue II: As to the state's argument that the trial court properly rejected Wike's claim that his trial counsel was ineffective for failing to develop and present a viable alibi defense.

The state argues that Wike has not preserved this issue for appellate review because he did not address it in his written final argument[4] submitted after the conclusion of the evidentiary hearing. However, the issue was properly raised in the defendant's 3.850 motion, evidence was submitted to the trial court at the evidentiary hearing regarding this issue and the trial court ruled on it in its order. (SA 46) In addition, the defendant, in his reply to the state's memorandum of law, specifically provided, in part, that,

> [I]nitially we note that in some instances we do not present argument regarding some of the claims. However, in not doing so, Mr. Wike does not abandon those claims -- instead, we ask the court to rule on them based upon the record. In particular, for example, Mr. Wike continues to argue that his

[4] At the conclusion of the evidentiary hearing, counsel for the defendant and the state agreed to submit final argument to the court in writing. (EH 227)

> trial counsel failed to develop and present an alibi for him despite his claim that he did not.

(R 185) Neither Florida Rule of Criminal Procedure 3.850 nor Florida case law requires that the defendant argue an issue in closing argument (written or oral) in order to preserve the issue for appellate review. Thus, the state is mistaken in this regard.

The state then argues that even if the issue was preserved, Wike is not entitled to relief because he "never had an alibi and never will, and his trial attorneys were not ineffective for failing to discover and present that which does not exist." (SA 46) The defendant acknowledges that the state might have a point, had Angie Cooper been the only alibi witness who might have testified in Wike's behalf. Wike had other witnesses who were available to testify that he was somewhere other than the crime scene (that is, the Rivazfar's residence) at the time of the initial abduction.

Judge Terrell testified at the 3.850 evidentiary hearing (when asked about the specifics of a possible alibi defense) that "the relevant timeframe in this case" was "after midnight. And in the hours of the, after midnight, 1:00 somewhere in that timeframe." (EH 143) Thus, although Ms. Cooper denied that she was with Wike during the time of the murder and related assaults (which occurred at about 5:00 or 6:00 a.m. on September 22, 1988), other witnesses were available to testify

that Wike was somewhere other than the Rivazfar's residence at the time of the initial abduction.

The state argues that Judge Terrell was not ineffective for not calling these witnesses because none of them could account for Wike's whereabouts after 1:15-1:30 a.m. on September 22, 1988. (SA 47) But as noted above, the victims were alleged to have been abducted at about midnight on September 21, 1988 or shortly thereafter. Thus, trial counsel should have realized that, if he could show the jury that Wike was somewhere else at about midnight on September 21, 1988, or shortly thereafter, reasonable doubt of his guilt would have been established and his client would have had an excellent opportunity for an acquittal on all charges.

The state also contends that defense counsel was not ineffective for calling these witnesses because many of them "had uncomplimentary things to say about Wike, including Glenda Hillard, who told Jim Martin (defense counsel's investigator) that Wike acted 'weird and was a strange person' (EH 112), and Terry Schuster, who said Wike seemed 'creepy' (EH 125)." (SA 47) Thus, it appears that the state is arguing that defense counsel made a strategic decision not to call these witnesses in fear that the jury would learn that these witnesses had the opinion that Wike possessed these unflattering character traits. The argument fails because the statements constituted inadmissible character evidence under Section 90.404 (1), Florida Statutes (1978).

Defense counsel's failure to investigate and call the witnesses referenced herein, and in the defendant's initial brief, fell measurably below objective standards of reasonably effective representation by attorneys handling death penalty cases. There remains a reasonable probability that, but for defense counsel's failure to call these witnesses during the guilt/innocence phase of the jury trial, the result of the proceeding would have been different.

These facts fulfill the two-prong test of Strickland, and require that Wike's judgment and sentence be vacated and set aside.

Issue III: As to the state's argument that the trial court did not err in denying Wike's claim that trial counsel was ineffective for failing to ensure that Wike was present at all critical stages of his trial.

Wike alleged that defense counsel was ineffective for failing to ensure that he was present at all critical stages of his trial. In this regard, the defendant relies on the argument as set forth in his Initial Brief in support of this claim.

Issue IV: As to the state's argument that the trial court did not err in denying Wike's claim that sentencing counsel was ineffective for failing to include Wike in all sidebar conferences.

The trial court erred in denying Wike's claim that trial counsel was ineffective for failing to inform him of his right to be physically present at sidebar conferences during the *voir dire* of his third penalty phase jury trial. The state argues that the defendant, in his post-hearing memorandum at page 18, "conceded that this issue could and should have been raised on direct appeal but was not."

(SA 53, 54) This assertion, first made in the state's earlier arguments, was not correct then and is not correct now. The defendant made no such statement in his post-hearing memorandum or otherwise.[5] The state asserts that this issue is procedurally barred "except to the extent that [it] is encompassed within an ineffective assistance of counsel" claim. (SA 54) The issue has always been framed as an ineffectiveness of counsel claim. (R. 42) Thus, the state is merely declaring the obvious.

The trial court denied the claim, finding that Wike failed to show how he was prejudiced by not being physically present at the sidebar conferences. Specifically, the trial court held that although Wike's absence amounted to a Coney violation, it nevertheless concluded that the error was harmless because the five jury-challenge sidebar conferences involved challenges for cause, not peremptory challenges, and the two non-jury-challenge sidebar conferences were legal in nature. Thus, the court concluded, Wike's presence was unnecessary. The state, in its Answer Brief at pages 54 and 55, contends that the trial court was correct in its reasoning. The state also argues that Wike was not entitled to relief because "Coney is limited essentially to the exercise of peremptory challenges" and because Coney is no longer the law since the holding in the case was superseded on January

[5] It is noted that the state made this same erroneous argument to the lower court in its post hearing memorandum of law (R. 175) and that the defendant noted in his reply (R. 171) that the statement was not correct.

1, 1997, the date the amendment to Florida Rule of Criminal Procedure 3.180 became effective. The state's argument is incorrect.

The state argues that the rule set forth in Coney v. State, 653 So. 2d 1009 (Fla. 1995) only requires a defendant to be physically present at sidebar conferences in which peremptory, not cause challenges are exercised.[6] The state's interpretation of Coney is incorrect. In Coney, this Court held that Florida Rule of Criminal Procedure 3.180(a)(4) establishes that the defendant has the right to be physically present at the site where juror challenges are exercised. Id. at 1013. This Court further held that it was error for the trial court to exclude Coney from bench conferences in which challenges for cause were exercised. Id. However, the court ultimately determined in that case that the error was harmless because the cause challenges involved purely legal matters to which Coney could not have contributed. Id. Thus, in the case at bar, Wike had a right to be physically present at sidebar conferences in which challenges for cause were exercised. The only question that remains, then, is whether the error was harmless. At this junction we note that the state did not argue harmless error[7] in its Answer Brief or in the court

[6] The state also erroneously contends that "[n]or has Wike shown that counsel would have had the right under Coney to secure Wike's personal presence at sidebar conferences dealing with subjects other than peremptory challenges." (SA 55) To the extent that the state is arguing that Coney only applies to peremptory challenges, it is mistaken. See for example Muhammad v. State, 782 So. 2d 343, 353 (Fla. 2001), where the court held that Coney was equally applicable to the examination of jurors.

[7] In State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), the court held that the burden is on the state to prove beyond a reasonable doubt that there is "no possible

below.[8] However, because the trial court ultimately determined that the error was harmless, we will respond to that finding notwithstanding the state's omission to do so.[9]

Florida Rule of Criminal Procedure 3.180(a)(4) does not make a distinction between peremptory and cause challenges. However, Coney held that a defendant would not be entitled to relief when a juror is challenged for cause because the error would be considered harmless. This is so because most challenges for cause are based on purely legal grounds, thus negating the need for the defendant's input. But there are instances in which a challenge for cause is not purely legal in nature. As Judge Webster pointed out in his dissenting opinion in Gaynard v. State, 686 So. 2d 1361 (Fla. 1st DCA 1996), Coney is equally applicable to a defendant when the challenge for cause is not legal in nature. Specifically, Judge Webster stated:

> Assuming that the challenge [for cause] is one regarding the exercise of which a defendant might offer meaningful input (such as, for instance, when the challenge is one which, for tactical reasons, might not be exercised even if available),

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way the error contributed to the conviction." Id. at 1134. See also Goodwin v. State, 751 So. 2d 537 (Fla. 1999).

[8] We acknowledge that the state presented an argument regarding the prejudice prong under Strickland, but harmless error and the lack of prejudice are not synonymous. They are completely different tests.

[9] We note that pursuant to Heuss v. State, 687 So. 2d 823 (Fla. 1996), an appellate court is not prevented from applying the harmless error test on its own when the state fails to make the argument. However, this language only makes the application of the harmless error test (when the state fails to advance the argument) permissive and does not require the appellate court to apply it on its own. Id. at 824.

I see no logical reason why Coney should not apply.

Id. at 1365. (The information contained in the brackets is added.)

In the case at bar, on August 14, 1995, five prospective jurors were excused for cause at bench conferences where Wike was not present.[10] At one of these bench conferences, a prospective juror was excused for religious purposes stating that he could not sit in judgment of another person. (TT 42-45) Wike's trial counsel agreed to allow the state to excuse this juror for cause without consulting with Wike.

In Sanders v. State, 707 So. 2d 664 (Fla. 1998), the trial court excused a juror for cause who stated that he could not recommend death without allowing defense counsel the opportunity to rehabilitate the juror. On appeal, this Court reversed and held that "defense counsel must be afforded an opportunity to rehabilitate jurors who have expressed objections to the death penalty or conscientious or religious scruples against its infliction." Id. at 668. Additionally the court held that,

> This Court has repeatedly determined that refusal to allow defense counsel to attempt to rehabilitate death scrupled jurors on *voir dire* violates both due process and rule 3.300(b).

Id. at 668.

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[10] We will cite to the trial transcript as "TT" followed by the page number when referencing the bench conferences held during the third penalty phase trial.

Sanders makes it clear that Wike's counsel had the right to attempt to rehabilitate the juror, but for reasons which are inexplicable,[11] defense counsel agreed to excuse the juror for cause without making a sufficient effort to rehabilitate him and without seeking Wike's input. Although this challenge for cause may be labeled as legal in nature, the decision whether to make a meaningful attempt to rehabilitate the juror is far from being too technically legal and should not have been decided by counsel without the defendant's knowledge or approval. In this regard, we note that the state, relying on Nixon v. State, 758 So. 2d 618 (Fla. 2000), previously argued in its answer as to Issue I (that is, the venue issue) that Wike was not entitled to relief as to that claim because "the defendant, not the attorney, is the captain of ship." (SA 42) The state essentially makes the argument that Wike is not entitled to relief because he is the blameworthy party, the decision making captain as to one issue (venue), saying that it was Wike's error in judgment, and then argues that Wike is not entitled to relief because he incapable of helping as to another issue. The state changes its argument from one position to its opposite, but either Wike is the captain of the ship, entitled to be consulted and informed of all matters relating to his case, or he is not.

[11] It is common knowledge among all experienced trial attorneys that it is favorable for the defendant to have jurors who oppose the death penalty, but are able to follow the law, serve on the penalty phase of the trial.

The state's second argument is that Wike is not entitled to relief under Coney because "Coney is no longer the law." (SA 56) The state notes that because Coney was superseded on January 1, 1997 (the date the amendment to Florida Rule of Criminal Procedure 3.180 became effective),[12] he is not entitled to relief because, "Wike has made no demonstration whatever that the manner in which his resentencing was conducted did not fully comply with the new rule." (SA 56) The state's argument fails to acknowledge that this Court in State v. Mejia, 696 So. 2d 339 (Fla. 1997) and Carmichael v. State, 715 So. 2d 247 (Fla. 1998) specifically held that Coney applies to all cases where the jury was sworn in after Coney became final on April 27, 1995 and before Rule 3.180 was superceded by the amendment that went into effect on January 1, 1997.

Be that as it may, the state cites Lockhart v. Fretwell, 506 U.S. 364 (1993) for the proposition that Wike is not entitled to relief, again supposedly because Coney is no longer the law. The state makes this flawed argument by asserting that Fretwell stands for the proposition that "the court making prejudice

[12] Under the new rule, the defendant's physical presence is satisfied if the defendant is in the courtroom and has an opportunity to be heard through counsel.

determination may not consider the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of its omission." (SA 56) The state's application of Fretwell to a Coney violation is incorrect.

In Fretwell, the defendant was convicted of felony murder and sentenced to death. One of the aggravating factors used against the defendant was that the murder was committed for pecuniary gain. On appeal, the defendant argued that his sentence should be reversed in light of Collins v. Lockhart, 754 F.2d 258 (which held that a death sentence is unconstitutional if it is based on an aggravating factor that duplicates an element of the underlying felony), but the court denied the argument because his trial counsel failed to object. The defendant then filed a state habeas petition arguing that trial counsel's failure to object amounted to ineffective assistance of counsel. The state supreme court denied the petition because the rule established in Collins was not available at the time of Fretwell's trial. Fretwell then filed a federal habeas petition regarding the same ineffective assistance claim and the federal district court granted the petition holding that counsel was ineffective for failing to make the Collins objection on the theory that although the rule had not been established, it was pending. The state appealed and the federal circuit court affirmed, even though it had two years earlier overruled its decision in Collins in light of the United States Supreme

Court's decision in Lowenfield v. Phelps, 484 U.S. 231 (1988). On petition for writ of certiorari, the United States Supreme Court reversed and held that trial counsel was not ineffective for failing to object to the "double counting" because the case that prohibited the "double counting" was ultimately overturned. Fretwell, 506 U.S. at 372.

Thus, the facts and issue in the Fretwell case are completely different from the facts and issue in the case at bar. As mentioned above, at the time of the defendant's trial in Fretwell, the law that prohibited the use of an aggravating factor that amounted to "double counting" had not yet been accepted by the courts of that state. Furthermore, the case that eventually established the prohibition against "double counting" was ultimately overruled while the defendant's habeas petition was pending. In the case at bar, this Court's decision in Coney was the law in Florida at the time of Wike's third penalty phase trial. Furthermore, Coney has never been overruled, although subsequent decisions from this court have clarified the ruling in Coney. Rule 3.180 was merely amended and this Court has never used that amendment retroactively to bar an otherwise valid Coney claim. In State v. Williams, 731 So. 2d 635 (Fla. 1999), this Court specifically held that the amendment to Rule 3.180 was not to be used retroactively. Thus, the state's argument that the newer rule bars Wike's claim is without merit and the trial court's order denying relief as to this issue should be reversed.

Issue V: As to the state's argument that Wike's cumulative error claim is without merit.

The state circuitously argues that "(b)ecause no error has been shown, it is clear that there is no cumulative error to consider." (SA 57) However, the trial court acknowledged in its order denying the 3.850 motion that there were errors in both Wike's first guilt phase, and third penalty phase trials. Regarding the first trial, it determined that, as to Issue III, there was error in Wike being excluded from a preliminary conference, which was held in chambers after the general qualification of the jury and prior to jury selection. (R 210) In the third trial, as to Issue IV, the trial court also found that it was error for Wike not to be physically present at sidebar conferences in which jurors were challenged. (R 213) The trial court ruled that each of these errors were harmless. However, it reached that conclusion only by considering the errors in isolation from the rest of the trial and, more importantly, without considering how all the errors, collectively, impacted the fairness of the trial.

The two errors determined by the court, when considered in totality with the other serious errors and omissions set out above, establish that the fundamental fairness and reliability of the proceedings were undermined. See Strickland, 466 U.S. at 696.

Wike did not receive effective assistance of counsel when defense counsel allowed his client to be tried in a county that he (defense counsel) knew and

admitted was hostile and predisposed to impose death on his client. Defense counsel's excuse for not seeking a venue change was that Wike told him he "had something up his sleeve,"[13] although he never attempted to ascertain what Wike meant by this. Instead, defense counsel abdicated his responsibility, knowing full well the danger of keeping the trial there and simply allowed Wike to make this important decision. Defense counsel had, at the very least, a professional duty of loyalty to inform Wike of the absolute need to seek a venue change. No effective counsel would simply allow his or her client to make such an important decision without even knowing the client's reasons for what surely was an irrational decision. As Judge Shevin noted in his dissenting opinion in Lanier v. State, 709 So. 2d 112, 120 (Fla. 3d DCA 1998), "(w)hile an attorney's tactical and strategic decisions are entitled to deference, these decisions must originate from a basis of information, not ignorance." There could be nothing strategic in keeping the trial in what Judge Terrell himself found to be an inflamed, hostile environment.

Defense counsel's ineffectiveness regarding venue was exacerbated by his refusal to call witnesses during the first trial whose testimony indicated that Wike could not be the murderer because he was miles away from the victims' home at about the time that the victims were abducted.

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[13] It should be noted that Judge Terrell's testimony regarding his conversations with Wike relating to venue, were not based on his own recollection or memory, but on his notes that were not part of the record.

The fairness and reliability of the outcome was further jeopardized by Wike not being present during many critical stages of the trial. The record is clear and supports Wike's claim in this regard. However, the trial court elected to credit Terrell's testimony that he (Terrell) believed Wike was present at all times during the trial, although he admitted to having no personal knowledge (memory) of Wike's presence. Instead, Terrell concluded that Wike was present because it was his practice to refuse to participate in the trial if the defendant was not there. Additionally, in the third penalty phase trial, Wike was denied the right to be physically present at side bar conferences on seven occasions during the *voir dire*, notwithstanding this Court's decision in Coney. The trial court determined that these errors were harmless because the issues discussed during these sidebar conferences were legal in nature, and even if Wike had been present, he would not have been able to assist counsel anyway. As explained above, the trial court's reasoning is incorrect because it fails to acknowledge that some of the decisions were critical, not at all academically technical, and defense counsel should have consulted with Wike prior to making many of these decisions. Wike was severely prejudiced as a result of his absence from these sidebar conferences and counsel was ineffective for not ensuring his presence, as required by Coney.

CONCLUSION

WHEREFORE, for the reasons set forth in the defendant's Initial Brief and above, the defendant respectfully requests this Honorable Court to reverse the circuit court's order of September 27, 2000, remand the cause to the lower tribunal, order the trial court to grant the defendant's 3.850 motion and reverse all the defendant's judgments and sentences including the death sentence(s), order that the defendant is entitled to a new trial, and grant the defendant such other and further relief as is deemed appropriate in the premises.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by United States mail to Curtis M. French, Esq., Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050 and John Molchan, Esq., Assistant State Attorney, Office of the State Attorney, Post Office Box 645, Milton, Florida 32572, this ____ day of August, 2001.

CERTIFICATE OF COMPLIANCE

Counsel for the appellant hereby certifies that the type used in this brief is Times New Roman 14 point proportionally spaced and that it complies with Florida Rule of Appellate Procedure 9.210(a)(2).

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Baya Harrison, III