

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA, )

Petitioner, )

v. )

CASE NO. 71,399

RALPH EDWARD PENNINGTON, )

Respondent. )

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*M*

RESPONDENT'S ANSWER BRIEF ON THE MERITS

MICHAEL J. WRUBEL  
Law Offices of Michael J. Wrubel, P.A.  
915 Middle River Drive, Suite 206  
Fort Lauderdale, Florida 33304  
(305) 564-8446

Counsel for Respondent

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PRELIMINARY STATEMENT

Petitioner was the appellee (not appellant as stated in his Initial Brief on the Merits in this Court) in the Fourth District Court of Appeal and the prosecution in the trial court. The Respondent was the Appellant (not appellee) in the Fourth District Court of Appeal and the Defendant in the trial court. In this brief, the parties will be referred to as they appear before this Honorable Court of Appeal, except that Petitioner will mainly be referred to as State and Respondent will mainly be referred to as Defendant.

The following symbol will be used:

"R"                      Record on Appeal

All emphasis has been added by the Respondent, unless otherwise indicated.

STATEMENT OF THE CASE

Respondent accepts Petitioner's rendition of the statement of the case.

STATE OF THE FACTS

The Petitioner is relying on the district court's rendition of the facts as set forth in the district court's opinion below. The Respondent accepts those facts, however, the Respondent would add the following important facts not mentioned by the district court below, but included in the record on appeal:

1. Co-Defendant STEFFEY testified during cross-examination by the State that STEFFEY had conversations with the Defendant about the cocaine deal in question (R-404; R-409).

2. The Defendant testified that STEFFEY had asked the Defendant to assist him in a jewelry transaction (R-441), and that his purpose in being there was for security purposes (R-443).

### SUMMARY ARGUMENT

The Fourth District below held that the State failed to prove a prima facie case and that the Defendant should be discharged, notwithstanding the fact that the co-Defendant's testimony filled in the "missing links" of the State's case. The Fourth District believed that its decision conflicted with other courts of appeal in this State, and certified a question to this Court which is posed in such a manner as to imply that the damaging evidence was introduced during the "Defendant's case".

The fact that the co-Defendant as opposed to the Defendant introduced the damaging testimony is highly material to any discussion pertaining to the application of the waiver rule. This is a case of first impression in the State of Florida. In the only cases discovered by Defendant's counsel where the missing links were supplied by the co-Defendant, the courts have consistently held that the waiver rule was inapplicable even if the defendant presented evidence in his own behalf. This Court should not exercise its jurisdiction because the certified question, as posed, is not germane to the issues and true conflict does not exist between the District Courts.

Rule 3.380, Fla.R.Crim.P. specifically states that where the "...evidence is insufficient to warrant a conviction..." on motion of the defendant, the court "... shall enter a judgment of acquittal. A motion for judgment of acquittal is not waived by subsequent introduction of evidence on behalf of the defendant..." These words are clear and unambiguous in their meaning. Based upon the Court's rules of statutory and rule construction, the Court should not involve itself in an exercise of judicial interpretation which is counter to the express intent of the Rule. It is the Court's obligation to declare the intent of the Rule to be exactly as it finds it. McDonald v. Roland, 65 So.2d 12 (Fla. 1953).



Assuming arguendo that the intent of the Rule is not clearly discernible, this Court's rules of construction require it to hold that a defendant cannot waive his right to appellate review of his motion for judgment of acquittal at the close of the State's case by the subsequent introduction of evidence in his own behalf. The Committee Notes to Rule 1.660, Fla.R.Crim.P. (1967)(currently Rule 3.380) reflect that a minority of the Committee wanted the substance of the language changed from Section 918.08, Florida Statutes (1939) "... so that a defendant would waive an erroneous denial of his motion for judgment of acquittal by introducing evidence".

Furthermore, the content of the language utilized in the Rule leaves no doubt as to its intent. Although the Defendant acknowledges that on occasion the word shall may be interpreted in a less strict directory sense, the drafters of the Rule used the words may and shall in the same sentence clearly in an effort to highlight the distinction of the trial court's obligations. The mandatory interpretation which this Court should apply to the word shall is uncontroverted by the fact that the Rule explicitly states that "... a motion for judgment of acquittal is not waived by the subsequent introduction of evidence on behalf of the defendant."

The State's argument that the intent of the Rule should be displaced because of policy considerations is without merit. Where the intention of a rule is clearly discernible, the Court "... may not modify it or shade it, out of any consideration of policy or regard for untoward consequences." McDonald v. State, supra, at page 14.

As noted earlier, the facts of this case are materially distinguishable from other cases in which the waiver rule has been applied. If this Court is inclined to hold that the waiver rule should have viability within the State of

Florida it should not apply the Rule against the Defendant, since our system of criminal justice is suppose to operate in an accusatorial manner with the burden of proof at all times remaining with the State. It is improper for the State to take advantage of the questionable testimony of a co-defendant "... who has the incentive to exculpate himself by inculcating a fellow defendant..." in order to avoid the reversal of a conviction when a motion for judgment of acquittal should have been granted at the close of the State's case. Cephus v. United States, 324 F.2d 893 (D.C. Cir. 1963).

Lastly, at the time of the Defendant's trial, the caselaw within the Fourth District had firmly established the principle that a defendant would not waive his right to appellate review of an erroneously denied motion for judgment of acquittal by thereafter introducing evidence in his own behalf. It would be a violation of the due process clauses of the United States and Florida Constitutions to ex post facto, change, between the time of trial and appeal, the rules of evidence in such a manner that different testimony may be relied upon in order to support a conviction. For all of these reasons, the District Court's ruling below should not be disturbed.

ARGUMENT

POINT I

THIS COURT SHOULD NOT ACCEPT DISCRETIONARY JURISDICTION TO REVIEW THE CERTIFIED QUESTION PRESENTED BY THE DISTRICT COURT BELOW, WHERE THE CERTIFIED QUESTION AS STATED IS NOT GERMANE TO THIS CAUSE AND TO ANSWER SUCH CERTIFIED QUESTION WOULD AMOUNT TO AN ADVISORY OPINION.

The exact language of the certified question to this Court is:

WHERE THE STATE HAS FAILED TO MAKE A PRIMA FACIE CASE AND THE DEFENDANT MOVES FOR A JUDGMENT OF ACQUITTAL WHICH IS DENIED AND THEREAFTER, DURING THE DEFENDANT'S CASE EVIDENCE IS PRESENTED THAT SUPPLIES ESSENTIAL ELEMENTS OF THE STATE'S CASE, IS IT REVERSIBLE ERROR FOR THE TRIAL COURT TO DENY THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL MADE AT THE CONCLUSION OF ALL OF THE EVIDENCE? (emphasis added).

The certified question is worded in such a manner that it does not correctly characterize the material facts of this case. Specifically, in the case sub judice it was the co-defendant and not the Defendant who supplied the missing essential elements of the State's case. (See Appendix for testimony of Defendant PENNINGTON (R 436-453) and co-defendant STEFFEY (R-404); (R-409)). Accordingly, the certified question is not germane to this cause. See Cleveland v. City of Miami, 263 So.2d 573 (Fla. 1972).

Counsel for the State has misstated the essential facts in his Initial Brief to this Court. Specifically the State wrote that:

However, the trial court hearing the evidence denied respondent's initial motion for judgment of acquittal. Subsequently, during the defense, valid admissible evidence was elicited which clearly linked respondent to knowingly participating in the drug transaction, ie. defendant had a conversation regarding the drug transaction. Here, any insufficiency in the State's case against respondent was cured (emphasis added by Petitioner) by subsequent admissible testimony which provided the missing link. Respondent thus waived his right to contest the trial court's denial of his motion for judgment of acquittal by presenting evidence in his defense. This evidence supplied the missing link in the State's case.

Petitioner's Initial Brief on the Merits at page 11.

The State's assertions that "...this evidence supplied the missing link..." is clearly an erroneous misstatement of a critical fact with respect to the issues before this Court.

In the Notice of Intent to Invoke Discretionary Jurisdiction filed with this Court on November 2, 1987, the State alleged that "...The decision also is in direct conflict with decisions of other district courts of appeal on the same point of law." For support of this assertion, the State cites Bullard v. State, 151 So.2d 343 (Fla. 1st DCA 1963); Kozakoff v. State, 104 So.2d 59 (Fla. 2d DCA 1958); Alvarez v. State, 403 So.2d 1005 (Fla. 3d DCA 1981); and Adams v. State, 367 So.2d 635 (Fla. 2d DCA 1979), cert. denied, 376 So.2d 68 (Fla. 1979). All four of these cases are materially distinguishable by the fact that it was the defendant who supplied the "missing link" during the presentation of his defense. The case sub judice is one of first impression since factually, it was the co-Defendant, as opposed to the Defendant, who supplied the missing link.

The Federal Courts have addressed the application of the so-called "waiver rule" on only three occasions where the co-defendant, as opposed to the defendant, supplied the missing link during testimony presented at trial. Cephus v. United States, 324 F.2d 893 (D.C. Cir. 1963); United States v. Belt, 574 F.2d 1234 (5th Cir. 1978); and United States v. Arias-Diaz, 497 F.2d 165 (5th Cir. 1974). All three decisions held that the waiver rule is inapplicable, and that a defendant's motion for a judgment of acquittal made at the close of the Government's case is not waived by evidence introduced during the co-defendant's portion of the trial. Thus, it is apparent that direct conflict does not exist between the Fourth District Court of Appeal and the other district courts of appeal of this State. Accordingly, this Court should not accept jurisdiction on the basis of a direct conflict between the district

courts of appeal.

The Defendant acknowledges that the Fourth District Court of Appeal's certified question can confer this Court with jurisdiction pursuant to Article V, Section 3(b)(4), of the Florida Constitution, if this Court is willing to restate the certified question. Lawton v. Alpine Engineering Products, Inc., 498 So.2d 879 (Fla. 1986); Fisher v. Shenandoah General Construction Co., 498 So.2d 882 (Fla. 1986). Nevertheless, it is submitted that this Court should refrain from such action because of the unique set of facts which make this a case of first impression in conjunction with the legal status of the case.

Acceptance of jurisdiction will create a legal quagmire. The Fourth District Court of Appeal in its opinion specifically acknowledged that the Defendant had raised the issue of denial of his motion for severance, but concluded that it need not address this issue since the case was being reversed. Pennington v. State, 12 F.L.W. 2418 (Fla. 4th DCA, Opinion filed Oct. 14, 1987). Had the motion for severance been granted, the co-Defendant never would have filled in the missing link in the State's case. Therefore, if this Court elects to retain jurisdiction it will be necessary for the parties to brief the severance issue, or in the alternative, for the Fourth District Court of Appeal, upon remand in the event of a reversal, to decide the severance issue.

It is suggested that since the Defendant did not supply the missing link it would probably be more prudent to wait to consider the waiver rule through facts which potentially lend themselves more directly to discussion and application of the waiver rule. (Also see discussion at POINT IV). Accordingly, for all of the above reasons, it is requested that this Court not accept jurisdiction.

POINT II

THE WORDS OF RULE 3.380, FLORIDA RULES OF CRIMINAL PROCEDURE, ARE SO CLEAR AND UNAMBIGUOUS IN THEIR MEANING THAT IT IS NOT APPROPRIATE FOR THIS COURT TO INVOLVE ITSELF IN JUDICIAL INTERPRETATION WHICH WOULD DISPLACE THE EXPRESS INTENT OF THE RULE.

Rule 3.380, Florida Rules of Criminal Procedure, provides:

(a) If, at the close of the evidence for the State or at the close of all the evidence in the cause, the court is of the opinion that the evidence is insufficient to warrant a conviction, it may, and on the motion of the prosecuting attorney or the defendant, shall, enter a judgment of acquittal.

(b) A motion for judgment of acquittal is not waived by subsequent introduction of evidence on behalf of the defendant, but after introduction of evidence by the defendant, the motion for judgment of acquittal must be renewed at the close of all of the evidence. Such motion must fully set forth the grounds upon which it is based.

(c) \* \* \*.

The State is asking this Court to interpret the language of Rule 3.380 to arrive at a result which is opposite from the clear and unambiguous language of the Rule itself. It should initially be noted that when construing court rules, the principles of statutory construction apply. Rowe v. State, 394 So.2d 1059 (Fla. 1st DCA 1981), affirmed 417 So.2d 981 (Fla. 1982); Hoodless v. Jernigan, 51 Fla. 211, 41 So. 194 (1906); Syndicate Properties, Inc. v. Hotel Floridian Company, 94 Fla. 899, 114 So. 441 (1927).

The first rule of statutory construction is that the Courts should avoid interpretation where the statutes meaning is clear and unambiguous. In McDonald v. Roland, 65 So.2d 12 (Fla. 1953), this Court stated that "Where the legislature's intention is clearly discernible, the court's duty is to declare it as it finds it..."

More recently this Court reaffirmed this proposition by stating:

In matters requiring statutory construction, courts always seek to effectuate intent. Where the words selected by the

Legislature are clear and unambiguous, however, judicial interpretation is not appropriate to displace the expressed intent. It is neither the function nor prerogative of the courts to speculate on construction more or less reasonable, when the language conveys an unequivocal meaning. Herida v. Allstate, 358 So.2d 1353, 1355 (Fla. 1978).

In Jenny v. State, 447 So.2d 1351 (Fla. 1984), this Court applied these principles when asked to decide whether an individual could be prosecuted who testified before the State Attorney pursuant to a subpoena, but who did not assert his privilege against self incrimination. Section 914.04, Florida Statutes (1979), in relevant portion provided that "...but no person shall be prosecuted or subjected to any penalty..." This Court stated that:

We will not rewrite the statute. Where a statute is unambiguous and clear upon its face, courts must accord the statute its plain meaning and are not free to construe it otherwise. Carson v. Miller, 370 So.2d 10 (Fla. 1979); Heredia v. Allstate Insurance Co., (supra).  
Jenny v. State, supra, at 1353.

Rule 3.380(a) specifies that on motion of the defendant the court shall enter a judgment of acquittal when the evidence is insufficient. The use of the word shall has a "...normal mandatory meaning and connotation." McDonald v. Roland, supra, at 65. S.R. v. State, 346 So.2d 1018 (Fla. 1977); Holloway v. State, 342 So.2d 966 (Fla. 1977); Tascano v. State, 393 So.2d 540 (Fla. 1980).

In addition to the use of the word shall in Rule 3.380(a), the framers of the Rule did, in fact, choose to commence Rule 3.380(b) with the words "A motion for judgment of acquittal is not waived by subsequent introduction of evidence on behalf of the defendant..." The words "not waived" are clear and unambiguous.

This Court in State v. Basiliere, 353 So.2d 820 (Fla. 1977), cited with approval the United States Supreme Court's definition of "waive" when it said:

The Supreme Court (of the United States), in Barber v. Page, 390 U.S. 719, 725, 88 S.Ct. 1318, 1322, 20 L.Ed.2d 255 (1968), stated:

\* \* \* ...this Court's definition of a waiver [is] "an intentional relinquishment or abandonment of a known right or privilege'. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); Brookhart v. Janis, 384 U.S. 1, 4, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966).

Webster's New Collegiate Dictionary, 1977, defines the word "not" as "...a function word to make negative a group of words or a word."

Thus the unambiguous language of the Rule prohibits an interpretation as the State suggests. The rule is clear and it is this Court's duty to declare the intention of the framers of Rule 3.380 to be that a motion for judgment of acquittal made by the defendant at the close of the State's case is not capable of being waived by subsequent introduction of evidence on behalf of the Defendant if properly preserved by motion at the close of all the evidence.



POINT III

ASSUMING ARGUENDO THAT THE LANGUAGE OF RULE 3.380 IS NOT CLEAR AND UNAMBIGUOUS, THIS COURT'S RULES OF CONSTRUCTION MANDATE THAT A DEFENDANT CANNOT WAIVE HIS MOTION FOR A JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE BY THE SUBSEQUENT INTRODUCTION OF EVIDENCE ON BEHALF OF THE DEFENDANT.

The history of the rule dealing with a motion for a judgment of acquittal in criminal cases is important in determining the proper construction to be placed on Rule 3.380. McDonald v. Roland, supra. The evolution of the Rule can be traced back to 1939 when the Legislature enacted Section 918.08, Florida Statutes (1939). The statute read as follows:

918.08 Directing acquittal of defendant.-

(1) If, at the close of the evidence for the state or at the close of all the evidence in the cause, the court is of the opinion that the evidence is insufficient to warrant a conviction, it may and, on the motion of the prosecuting attorney or the defendant, shall, direct the jury to acquit the defendant.

(2) A motion for directed verdict is not waived by subsequent introduction of evidence on behalf of defendant, but after introduction of evidence by defendant, the motion for directed verdict must be renewed at the close of all the evidence. Such motion must fully set forth the grounds upon which it is based.

The language of the original statute is identical to the rule in its present form, with the one exception. Under the old statute, the trial court directed the jury to acquit the defendant, while under the current rule, the trial court now enters a judgment of acquittal. According to the Committee Notes for Rule 1.660 (1967)(now 3.380):

(a) The existing statutory practice of granting directed verdicts is abolished in favor of the Federal practice of having the judge enter a judgment of acquittal. [See Federal Criminal Rule 29(a).]

Very little is available which illuminates the Legislature's original intent other than the plain language of the statute itself. Counsel for the Defendant was able to obtain and review the 1939 Journals of the House and

Senate when Section 918.08 was passed as part of an all encompassing act relating to Criminal Procedure. Unfortunately, none of the Journal entries make any reference to Section 918.08.

Nevertheless, this Court can and should look to the Committee Notes of the Rules of Criminal Procedure for assistance in ascertaining the intention of the framers of the Rule. Although the Committee Notes of the Florida Rules of Criminal Procedure have not been adopted by this Court, they are considered highly persuasive in arriving at the proper construction to be placed on them. Duggar v. State, 446 So.2d 222 (Fla. 1st DCA 1984).

When this Court first adopted Rule 1.660 in 1967, now referred to as 3.380, the Committee Notes stated that:

(b) A majority of the committee felt that the substance of the existing statute was all right, but a minority felt that the language should be changed so that a defendant would waive an erroneous denial of his motion for judgment of acquittal by introducing evidence. In Re Florida Rules of Criminal Procedure, 196 So.2d 124, 167 (Fla. 1967).

The language of the notes reflect that the Committee was aware of Federal Rule 29(a), dealing with judgments of acquittal, and its interpretation, when it chose not to change the language of the statute and adopted Rule 1.660. The Committee intentionally changed one portion of the old statute, which required the entry of judgments of acquittal instead of directing the jury to acquit the defendant and thereafter cited Federal Rule 29(a).

The language of Committee Note (b) itself specifically states that a minority of the committee "...felt that the language should be changed so that a defendant would waive an erroneous denial of his motion for judgment of acquittal by introducing evidence." In McDonald v. Roland, supra, at page 14, this Court stated that "Rules of statutory construction are the means, resting in logic, by which courts seek to determine legislative intent when that intent is not so plain and obvious as to be conclusive."

It is submitted that several logical conclusions can be drawn from Committee Note (b). First, since the note specifically refers to waiver and implies that it could not be accomplished under the existing language, then the only reasonable conclusion is that the committee specifically addressed the waiver argument now proposed by the State and rejected it. Additionally, since the note reflects that a minority wanted the language changed to facilitate a waiver, then it was the Committee's opinion that a waiver could not be obtained without changing the substance of the existing language of Section 918.08. Thus the intention of the framers of the Rule with respect to the specific issue of waiver is ascertainable.

Although efforts were made by Counsel for the Defendant to obtain the minutes of the committee with respect to Rule 1.660, Fla.R.Crim.P. (1967), according to the Clerk of this Court, Sid J. White, and the Chairman of the sub-Committee, Albert Datz, such notes or minutes do not exist. In the event this Court grants the Defendant's Motion to Supplement in the Record the Affidavit of Chairman of the sub-Committee to Draft Rules of Criminal Procedure, Albert Datz, this Court is requested to consider the affidavit which reflects the clear intent of the drafters of the Rule.

The Defendant maintains that the framers of Rule 1.660 intended that a motion for judgment of acquittal at the close of the State's case not be capable of waiver by the subsequent introduction of evidence on behalf of the Defendant if the prior motion was properly preserved. A basic rule of construction is that the writers of the rules (or statutes) are presumed to know the meaning of the words they utilize and to have a working knowledge of the English language. Florida State Racing Commission v. McLaughlin, 102 So.2d 574 (Fla. 1958).

In S.R. v. State, supra, at page 1019, this Court was confronted with the

issue of how the word shall was to be interpreted when it stated:

It's interpretation depends upon the context in which it is found and the intent of the legislature as expressed in the statute.

This Court went on to note that the statute provided that an untimely motion "...shall be dismissed with prejudice," and stated that "We can think of no better example of a mandatory requirement." Id. at page 199.

Rule 3.380(a) contains the word may in one portion of a sentence and the word shall in another portion of the same sentence. Although this type of situation may not be better than that presented in S.R. v. State, supra, the Defendant suggests that this is at least as equally compelling a reason for the word shall to be interpreted in a mandatory sense. Specifically, the rule uses the word may with respect to the court entertaining a judgment of acquittal at the close of the State's case when the court, without the benefit of a motion, is of the opinion that the evidence is insufficient, but uses the word shall when the issue is presented by motion of one of the parties. Logic dictates that the framers of the Rule and its predecessor statute intended that the use and distinction between the two words may and shall in one sentence would leave no room for doubting that may was to be applied in a directory sense and shall was to be applied in the mandatory sense.

The mandatory interpretation of the word shall is buttressed by the fact that subsection (b) of Rule 3.380 provides that "A motion for judgment of acquittal is not waived by the subsequent introduction of evidence..." Clearly, the writers of the Rule perceived the possibility that a motion for judgment of acquittal might be erroneously denied at the close of the State's case. The inclusion of language in the Rule preventing waiver, therefore, reaffirms the mandatory obligation of the trial court to enter a judgment of acquittal when a proper motion has been made asserting insufficient evidence.

The State urges this Court to adopt the federal waiver rule. However, the Federal Courts were not limited by the language of Federal Rule 29(a) in creating the waiver rule. Federal Rule 29(a), reads in pertinent part:

\* \* \* The court on motion of a defendant or on its own motion shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

It is clear that the language employed by Federal Rule 29(a) and Florida Rule 3.380 are vastly different. The federal rule fails to include any language similar or even implying that "A motion for judgment of acquittal is not waived by subsequent introduction of evidence on behalf of the defendant." The Defendant strongly urges this Court to consider the probability of a waiver rule existing in the Federal Courts if Federal Rule 29 contained language identical to Rule 3.380(b).

In reviewing Rule 3.380, not only is the rule not patterned after the federal rule, (The rule was patterned from Section 918.08, Florida Statutes) but the history of the rule shows an express desire not to adopt or apply a waiver provision. See Committee Notes to Rule 1.660 and the express language of the Rule.

In Palm Beach Newspapers v. Burk, 471 So.2d 571, 580, note 4 (Fla. 4th DCA 1985), the Fourth District Court of Appeal, in interpreting a Florida rule, specifically refused to follow federal decisions interpreting a similar federal rule because "there were significant differences". The Defendant maintains that, since Rule 3.380 has language which specifically advises a Defendant that his motion for judgment of acquittal will not be waived by the subsequent introduction of evidence on his behalf, that the differences between the State

and Federal rule are too significant to rely upon federal interpretation.

The State is requesting this Court to adopt an interpretation of the Rule which provides for waiver of a motion for judgment of acquittal primarily for reasons of policy. The State totally fails to address itself in its initial brief to the language of the Rule and the intent of its framers. Additionally, it should be noted that the texts of all of the opinions where the courts of this State have upheld convictions with possible missing links at the conclusion of the State's case, have failed to even mention Rule 3.380, its predecessors or Section 918.08, Florida Statutes. Roberts v. State, 16 So.2d 435 (Fla. 1944); Bullard v. State, supra; Adams v. State; Kozakoff v. State; Alvarez v. State, supra. Only Adams v. State, supra, at page 637, even acknowledges this fact in a footnote. Nevertheless, it is significant that the footnote states that the Rule and its predecessor statute:

"...implies a result contrary to the decisions in the cases cited above, but is not mentioned in any of them."

The intent of the Rule, and its predecessor statute, clearly indicate that the framers did not want a valid motion for a directed verdict to be waived by the subsequent introduction of evidence on behalf of a defendant. Nevertheless, the State argues that guilty people may go free if this Court fails to avail itself of a waiver rule. As laudable as such a policy may be, it must be rejected. One of the fundamental principles of our Criminal Justice System is that it is suppose to function in an accusatorial not inquisitorial manner. As was stated by Justice Frankfurter in Watts v. State of Illinois, 338 U.S. 49, 54, 69 S.Ct. 1347, 1350 (1949):

Under our system society carries the burden of proving its charge against the accused not out of his own mouth.  
Id., at 1350.

Application of a waiver rule will constitute a serious erosion of the

fundamental constitutional requirement that the burden of proving guilt beyond a reasonable doubt rests with the prosecution. In Adams v. State, 102 So.2d 47 (Fla. 1st DCA 1958), the importance of this concept was clearly recognized when the court stated:

It is only after the state has sustained its initial burden of proof by making out a prima facie case, establishing the guilt of the accused beyond and to the exclusion of every reasonable doubt, that it becomes, procedurally necessary for the accused to determine whether he will present evidence in rebuttal thereof or accept the consequences of his failure to do so. Whether the state has sustained that burden is strictly a question of law.

Of greater importance than attempting to balance the policy interest of the parties is the fact that our rules of construction flatly reject the proposition that policy considerations should override clearly expressed intent. As was stated in McDonald v. Roland, supra:

Where the legislature's intention is clearly discernible, the court's duty is to declare it as it finds it, and may not modify or shade it, out of any consideration of policy or regard for untoward consequences.  
Id., at 14.

Also see Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984) and Fruh v. State Dept. of Health and Rehabilitative Services, 430 So.2d 581, 583 (Fla. 5th DCA 1983).

The Defendant can think of no greater example of a clearly discernible expression of intent than that which is apparent from the language of Rule 3.380(b) with respect to the issue of waiver. "A motion for judgment of acquittal is not waived by subsequent introduction of evidence on behalf of the Defendant..." The intent of the Rule is clear and unambiguous. Therefore, based upon one of our fundamental rules of construction it would be improper for this Court to even consider the State's policy argument in reaching a decision in the case sub judice. In short, after applying this Court's rules of construction to the clear language of Rule 3.380, this Court is required to find that a defendant cannot waive his motion for judgment of acquittal at the

close of the State's case by the subsequent introduction of evidence on behalf of the defendant.



POINT IV

THE WAIVER RULE IS INAPPLICABLE WHEN A CO-DEFENDANT, AS OPPOSED TO A DEFENDANT, SUPPLIES THE MISSING ELEMENTS OF THE STATE'S CASE AFTER A MOTION FOR JUDGMENT OF ACQUITTAL HAS ERRONEOUSLY BEEN DENIED.

It is undisputed that the State failed to prove a prima facie case during its presentation of evidence.

The State did not present sufficient evidence to prove that appellant knowingly participated in the delivery of a controlled substance. The state also failed to present evidence from which the jury could reasonably have concluded that appellant participated in a conspiracy to deliver the cocaine.

Pennington v. State, 12 F.L.W. at 2419.

At the conclusion of the State's case, the co-Defendant, Gary Steffey, took the stand and during his direct testimony, attempted to establish the defense of entrapment (R 388-400). During cross-examination by the State, the missing element of knowledge from a prima facie standpoint was filled in against the Defendant PENNINGTON. (R-404, 409). Thereafter, the Defendant testified and rebutted the co-Defendant's testimony (R 436-453).

The leading case discussing the issue of whether or not the State may rely upon the testimony of a co-defendant in trial in order to perfect a prima facie case is Cephus v. United States, supra. In that case, the co-defendant testified and "...related facts tending to prove his own innocence and appellant's guilt." Id., at page 894.

The Court began its discussion by reaffirming that:

One of the greatest safeguards for the individual under our system of criminal justice is the requirement that the prosecution must establish a prima facie case by its own evidence before the defendant may be put to his defense. \* \* \* Moreover, there is danger that under the waiver rule prosecutions may be pursued with inadequate evidence in the hope that defendants will supply missing evidence. The rule seriously limits the right of the accused to have the prosecution prove a prima facie case before he is put to his defense.

Id., at pages 895-896.

Nevertheless, the court in Cephus specifically addressed itself only to the issue of the application of the waiver rule "...based upon the defendant's response to damaging testimony of a co-defendant testifying on his own behalf." Id., at page 897. Although the District of Columbia Circuit recently adopted a waiver rule, it declined to overrule the limited factual situation of Cephus. United States v. Foster, 783 F.2d 1082, 1086 (D.C. Cir. 1986).

The Cephus court did not believe that the waiver doctrine could fairly be applied in the situation described above and explained itself in the following manner:

A defendant's attempt to explain, impeach, or rebut a co-defendant's testimony does not at all imply that after the defendant made his motion to dismiss, he then re-evaluated the Government's case-in-chief and now thinks it sufficient. It may be both necessary and possible for the defendant to meet the co-defendant's testimony. He should be free to do so without risk that he may be held to have waived his motion.

If the appellant is now deemed to have waived his right to test the sufficiency of the Government's case, the Government will in effect have been able to use the coercive power of the co-defendant's testimony as part of its case-in-chief, even though the Government was prohibited from calling the co-defendant to testify for the prosecution. Although this prohibition arises from the co-defendant's privilege against self-incrimination, its effect excludes from the Government's case-in-chief the testimony of one who has incentive to exculpate himself by inculcating his fellow defendant.

Cephus v. United States, supra, at pages 897-898.

More recently, the Fifth Circuit has held that in a situation, similar to that which existed in Cephus, the waiver rule is inapplicable. U.S. v. Belt, supra. Also see United States v. Arias-Diaz, supra. In Belt, supra, the court stated:

To deny a jointly tried defendant the benefit of his prior motion if he cross-examines and rebuts the codefendant's testimony would erode the defendant's right to require the government to prove every element of the case against him. Such a rule would permit the government in a joint trial, after it has rested its case and after a defendant has tested the sufficiency of the evidence by motion for

judgment of acquittal, to rely on a testifying codefendant to supply missing links in its case.  
Id., at page 1237.

Thus, it is apparent that the State cannot rely upon a co-defendant's testimony during trial in order to cure an erroneously denied motion for judgment of acquittal at the close of the State's case. Additionally, a defendant may present evidence in his own behalf and avoid the application of the waiver rule.

POINT V

ASSUMING ARGUENDO THAT THIS COURT BELIEVES THAT RULE 3.380 PERMITS THE APPLICATION OF THE WAIVER RULE, IT CAN ONLY BE APPLIED PROSPECTIVELY.

If this Court should decide to apply the waiver rule, it should do so prospectively only and not allow this decision to affect the Defendant or any criminal defendant whose motion for judgment of acquittal is denied before the decision is rendered. The waiver rule unfairly requires a defendant not to put on any evidence in his defense if he wishes to preserve the sufficiency of the State's evidence as an issue for appeal. Trial attorneys and defendants within the territorial jurisdiction of the Fourth District Court of Appeal, have been relying upon caselaw directly interpreting Rule 3.380 since 1979 to guide them with respect to whether or not it was prudent to present a defense after a motion for judgment of acquittal has erroneously been denied at the close of the State's case. In Green v. State, 375 So.2d 55 (Fla. 4th DCA 1979), cert. denied, 388 So.2d 1118 (Fla. 1980), a specially concurring opinion acknowledged that the State could not rely upon the testimony of a defendant to justify a conviction on appeal where the evidence was insufficient at the close of the State's case. Thereafter, in Wagner v. State, 421 So.2d 826 (Fla. 4th DCA 1982), a majority of the panel specifically addressed itself to Rule 3.380 in holding that:

The State may not rely upon evidence presented during Wagner's subsequent defense to supply essential missing links in the State's prima facie case to support the denial of the motion for judgment of acquittal.  
Id., at page 827.

Also see Richardson v. State, 488 So.2d 666 (Fla. 4th DCA 1986) and Brooks v. State, 501 So.2d 176 (Fla. 4th DCA 1987). Thus trial counsel was led to believe that within the territorial jurisdiction of the Fourth District Court of Appeal, presentation of evidence after the State had rested would not

preclude appellate review of the sufficiency of the evidence at the close of the State's case.

It would be fundamentally unfair and a violation of the due process clauses of the Fifth Amendment of the United States Constitution and Article I, Section 9 of the Florida Constitution to ex post facto change the rules after a defendant has made his trial strategy choices. Retrospective application of a new rule, eliminating or changing procedural protections for the criminal defendant, immediately raises grave concerns about fairness. Very few cases address this issue, no doubt because constriction of procedural protection for the defendant has been a rare exception rather than a theme of modern legal history, but the salient considerations are not obscure. A defendant prepares his case, within his jurisdiction, in reliance upon settled expectation about how his evidence may be presented and what legal arguments he may make, thus making choices among many options. Changes of procedure between trial and appeal can eliminate the solid ground of a defense, leaving what remains more harmful than helpful and rendering choices that were reasonable at the time suicidal in retrospect. It introduces caprice and surprise into proceedings that in the interests of fairness must reflect reasonableness and predictability.

These considerations are fully applicable to this case. At the close of the State's case, the trial court erroneously denied the Defendant's motion for judgment of acquittal. If the Defendant had known that a waiver rule would be applied he might well have rested at that point to preserve that which in retrospect was clearly a winning issue for appeal.

The Defendant was only entitled to one appeal as a matter of right which was heard by the Fourth District Court of Appeal. It would be grossly unfair to now apply the drastic consequence of reversing his District Court appellate

victory to a trial decision which was without risk under prior settled law within the territorial jurisdiction of the Fourth District. Furthermore, it would be worse than a fiction and absurd to label the Defendant's action a waiver.

A case almost directly on point is United States v. Foster, supra. In that case the District of Columbia Circuit Court of Appeals, in a decision involving Federal Rule 29(a), dealing with motions for judgments of acquittal in Federal Court, decided to adopt the waiver rule after previously having ruled it not applicable. The Court there stated:

We find that it was reasonable--indeed, the only responsible course--for counsel for defendant to proceed on the assumption that he had nothing to lose in the trial below by proceeding with the defendant's evidence. That was the clear law of this circuit, repeated as recently as 1983. (Citation omitted). While it may be true that in light of the great weight of authority there was reason to suspect that we (or the Supreme Court) might change the circuit law, it would certainly not have been prudent for counsel to withhold the defendant's evidence on the slim chance that that would occur in this very case. \* \* \* [T]he rule here is likely to have induced reliance which substantially affected conduct of the defense. To change the ground rules after the trial would not merely deprive the defendant of a benefit he thought he had, but would retroactively convert a thoroughly sensible trial tactic into a disastrous one.  
Id., at page 1086.

The only differences between the Defendant's case and Foster's is that instead of the first level of appellate review overruling itself, this case will have gone procedurally further and the Supreme Court will be reversing an appellate court. Additionally, the extent of authority within this State was not nearly as great as that which existed within the other 10 Circuits of the Federal Courts at the time of Foster's trial for the Defendant to suspect that his case would be the one which would invite application of the waiver rule at the Supreme Court level.

Although the ex post facto clause does not necessarily apply to all rule

changes by courts, in some situations application of the clause is mandated. In United States v. Henson, 486 F.2d 1292 (D.C. Cir. 1973), a new procedural statute was subjected to ex post facto scrutiny. The language of the Court therein reveals the following:

The Supreme Court's initial pronouncement on the ex post facto clause held that an enactment of the Connecticut legislature setting aside a probate decree was not prohibited by the clause because the enactment did not relate to penal matters. Calder v. Bull, 3 U.S. (3 Dall.) 269, 1 L.Ed. 648 (1798). In so limiting the scope of the clause the Court also set forth, through Mr. Justice Chase, what laws it thought to be within the prohibition, and those included:

...Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender...Id. at 273.

The constitutional bar against retrospective limitation of a criminal defendant's appeal rights is well illustrated by State v. Finate, 80 A.2d 341 (N.J. Sup. 1951), where the facts are quite similar to those presented here. In Finate, after defendants appealed from their convictions on the ground that the charges against them were legally defective, the court's rules of procedure were amended so that an appeal waived errors in the charges. The court held that retrospective application of subsequent changes in criminal procedure that force a waiver of the defendant's procedural rights would violate the constitutional guarantee against ex post facto laws, and it gave the rule change only prospective effect.

In summary, should this Court hold that the waiver rule is applicable, it should do so prospectively only and not apply the decision to the Defendant in this case. The Defendant's legal status with respect to the Fourth District is identical to that which Foster had with the District of Columbia Circuit. Retrospective application of the rule to eliminate the Defendant's right to

test the State's evidence because of conduct that could not effect waiver at the time of trial would represent the highest form of unfairness. Accordingly, retrospective application of the waiver rule in this case would violate the due process clause and should not be ordered.