IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. RALPH EDWARD PENNINGTON, Respondent.	)	CASE NO. 71,399

REPLY BRIEF OF PETITIONER ON
ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellee in the Fourth District Court of Appeal and the prosecution in the trial court. The Respondent was the Appellant and the defendant, respectively, in the lower courts.

In the brief, the parties will be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the state.

The following symbols will be used:

"R" Record on Appeal

All Emphasis has been added by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE

Petitioner, again, accepts the statement of the case as stated in Respondent's initial brief on the merits, filed in the Fourth District Court of Appeal.

STATEMENT OF THE FACTS

Petitioner, again, accepts the Fourth District's statement of the facts as enunciated in the Court's Opinion of October 14, 1987. Pennington v. State, 12 F.L.W. 2418 (Fla. 4th DCA filed Oct. 14, 1987). Petitioner would add that the Respondent did not rest his case at the close of the State's case-in-chief, and instead introduced evidence in his own behalf (R 385).

ISSUE INVOLVED

IT IS NOT 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, 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.
(Certified question restated).

SUMMARY OF THE ARGUMENT

The essential issue before this Honorable Court is whether the State may rely upon testimony presented during the Respondent's case which supplies a missing element in the State's prima facie case, in order to sustain a conviction. Fla.R.Crim.P. 3.380(b) does not vitiate the rule of law applied in Adams v. State, 367 So.2d 635 (Fla. 2d DCA 1979), which resolves this issue in the affirmative.

ARGUMENT

IT IS NOT 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, 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. (Certified question restated).

The essential issue before this Honorable Court is whether the State may rely on testimony presented during the Respondent's case to sustain a conviction. The Fourth District Court of Appeal in Pennington v. State, 12 F.L.W. 2418 (Fla. 4th DCA filed Oct. 14, 1987), has answered this question in the negative whereas other district courts of appeal have answered this same question affirmatively. The Fourth District acknowledged, in its written opinion, that its ruling in Pennington v. State was in conflict with the ruling in Adams v. State, 367 So.2d 635 (Fla. 2d DCA 1979).

Respondent fails to recognize this and argues initially, that no legal conflict between Pennington v. State and Adams v. State exists, and therefore, this Court should not accept discretionary jurisdiction. Inferentially, Respondent argues that the only distinction between Pennington and Adams is that Adams involved one defendant and Pennington involved co-defendants. Thus arguing that there is no legal

conflict since the law was applied to dissimilar facts. Petitioner submits that the facts of the cases are very similar and the distinction Respondent makes, with regard to the co-defendants is not valid. Notably, a joint trial involves only one case for the defense, regardless of how many defendants are being tried. See, generally, Rickey v. United States, 242 F.2d 586, (5th Cir. 1957).

Respondent's argument is further flawed as its main premise, that no legal conflict in fact exists between the two cases, has already been judicially determined to be false. Both the Fourth District in its written opinion, Pennington, supra, and this Honorable Court, in ordering briefs on the merits in the instant case, has recognized that a legal conflict does in fact exist between Pennington and Adams.

Again, the facts of Adams and Pennington are similar, it is the rule of law as applied to the facts which is dissimilar. The Second District in Adams held that ". . . where the prosecution fails to introduce evidence of an essential element of a crime, so that there is error in failing to grant . . . [a] judgment of acquittal, that error is not grounds for reversal where the defendant takes the stand and in his testimony supplies the missing link." Adams at 637 (citations omitted). The court then cited, with approval, Bullard v. State, 151 So.2d 343 (Fla. 1st DCA 1963). The Bullard court specifically rejected the argument that evidence presented after denial of a "judgment of" acquittal cannot be considered an appeal in determining whether the denial of the motion was

a reversible error. Adams at 637. In Adams the evidence by the State was insufficient to establish an element of the crime charged. Id. at 637. The defendant, after the close of the State's case, then presented his defense. During that defense testimony was elicited which supplied the missing element.

Similarily, in Pennington, the Fourth District determined that the State tendered insufficient evidence to establish an element of the offenses charged, trafficking in cocaine and conspiracy to traffic in cocaine. The respondent however presented a defense and testimony elicited during the defense supplied the missing element of the State's case. Accordingly, the facts of Adams and Pennington are similar however the Fourth District applied a different rule of law. The Fourth District held that "the State may not rely upon evidence presented during [defendant's] subsequent defense to supply essential missing links in the State's prima facie case . . . ". Pennington at 2419. The court then noted a conflict with Adams and only briefly addressed Florida Rules of Criminal Procedure, 3.380(b).[1]

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[1]Respondent points out in his answer brief on the merits that the Adams Court recognized in a footnote that no Florida decision on this issue has mentioned Fla. R.Crim.P. 3.380. However, Petitioner submits that the Third District in Villageliu v. State, 347 So.2d 445, 447 (Fla. 3rd DCA 1977) cited Rule 3.380 in holding that the trial court did not err in refusing to rule on a defendant's motion for judgment of acquittal after the defendant had introducted evidence in his own behalf.

Respondent's reliance upon Rule 3.380(b) is somewhat misplaced. Although the Fourth District applies Rule 3.380 (b) to furnish the basis for its decision in Pennington, the issue before the court was whether the State may rely on testimony presented during the defendant's case to sustain a conviction. Accordingly, the issue which is before this Court is whether the State may rely on evidence presented during the defendant's case to supply the missing element in the State's case in order to sustain Respondent's conviction. The "waiver rule", discussed in Petitioner's initial brief on the merits, is an illustration of how the Federal Court's resolve this issue.

The United States Court of Appeals, Fifth Circuit, in analyzing the waiver doctrine stated:

> The waiver doctrine is not mere formalism... The doctrine's operative principle is not so much that the defendant offering testimony "waives" his earlier motion but that, if he presents the testimony of himself or of others and asks the jury to evaluate his credibility (and that of his witnesses) against the government's case, he cannot insulate himself from the risk that the evidence will be favorable to the government.

United States v. Belt, 574 F.2d 1234, 1236-1237 (5th Cir.1978) (footnotes omitted) (emphasis supplied). Accordingly, even if this court, arguendo, were to construe Rule 3.380(b) as providing that a defendant who presents a defense does not waive his earlier motion for judgment of acquittal, this would not

vitiate the rule of law that evidence presented during the defendant's case can be relied upon to supply the essential element of the State's case. See, Adams, supra.

Respondent next complains that the waiver rule's policy is inapplicable in a situation where a co-defendant, as opposed to a defendant himself, supplies the missing elements of the State's case. This precise distinction has never been carved out by the courts and is misunderstood by the Respondent. The Fifth and Eleventh Circuits have applied the waiver rule analysis wherever a defendant presents any testimony in his behalf. See, United States v. Contreras, 667 F.2d 976, 980 (11th Cir. 1982); United States v. White, 611 F.2d 531, 536 (5th Cir. 1980). This is so because it is not essential whether the defendant, himself, or another witness which he calls actually testifies and supplies the missing element. What is essential is the fact that the Defendant presented a case and chose not to stand by his assertion that there is insufficient evidence upon which to convict him. The policy of the waiver doctrine is that a defendant cannot on one hand state that he is innocent by the fact that there is insufficient evidence to convict him, and on the other hand present a defense refuting the "insufficient" evidence against him.

Respondent cites Cephus v. United States, 524 F.2d 893 (D.C.Cir. 1963) and United States v. Belt, supra, to support his argument. These cases are distinguishable. In Cephus the Court stated that if the defendant himself rests

at the close of the government's case, but his co-defendant presents evidence the defendant does not waive his motion where he cross-examines his co-defendant. Cephus at 897; Belt at 1237. In the instant case Respondent did not rest at the close of the State's case, instead he presented a defense. Additionally, Cephus and Belt are limited to their facts. Thus where a defendant produces testimony solely to rebut or impeach a co-defendant's evidence he has not waived his motion for judgement of acquittal. Belt at 1237; United States v. Foster, 783 F.2d 1082, 1086 (D.C.Cir. 1986)(expressly limited Cephus to its facts). In our case Respondent decided not to stand by his assertion that there was insufficient evidence upon which to convict him, and instead, chose to present evidence in his defense.

As a last effort, Respondent argues that this Court, should it adhere to the waiver rule policy, do so only prospectively. Petitioner however submits that were this Court to uphold the law of Adams, supra, its holding would not be a change in the law. See, Witt v. State, 465 So.2d 510 (Fla. 1985). In essence, this Court would merely be interpreting pre-existing law and the prospective application of it would not be necessary.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited herein, Petitioner respectfully requests that this Court answer the certified question of the Fourth District in the negative and reverse the Fourth District's holding, thus affirming Respondent's conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner on the Merits has been furnished by United States Mail to: MICHAEL J. WRUBEL, ESQ., Law Offices of Michael J. Wrubel, P.A., 915 Middle River Drive, Suite 206, Fort Lauderdale, Florida 33304 this 12th day of January, 1988.

Of Counsel