SUPREME COURT OF FLORIDA

CASE NO.: 84,060

STARR TYME, INC.

Defendant/Petitioner,

vs.

DAVID COHEN

Plaintiff/Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS[1]

David Cohen was employed as a sales representative for Starr Tyme, Inc. ("Starr Tyme") a wholesale shoe importer. Starr Tyme authorized Cohen's use of a corporate credit card for business purposes and permitted him to charge personal expenses, provided he reimburse the company. In January 1988, Cohen received a $6,234 shoe order from Future Nails, Inc. The shoes were delivered but the order remained unpaid. Starr Tyme then asked Cohen to collect the balance owed. Cohen collected the entire amount due from the purchaser but remitted $2,672.50 to Starr Tyme. Starr Tyme subsequently learned Cohen had been paid in full and had given Future Nails a signed receipt reflecting complete payment. Starr Tyme also discovered that Cohen gave Future Nails two unauthorized discounts which reduced Future Nails' account balance from approximately $6,000 to $5,671.50. Starr Tyme paid Cohen a $655. sales commission but demanded payment of the $3,000 paid by Future Nails. Cohen refused, alleging Starr Tyme withheld payment of his sales commissions and certain business expenses. Cohen advised his employer that he would pay over the remaining $3,000 once Starr Tyme paid him in full for his services. Additionally, two of Cohen's checks written to reimburse Starr Tyme for personal expenses charged on his credit card were returned for insufficient funds. Starr Tyme notified the authorities and the state subsequently charged Cohen with grand theft. (Op. 1-2).

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[1] All references are to the District Court's opinion (Op.), the record on appeal (R.) and the transcript of trial. (T.).

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Pursuant to a negotiated plea, Cohen pled nolo contendere to petit theft, a misdemeanor. The trial court entered a judgment in favor of the state, adjudicated Cohen guilty, ordered him to pay $3000. in restitution, and sentenced him to one day imprisonment with credit for time served. (R. 488-91).

Thereafter Starr Tyme sued Cohen for civil theft, conversion, breach of fiduciary duty, unauthorized use of a credit card and conversion. (R. 276-81)[2] Cohen counterclaimed for breach of contract and sought an accounting of funds allegedly owed him in his capacity as a salesman (R. 297-300).

In the civil action, Starr Tyme moved in limine to preclude Cohen from offering his own testimony on the civil theft claim, pursuant to section 772.14 and 775.089(8), Florida Statutes (1991). Those sections provide:

> 772.14 Estoppel of defendant. -- A final judgment or decree rendered in favor of the state in any criminal proceeding concerning the conduct of the Defendant which forms the basis for any civil cause of action under this chapter, or any criminal proceedings under chapter 895, shall estop the defendant in any action brought pursuant to this chapter as to all matters as to which such judgment or decree would be an estoppel as if the plaintiff had been a party in the criminal action.
>
> 775.089 Restitution.--

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[2] Suit was filed in February 1991 when the jurisdictional limit of the Circuit Court was only $10,000.00. §34.01(c)(3), Fla. Stat. (1991). This action was within such limits because Starr Tyme sought treble damages of $9000. for the theft, plus various sundry sums amounting to approximately $5000.00.

* * *

> (8) The conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent civil proceeding... .

The trial court denied Starr Tyme's motion in limine. Cohen was then permitted to give testimony as to the circumstances surrounding the theft. Based solely on this testimony, the trial court made a finding which was directly contrary to the prior adjudication of guilt. It found that "At no time did David Cohen commit a theft of funds from ... Starr Tyme, Inc. nor convert to his own use any such funds." The court then entered a net final judgment in Cohen's favor from which Starr Tyme appealed to the Fourth District Court of Appeal.

On appeal, the Fourth District affirmed holding that Cohen's nolo plea was a plea of convenience, despite his adjudication of guilt, and held the statutes inapplicable. Starr Tyme, Inc. v. Cohen, 638 So.2d 599 (Fla. 4th DCA 1994). It certified the following issue of great public importance to this Court:

> WHETHER A DEFENDANT WHO PLEADS NOLO CONTENDERE IN A CRIMINAL PROSECUTION IS COLLATERALLY ESTOPPED FROM SEEKING AFFIRMATIVE RELIEF OR DEFENDING A CLAIM IN A SUBSEQUENT CIVIL ACTION UNDER THE PROVISIONS OF SECTIONS 772.14 AND 775.098(8), FLORIDA STATUTES (1991)?

This Court has jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution. Petitioner restates the question as follows:

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WHETHER A DEFENDANT WHO IS ADJUDICATED GUILTY AFTER ENTRY OF JUDGMENT IN FAVOR OF THE STATE PURSUANT TO A PLEA OF NOLO CONTENDERE AND IS THEREBY ORDERED TO MAKE RESTITUTION IS COLLATERALLY ESTOPPED FROM SEEKING AFFIRMATIVE RELIEF OR DEFENDING A CLAIM IN A SUBSEQUENT CIVIL ACTION UNDER THE PROVISIONS OF SECTION 772.14 AND 775.089(8), FLORIDA STATUTES (1991)?

It is respectfully submitted that the rephrased question should be answered in the affirmative, and the decision of the District Court quashed with directions to reverse and order a new trial.[3]

SUMMARY OF THE ARGUMENT

The estoppel provisions contained in §§772.14 and 775.089(8), Fla. Stat. (1991) mandate that where a judgment is rendered in favor of the State in criminal proceedings or where a defendant is "convicted" of an offense, that he be estopped from denying the elements of the same offense in subsequent civil proceedings.

Here a judgment was clearly rendered in favor of the state. This Court has further defined a conviction as an adjudication by the Court of the Defendant's guilt and the pronouncement by the Court of the penalty imposed upon the Defendant. An adjudication of guilt entered upon a nolo plea falls squarely within that definition.

There is no inconsistency between the statutes and §90.410 of the Florida Evidence Code, rendering nolo pleas inadmissible. It

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[3] The Court may consider a rephrased question presented on the face of the decision. See e.g., Dept. of Transportation v. Fortune Federal Savings & Loan, 532 So.2d 1267 (Fla. 1988).

is not the plea that is at issue, but the final judgment in favor of the state and Cohen's adjudication of guilt.

In sum, the District Court's decision should be quashed and the cause remanded with directions to either enter judgment in the petitioner's favor or alternatively grant the petitioner a new trial where the statutory estoppel provisions are enforced.

ARGUMENT

A DEFENDANT WHO IS ADJUDICATED GUILTY AFTER ENTRY OF JUDGMENT IN FAVOR OF THE STATE PURSUANT TO A NOLO CONTENDERE PLEA AND IS ORDERED TO MAKE RESTITUTION SHOULD BE COLLATERALLY ESTOPPED BY STATUTE FROM OFFERING EVIDENCE ON THE SAME CORE FACTS IN SUBSEQUENT CIVIL PROCEEDINGS.

In 1982, Congress passed the "Victim and Witness Protection Act" (Hereinafter the "VWPA") which contained restitution provisions requiring convicted criminals to compensate their victims. 18 U.S.C. §§3579-80 (1982), renumbered 18 U.S.C. §§3663-64 (1987) (effective November 1, 1987). In enacting the VWPA, Congress wanted to ensure that victims of crime would be restored to their prior state of well-being. S.Rep. 97-532, 97th Congress, 2nd Sess. 32, reprinted in 1982 U.S. Code Cong. & Ad. News 2515, 2536. Included among those provisions was 18 U.S.C. §3579, which has now been recodified as 18 U.S.C. §3664 and provides that:

> A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil

> proceeding or State civil proceeding to the extent consistent with State law, brought by the victim.

The legislative history to the statute reflects "the committee's intention in this subsection that a criminal conviction obviates a victim's need to establish a defendant's liability in a civil suit for punitive and/or compensatory damages." S.Rep. No. 97-532, 97th Congress, 2nd Sess. 3G, reprinted in 1982 U.S. Code Cong. & Ad. News 2515 at 2538.

Prior to 1984, Florida law provided that a criminal conviction could not be used as conclusive proof of facts underlying conviction in a civil suit arising from the same facts. Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano, 450 So.2d 843 (Fla. 1984). While a plea of nolo contendere had the same effect as a guilty plea in other instances, it did not estop the defendant from pleading and proving his innocence in a civil case. Chesebrough v. State, 255 So.2d 675 (Fla. 1971). In 1984, however, the Florida legislature enacted section 775.089(8), Fla. Stats., which was almost identical to its federal counterpart. Petitioner contends that sections 775.089(8) and 772.14, a completely different statute, effected a change in existing law which the district court ignored.

In affirming the final judgment, the district court relied upon United States v. Satterfield, 743 F.2d 827, 838 (11th Cir. 1984), cert. denied, 471 U.S. 1117, 105 S.Ct. 2362, 86 L.Ed.2d 262 (1985), and Matter of Raiford, 695 F.2d 521, 523 (11th Cir. 1983).

In Satterfield, the defendants were convicted of kidnapping

after a criminal jury trial and sentenced to varying prison terms. However, the trial court refused to order restitution to the victim under the VWPA, declaring those provisions of the federal statute unconstitutional under the seventh, fifth and fourteenth Amendments. The district court held that 18 U.S.C. §3580 (now section 3664(e)) gave collateral estoppel effect to all of the facts underlying a restitution order, including the victim's damages in a subsequent civil proceeding, (which were adduced at a hearing to consider the financial resources of the defendants, their earning ability and the financial needs of their dependents) and therefore was unconstitutional because it was essentially a civil judgment without trial by jury or due process.

The Eleventh Circuit affirmed the defendants' convictions, but reversed the finding that §3664(e) was unconstitutional. It held that the facts developed for restitution at a criminal sentencing proceeding were irrelevant to and necessarily differed from those developed in a civil trial on damages. The court read the statute more narrowly, barring the defendant from challenging only those facts underlying the criminal offense that were necessarily determined by the jury's verdict. United States v. Satterfield, 743 F.2d at 837-38, n.7. Thus collateral estoppel would not apply to facts supporting the restitution order -- e.g., the extent and nature of the victim's damage or injury -- which were not part of the essential allegations underlying the criminal conviction.

The Court wrote that "subsection 3580(e) does no more than codify the rule in this and other circuits that a criminal

conviction may be used as conclusive proof of some issues in a subsequent civil litigation." Id. at 838. It further noted that facts underlying a criminal conviction would only be given collateral estoppel effect if they were fully and fairly litigated at a criminal trial or stipulated through guilty plea. Id. See also Matter of Raiford, 695 F.2d 521 (11th Cir. 1983) ("A federal criminal defendant wishing to avoid both a trial and any collateral estoppel effect may ask for court permission to plead nolo contendere").

The Fourth District's reliance on these cases as dispositive of the issue presented here is misplaced for several reasons. First, the federal plea rule on which the federal cases are based differs significantly from the state rule. Pursuant to Fed.R.Crim.Proc. 11(b), a defendant is allowed to plead nolo contendere with the consent of the court, which may accept the plea "only after due consideration of the views of the parties and the interest of the public in the effective administration of justice." According to the Notes of the Advisory Committee on the 1974 Amendment, this express consent provision leaves the balancing of competing provisions of fairness and finality to the trial court:

> A defendant who desires to plead nolo contendere will commonly want to avoid pleading guilty because the plea of guilty can be introduced as an admission in subsequent civil litigation. The prosecution may oppose the plea of nolo contendere because it wants a definite resolution of the defendant's guilt or innocence either for correctional purposes or for reasons of subsequent litigation. ABA standards Relating to Pleas of Guilty §1.1(b), Commentary at 16-18 (Approved Draft, 1968).

> Under subdivision (b) of the new rule, the balancing of the interests is left to the trial judge who is mandated to take into account the larger public interest in the effective administration of justice. (emphasis added).

There is no commensurate provision in the state rule. See Fla.R.Crim.Proc. 3.170(b). Both rules contain a provision that if a defendant is adjudged guilty after a nolo plea, he expressly waives his right to a further trial of any kind and must be so advised. Fla.R.Crim.Proc. 3.172(c)(5); Fed.R.Crim.Proc. 11(c)(3).

Second, it is not Cohen's nolo plea at issue pursuant to statute, but his conviction by adjudication of guilt, that constitutes an estoppel bar. Insofar as section 775.089(8) requires a "conviction ... for an offense involving the act giving rise to restitution" this Court has defined "conviction" in other contexts as "the adjudication by the court of the defendant's guilt and the pronouncement by the court of the penalty imposed upon the defendant." State v. Smith, 160 Fla. 288, 34 So.2d 533 (Fla. 1948) (interpreting "convicted" in context of habitual offender statute); Weathers v. State, 56 So.2d 536 (Fla. 1952), cert. denied, 344 U.S. 896, 73 S. Ct. 276, 97 L.Ed. 692 (1952) (interpreting "conviction" of principal for purposes of convicting accessory); Castillo v. State, 590 So.2d 458 (Fla. 3d DCA 1991) (for purposes of statute making it "unlawful" for any person convicted of a felony to possess a firearm, "conviction" means adjudication of guilt).

Third, the language in the entirely separate and independent statute §772.14, is addressed by neither Satterfield nor Raiford. Section 772.14, Fla. Stat. (1991) accords estoppel effect in a

subsequent civil suit to "A final judgment or decree rendered in favor of the State in any criminal proceeding concerning the conduct of the defendant which forms the basis for a civil cause of action under this chapter." The issue before this Court is thus one of interpretation of a statute which is clear on its face. Here, Cohen was adjudicated guilty and a judgment was rendered in favor of the state.[4] Thus, it is not the admissibility of the plea which is in issue, see §90.410, Fla. Stats. (1991) (nolo plea inadmissible), but the final judgment of guilt. A nolo plea together with an adjudication of guilt frequently has collateral consequences. See Florida Bar v. Lancaster, 448 So.2d 1019 (Fla. 1984) (plea plus adjudication sufficient to sustain disciplinary action, but accused has due process right to explain in mitigation of punishment). The general rule adopted by the majority of courts was stated in Sokoloff v. Saxbe, 501 F.2d 571, 574 (2d Cir. 1974):

> Where, as here, a statute (or judicial rule) attaches legal consequences to the fact of a conviction, the majority of courts have held that there is no valid distinction between a conviction upon a plea of nolo contendere and a conviction after guilty plea or trial.

It is thus the fact of conviction not the nolo plea which provides an estoppel if the identical question has been decided in a prior suit which could not have been decided without its resolution. See United States v. Thomas, 709 F.2d 968 (5th Cir. 1983).

Indeed, "compelling arguments" exist to give such convictions

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[4] Satterfield is based on §3664(e), which is the federal counterpart of §775.089(8).

collateral estoppel effect:

> [A] plea of nolo contendere can be made and accepted in a capital case. If a consequence of entering such a plea in a capital case can be the imposition of life in prison or the death penalty, it seems logical to require that a consequence of such a plea can result in the application of the collateral estoppel provisions of the VWPA to any civil proceedings brought by the victim against the defendant.

Sawaya, Nov. 1988 Fla. Bar J., p. 17.[5] See Munnelly v. U.S. Post Office Service, 805 F.2d 295 (11th Cir. 1986) (for other consequences of a conviction entered on a nolo plea, including deportation.)

In addition to promoting judicial economy and protecting litigants from the burden of relitigation, collateral estoppel serves to prevent inconsistent judgments which can undermine the finality and integrity of the judicial system. That is precisely what is at issue here. Cohen was adjudicated guilty for stealing $3000. in criminal court, and ordered to repay the money, only to be found not liable for stealing the identical money in civil court. Query whether the civil judgment at issue undid the order of restitution by effectively requiring the money to be repaid to Cohen? This is precisely the type of inconsistent judgments which undermine the finality and integrity of the judicial system.

Applying the district court's logic, a criminal defendant

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[5] As Judge Learned Hand once observed, the effect of a nolo plea is not governed by logic; if it were, the plea might be abolished "because indubitably the plea does admit the facts and is intended to do so." Pfotzer v. Aqua Systems, Inc., 162 F. 2d 779, 785 (2d Cir. 1947).

could plead nolo to murder charges, be adjudicated guilty, and sentenced to life imprisonment or even death, but would still retain the right to testify in civil wrongful death proceedings that he or she had done "nothing wrong". The clear intent and purpose of section 772.14 is to prevent such erroneous, inconsistent, and illogical results.

CONCLUSION

The district court's decision should be quashed, and the cause remanded with directions to either enter judgment in the petitioner's favor, or alternatively to grant it a new trial with enforcement of the statutory estoppel provisions.

Respectfully submitted,

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By: _____
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(Florida Bar No.: 311200)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 22 day of August, 1994 to:

Joseph A. Murphy, III, Esq.
Suite 200, Courthouse Square Building
200 Southeast 6th Street
Ft. Lauderdale, FL 33301

By: Lauri Ross
LAURI WALDMAN ROSS, ESQ.

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1994

STARR TYME, INC.,

Appellant,

v.

DAVID COHEN,

Appellee.

CASE NO. 92-3683.

L.T. CASE NO. 91-3965 23.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed June 22, 1994

Appeal from the Circuit Court for Broward County; C. Lavon Ward, Judge.

Lauri Waldman Ross of Maland & Ross, Miami, and Bruce J. Benenfeld, Sunrise, for appellant.

Joseph A. Murphy, III, Fort Lauderdale, for appellee.

DELL, C.J.

Appellant contends the trial court erred when it permitted appellee to defend a civil theft action and assert a counterclaim for breach of contract after appellee had been adjudicated guilty in connection with his plea of nolo contendere to a related criminal charge. We find no error and affirm.

David Cohen was employed as a sales representative for Starr Tyme, Inc., a wholesale shoe importer. Starr Tyme authorized Cohen's use of a corporate credit card for business purposes and permitted him to charge personal expenses provided he reimburse the company. In January 1988, Cohen received a $6,234 shoe order from Future Nails, Inc. The shoes were delivered but the order remained unpaid. Starr Tyme then asked

Cohen to collect the balance owed. Cohen collected the entire amount due from the purchaser but remitted $2,671.50 to Starr Tyme. Starr Tyme subsequently learned Cohen had been paid in full and had given Future Nails a signed receipt reflecting complete payment. Starr Tyme also discovered Cohen gave Future Nails two allegedly unauthorized discounts which reduced Future Nails' account balance from approximately $6,000 to $5,671.50. Starr Tyme paid Cohen a $655 sales commission but demanded payment of the $3,000 paid by Future Nails. Cohen refused, alleging Starr Tyme withheld payment of his sales commissions and certain business expenses. Cohen advised his employer he would pay over the remaining $3,000 once Starr Tyme paid him in full for his services. Additionally, two of Cohen's checks written to reimburse Starr Tyme for personal expenses charged on his credit card were returned for insufficient funds. Starr Tyme notified the authorities and the state subsequently charged Cohen with grand theft.

Pursuant to a negotiated plea, Cohen pled nolo contendere to petit theft, a misdemeanor, and agreed to pay restitution to Starr Tyme. Cohen claims he pled nolo contendere in order to avoid the cost of a felony trial. The trial court adjudicated him guilty of petit theft, ordered him to pay $3,000 in restitution and sentenced him to one day imprisonment with credit for time served. Starr Tyme later sued Cohen for civil theft, conversion, breach of fiduciary duty, unauthorized use of a credit card and conversion. Cohen counterclaimed for breach of contract and sought an accounting of funds owed him in his capacity as a salesman.

Starr Tyme moved in limine to preclude Cohen from offering evidence to establish his defense to the civil theft claim. In doing so, it relied on section 772.14, Florida Statutes (1991), Florida's collateral estoppel statute which addresses civil remedies for criminal acts. The trial court denied its motion.

After a nonjury trial the court found, "At no time did David Cohen commit a theft of funds from . . . Starr Tyme, Inc. nor convert to his own use any such funds." The trial court denied Starr Tyme relief other than its claim for unauthorized use of a credit card. Instead, the trial court entered judgment in favor of Cohen on his counterclaim in the amount of $7,989.49. This amount was then offset by certain credit card and other charges leaving Cohen a judgment in the net amount of $4,591.36.

Appellant argues sections 772.14 and 775.089(8), Florida Statutes (1991), preclude appellee's recovery in the civil action. Those sections provide:

> 772.14 Estoppel of defendant. -- A final judgment or decree rendered in favor of the state in any criminal proceeding concerning the conduct of the defendant which forms the basis for a civil cause of action under this chapter, or any criminal proceeding under chapter 895, shall estop the defendant in any action brought pursuant to this chapter as to all matters as to which such judgment or decree would be an estoppel as if the plaintiff had been a party in the criminal action.
>
> 775.089 Restitution. --
>
> . . . .
>
> (8) The conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent civil proceeding. . . .
>
> . . . .

The Supreme Court of Florida has determined a prior plea of nolo contendere is not a "conviction" for purposes of a capital offense sentencing proceeding. Garron v. State, 528 So. 2d 353 (Fla. 1988). In Garron, the court pronounced the legal effect of a nolo plea as follows:

> A nolo plea means "no contest," not "I confess." It simply means that the defendant, for whatever reason, chooses not to contest the charge. He does not plead either guilty or not guilty, and it does not function as such a plea.

Id. at 360. Several district courts have also stated "[a] no contest plea . . . represents only an accused's unwillingness to contest charges against him, and does not constitute an admission of guilt and may not be used as direct evidence of guilt in a civil suit or in an administrative proceeding." Kelly v. Dep't of Health & Rehabilitative Servs., 610 So. 2d 1375, 1377 (Fla. 2d DCA 1992); Wyche v. Fla. Unemployment Appeals Comm'n, 469 So. 2d 184 (Fla. 3d DCA 1985). Section 90.410, Florida Statutes, of the Florida Evidence Code provides, "[e]vidence of a plea of guilty later withdrawn; a plea of nolo contendere; or an offer to plead guilty to a criminal charge or any other crime is inadmissible in any civil or criminal proceeding." (Emphasis supplied). A guilty plea, on the other hand, is deemed an admission by the defendant of all facts contained in the information. See Paterno v. Fernandez, 569 So. 2d 1349 (Fla. 3d DCA 1990), review denied, 581 So. 2d 1309 (Fla. 1991). One who pleads guilty or is found guilty by a jury has been "convicted" under the provisions of section 775.089(8) even in the absence of an adjudication. Smith v. Bartlett, 570 So. 2d 360 (Fla. 5th DCA 1990), review denied, 581 So. 2d 1310 (Fla. 1991).

We agree with the Eleventh Circuit's interpretation of 18 U.S.C. § 3664(e) (1985)[1], the federal counterpart to section 775.089(8), Florida Statutes. The court said that under 18 U.S.C. § 3508(e), later renumbered as § 3664(e), "[t]he facts underlying a criminal offense that gives rise to a restitution order will be given collateral estoppel effect only if they were fully and fairly litigated at the criminal trial, or stipulated through a guilty plea." United States v. Satterfield, 743 F.2d 827, 838 (11th Cir. 1984), cert. denied, 471 U.S. 1117, 105 S. Ct. 2362, 86 L. Ed. 2d 262 (1985). Moreover, the same court observed, "[a] federal criminal defendant wishing to avoid both a trial and any collateral estoppel effects may ask for court permission to plead nolo contendere. [Fed.R.Crim.P. 11(b)] & advisory committee note; Fed.R.Evid. 803(22)." In re Raiford, 695 F.2d 521, 523 (11th Cir. 1983).[2]

Here, appellee elected to plead nolo contendere to avoid defending the felony charge. This resulted in a judgment of conviction being entered without litigation of the underlying facts giving rise to the charge. Application of Satterfield to

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[1] 18 U.S.C. § 3664(e), part of the Victim and Witness Protection Act of 1982, provides:

> A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding to the extent consistent with the State law, brought by the victim.

[2] Appellant relies upon Sokoloff v. Saxbe, 501 F.2d 571 (2d Cir. 1974), Noell v. Bensinger, 586 F.2d 554 (5th Cir. 1978), Pearce v. U.S. Dep't of Justice, DEA, 836 F.2d 1028 (6th Cir. 1988), and Munnelly v. U.S. Postal Serv., 805 F.2d 295 (8th Cir. 1986). We find these decisions unpersuasive.

these facts harmonizes the facial conflict between the Florida Evidence Code and sections 772.14 and 775.089(8). Accordingly, we affirm.

The matter presented in this appeal, however, involves a question of great public importance and is likely to have a great effect on the proper administration of justice throughout the state. Therefore, we certify the following question to the Supreme Court of Florida:

> WHETHER A DEFENDANT WHO PLEADS NOLO CONTENDERE IN A CRIMINAL PROSECUTION IS COLLATERALLY ESTOPPED FROM SEEKING AFFIRMATIVE RELIEF OR DEFENDING A CLAIM IN A SUBSEQUENT CIVIL ACTION UNDER THE PROVISIONS OF SECTIONS 772.14 AND 775.089(8), FLORIDA STATUTES (1991)?

AFFIRMED.

GLICKSTEIN and PARIENTE, JJ., concur.