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IN THE SUPREME COURT OF THE STATE OF FLORIDA

ANDREW J. MORRIS,

Petitioner,

v.

Case No. 90,427
5th DCA No. 95-1230

STATE OF FLORIDA,

Respondent.
______________________________/

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

RESPONDENT'S BRIEF ON JURISDICTION

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SUMMARY OF ARGUMENT

This Court should decline to exercise discretionary jurisdiction because the Fifth District's decision in Morris v. State, 22 Fla. L. Weekly D 738 (Fla. 5th DCA Mar. 21, 1997), holding that a motion for a judgment of acquittal must be renewed at the close of all the evidence to preserve the issue for appeal, does not expressly and directly conflict with this Court's decision in State v. Pennington, 534 So. 2d 393 (Fla. 1988).

ARGUMENT

THE FIFTH DISTRICT'S DECISION IN MORRIS v. STATE, THAT A MOTION FOR A JUDGMENT OF ACQUITTAL MUST BE RENEWED AT THE CLOSE OF ALL THE EVIDENCE TO PRESERVE THE ISSUE FOR APPEAL, DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH STATE V. PENNINGTON, 534 So. 2d 393 (Fla. 1988).

The petitioner contends that this Court has jurisdiction to review this matter pursuant to "Rule 9.030(a)(2)(A)(6), Florida Rules of Appellate Procedure." Petitioner's Brief on Jurisdiction at page 4. This contention is incorrect. Rule 9.030(a)(2)(A)(vi) states:

> (2) *Discretionary Jurisdiction.* The discretionary jurisdiction of the supreme court may be sought to review
>
> (A) decisions of district courts of appeal that
>
> ....
>
> (vi) are certified to be in direct conflict with decisions of other district courts of appeal.

(footnote omitted). Nowhere in its decision does the Fifth District Court of Appeal certify that its decision is in direct conflict with another district court of appeal. Morris v. State, 22 Fla. L. Weekly D 738 (Fla. Mar. 21, 1997)(Appendix A). Thus, it is respectfully submitted that this Court does not have

discretionary jurisdiction to review this case under the rule of appellate procedure cited by the petitioner.

Upon review of the jurisdictional brief, it appears that the petitioner seeks discretionary review with this Court under Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv). Both the constitutional provision and appellate rule permit discretionary review of a district court of appeal decision that "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."

Specifically, the petitioner contends that Morris conflicts with this Court's decision in State v. Pennington, 534 So. 2d 393 (Fla. 1988)(Appendix B). This contention is incorrect. In Morris, the Fifth District Court of Appeal held:

> Morris' claim that the court erred in not granting his motion for judgment of acquittal was not preserved for appeal. Although he properly made the motion at the close of the State's case, he did not renew the motion at the conclusion of his case. Rule 3.380(b), Florida Rules of Criminal Procedure provides:
>
>> 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 the evidence. Such motion must fully

> set forth the grounds upon which it is based.
>
> In State v. Pennington, 534 So. 2d 393 (Fla. 1988), the supreme court noted that the above rule expressly states that a defendant's motion for a judgment of acquittal at the close of the State's case is not waived by the defendant's subsequent introduction of evidence *if properly preserved by a motion at the close of all the evidence.* Therefore, both the rule and Pennington (at least by implication) require that a motion for a judgment of acquittal must be repeated at the close of all the evidence in order to preserve the denial of such motion for review on appeal (italics in original).

Id. In Pennington, this Court, in interpreting Rule 3.380(b), stated that: "The Florida rule expressly states that a defendant's motion for a judgment of acquittal at the close of the State's case is not waived by the subsequent introduction if properly preserved by a motion at the close of all the evidence." (emphasis added) Pennington, 534 So. 2d at 395-396. Thus, it is apparent that no "express and direct conflict" exists with Pennington such that would permit discretionary review. See also Walker v. State, 604 So. 2d 475, 476-477 (Fla. 1992)("This Court has ruled that a defendant's motion for a judgment of acquittal at the close of the State's case is not waived by the defendant's subsequent introduction of evidence if the motion is renewed at the close of all the evidence.")(emphasis added).

In his analysis, the petitioner contends that the Fifth District's decision in Morris approved the Federal "waiver doctrine" which was expressly rejected by this Court in Pennington. This argument is not correct. The Fifth District's decision did not even involve the federal "waiver doctrine.".

The federal "waiver doctrine" provides that "a defendant, on appeal, is not allowed to challenge the denial of a motion for a judgment of acquittal made at the close of the prosecution's case if any deficiency in the government's evidence is subsequently cured during the defense's case." Pennington, 534 So. 2d at 394-395. Stated in another manner, "Under the 'waiver doctrine,' a defendant's decision to present evidence in his behalf following the denial of his motion for a judgment of acquittal made at the conclusion of the Government's case operates as a waiver of his objection to the denial of the motion." Id. at 395 (quoting from United States v. White, 611 F.2d 531, 536 (5th Cir.), cert denied, 446 U.S. 992, 100 S.Ct. 2978, 64 L.Ed.2d 849 (1980).

The Fifth District Court of Appeal never approved the federal "waiver doctrine" as there is nothing in the Fifth District's decision to suggest that the defendant's testimony cured any defects in the State's case. The Fifth District's ruling, consistent with both Rule 3.380(b) and Pennington, is that any

nonfundamental issue regarding the ruling on a motion for a judgment of acquittal is not preserved for appeal if the defendant fails to renew the motion at the close of all the evidence.

The petitioner also contends that discretionary review should be granted because the Morris decision "expressly and directly" conflicts with prior decisions by the same district court of appeal, citing Williams v. State, 511 So. 2d 740 (Fla. 5th DCA 1987) and McGeorge v. State, 386 So. 2d 29 (Fla. 5th DCA 1980). Even if Morris expressly and directly conflicted with the foregoing prior decisions of the Fifth District, this does not provide a jurisdictional basis to permit discretionary review. Review to this Court review is limited to inter-district conflicts, not intra-district conflicts. Intra-district conflicts are resolved by way of an *en banc* proceeding pursuant to Florida Rule of Appellate Procedure 9.331.

In any event, there is no conflict, as the Florida Supreme Court's pronouncement in Pennington superseded or overruled the prior appellate court decisions in the Fifth District Court of Appeal as well as the prior decisions of other district courts of appeal cited to in the petitioner's jurisdictional brief.

Finally, the Fifth District's decision in Morris does not "expressly and directly conflict" with the Fourth District's

decision of "TMM v. State, 567 So. 2d 805 (Fla. 4th DCA 1990) as there is no such decision or case name listed in that volume of the Southern Reporter, Second Series.

The petitioner appears to be referring to the case of In the Interest of T.M.M, 560 So. 2d 805 (Fla. 4th DCA 1990). However, there is no express and direct conflict with Morris. T.M.M. involved a situation wherein the State failed to present a prima facie case, i.e., that the defendant's conduct did not constitute the crime for which he was convicted. In this type of a situation, the error is fundamental error and, therefore, is reviewable on appeal notwithstanding the failure to renew the motion for a judgment of acquittal. See Hornsby v. State, 680 So. 2d 598 (Fla. 2d DCA 1996); Hundley v. State, 613 So. 2d 500 (Fla. 5th DCA 1993). The foregoing analysis also is supported by the fact that in T.M.M., the First District did not even cite to the Florida Supreme Court's opinion in Pennington.

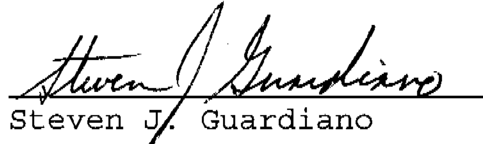
Alternatively, the respondent points out that T.M.M. is something of an anomaly, having been decided over seven years ago and having relied on earlier case law and statutes that have since been overruled or repealed.

CONCLUSION

Based upon the foregoing argument and authority, the State respectfully requests this Honorable Court to decline jurisdiction in this case.

Respectfully submitted,

Robert A. Butterworth
Attorney General



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Respondent's Brief on Jurisdiction has been furnished to M.A. Lucas, Assistant Public Defender, by hand delivery to the Public Defender's Box at the Fifth District Court of Appeal, 300 South Beach Street, Daytona Beach, FL 32118, this 13th day of May, 1997.

Steven J. Guardiano
Senior Assistant Attorney General

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ANDREW J. MORRIS,

Petitioner,

v.

Case No. 90,427
5th DCA Case No. 95-1230

STATE OF FLORIDA,

Respondent.

_______________________________/

APPENDIX TO RESPONDENT'S BRIEF ON JURISDICTION

Appendix	Case
A.	Morris v. State, 22 Fla. L. Weekly D 738 (Fla. 5th DCA Mar. 21, 1997).
B.	State v. Pennington, 534 So. 2d 393 (Fla. 1988).

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(PER CURIAM.) Convicted of the offense of battery on a law enforcement officer, the appellant Julia Macri complains that the trial court failed to instruct the jury on the necessarily lesser included offense of simple battery as requested by defense counsel. The appellant correctly argues that the trial court had no alternative but to give the instruction and the state, in effect, concedes that it was a per se reversible error. *State v. Wimberly*, 498 So. 2d 929 (Fla. 1986); *Nelson v. State*, 665 So. 2d 382 (Fla. 4th DCA 1996); *Crapps v. State*, 566 So. 2d 62 (Fla. 5th DCA 1990).

Accordingly, we vacate the judgement of conviction and remand for a new trial on the charge of battery on a law enforcement officer.

JUDGMENT VACATED; REMANDED. (PETERSON, C.J., SHARP, W., and GOSHORN, JJ., concur.)

* * *

Criminal law—Denial of motion for judgment of acquittal not preserved for appellate review where defendant made motion at the close of state's case, but failed to renew motion at close of all evidence—Sentencing—Guidelines—Error to impose departure sentence based on nonscoreable juvenile record where record on appeal does not reflect that trial court considered the limitation that the departure may be no greater than the sentence that the juvenile would have received had the juvenile record been scored—Error to set public defender's lien without proper notice

ANDREW J. MORRIS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 95-1230. Opinion filed March 21, 1997. Appeal from the Circuit Court for St. Johns County, Robert K. Mathis, Judge. Counsel: James B. Gibson, Public Defender, and M. A. Lucas, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Michael D. Crotty, Assistant Attorney General, Daytona Beach, for Appellee.

(HARRIS, J.) Andrew J. Morris was convicted of the unlawful possession of a controlled substance and resisting arrest without violence. Although his scoresheet reflected a sentence of any non-state incarceration, the judge departed and sentenced Morris to five years incarceration based on his unscored juvenile record. Morris appeals his conviction and his sentence. We affirm the conviction but reverse for a new sentencing.

Morris' claim that the court erred in not granting his motion for judgment of acquittal was not preserved for appeal. Although he properly made the motion at the conclusion of the State's case, he did not renew the motion at the conclusion of his case. Rule 3.380(b), Florida Rules of Criminal Procedure provides:

> 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 the evidence. Such motion must fully set forth the grounds upon which it is based.

In *State v. Pennington,* 534 So. 2d 393 (Fla. 1988), the supreme court noted that the above cited rule expressly states that a defendant's motion for judgment of acquittal at the close of the State's case is not waived by the defendant's subsequent introduction of evidence *if properly preserved by a motion at the close of all the evidence*. Therefore, both the rule and *Pennington* (at least by implication) require that a motion for judgment of acquittal must be repeated at the close of all the evidence in order to preserve the denial of such motion for review on appeal.

We agree with Morris, however, that the trial court erred in sentencing both by not having or providing us with sufficient information and also by setting a Public Defender's lien without proper notice. Although the nonscoreable juvenile record may be considered as a reason for departure, such departure may be no greater than the sentence which the juvenile would have received had the juvenile record been scored. *See Puffinberger v. State,* 581 So. 2d 897 (Fla. 1991). This record does not reflect that the trial court considered what that limitation might be.

We, therefore, affirm the conviction but reverse and remand for a new sentencing in conformity with *Pennington* and for a new determination of the Public Defender's lien after proper notice.

AFFIRMED in part; REVERSED in part and REMANDED. (COBB and SHARP, W., JJ., concur.)

* * *

Torts—Nuisance—Trespass—Real property—Injunctions—Error to grant summary judgment in favor of city based on sovereign immunity in action which alleged that developer of adjacent subdivision, the roads of which were dedicated to the city for public use, and the plans for which were reviewed by city, raised elevation of land so that surface waters accumulated on plaintiff's property, and further alleged that manner in which city was using its property constituted an unlawful diversion of surface water onto private property, representing a continuing trespass and nuisance—Once government takes control of property or decides to build, it has same common law duty as private person to properly maintain and operate property—Trial court incorrectly concluded that action was only a "taking" case—Cause of action can exist against city for injunctive relief or abating a private nuisance, and related damages—Fact that city did not build roads not determinative

MADAY'S WHOLESALE GREENHOUSES, INC. and HENRY G. MADAY, Appellants, v. INDIGO GROUP, INC. and CITY OF PORT ORANGE, Appellees. 5th District. Case No. 96-2458. Opinion filed March 21, 1997. Appeal from the Circuit Court for Volusia County, Richard B. Orfinger, Judge. Counsel: C. David Coffey of Coffey, Tillman & Kalishman, Gainesville, for Appellants. Bruce R. Bogan of Eubanks, Hilyard, Rumbley, Meier and Lengauer, P.A., Orlando, for Appellee City of Port Orange. No Appearance for Appellee, Indigo Group, Inc.

(COBB, J.) The sole issue on this appeal is whether the lower court properly entered summary judgment in favor of the City of Port Orange.

Maday's Wholesale Greenhouses, Inc. (Maday), as plaintiff below, alleged that Indigo Group, Inc. (Indigo), developer of the Woodlake Subdivision (Woodlake), raised the elevation of its land adjacent to Maday's property, thereby altering the natural contours of the land so that surface waters that previously flowed across Woodlake now accumulated on Maday's property. Maday requested damages and injunctive relief. The City of Port Orange is now the "dedicated" owner of the roads in Woodlake.

In response to the complaint, Port Orange argued in its affirmative defenses that it was protected by sovereign immunity and that its action in issuing permits to Indigo was a planning level discretionary decision. It also maintained that it did not design or construct the subdivision, nor did it design or construct the drainage systems or roads. According to Port Orange, its only involvement was to review plans for compliance with local and state regulations and to issue permits. Once the subdivision roads were complete, Port Orange accepted their dedication for public use, but made no material alterations to the roads which would change the elevations or drainage.

Maday filed a memorandum in opposition to Port Orange's subsequent motion for summary judgment arguing that the City did not enjoy sovereign immunity from liability for unreasonable use of the property it now owned, *i.e.*, the subdivision roads. Maday cited *Trianon Park Condominium Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985) for the proposition that when a government takes control of property or an improvement, it has the same common law duty as a private person to properly maintain and operate the property. Maday also cited *Westland Skating Center, Inc. v. Gus Machado Buick, Inc.*, 542 So. 2d 959 (Fla. 1989) to demonstrate that Florida law imposes a duty on adjacent landowners to refrain from interfering with the natural flow of surface water as would cause harm to any adjoining land. In addition, Maday submitted an affidavit from one A. J. "Jay" Brown, a professional engineer, who claimed the "primary reason for the flooding on plaintiff's property results directly from the replacement of fill on the entire Woodlake Subdivision property."

Subsequently, the trial court entered an order granting Port Orange's motion for summary judgment and entered final judgment. The court concluded that a governmental entity enjoys sovereign immunity in circumstances "where the purported failure to maintain is in actuality only the failure to make (or in some cases, the making of) a capital improvement or expenditure."

Based on this, the court indicated that Maday's complaint

***393** 534 So.2d 393

13 Fla. L. Weekly 678

STATE of Florida, Petitioner,
v.
Ralph PENNINGTON, Respondent.

No. 71399.
Supreme Court of Florida.
Nov. 23, 1988.

Defendant was convicted by jury in the Circuit Court, Broward County, M. Daniel Futch, Jr., J., of trafficking in cocaine and conspiracy to traffic in cocaine and he appealed. The District Court of Appeal, 526 So.2d 87, reversed and certified a question to the Supreme Court. The Supreme Court, Overton, J., answered that: the State could not rely upon testimony of codefendant given on cross-examination during defense's case to establish necessary elements of the drug offense where State presented insufficient evidence connecting the defendant to the transaction and the court denied defendant's motion for a judgment of acquittal at the conclusion of the State's case.

Certified question answered in the affirmative and decision approved.

Ehrlich, C.J., concurred in result only.

1. CRIMINAL LAW 901
110 ----
110XX Trial
110XX(L) Waiver and Correction of Irregularities and Errors
110k901 Rulings as to weight and sufficiency of evidence.

Fla. 1988.
Federal waiver rule prohibiting defendant, on appeal, from challenging denial of a motion for judgment of acquittal made at the close of the prosecution's case if any deficiency in the government's evidence is subsequently cured during the defense's case does not apply in state courts. West's F.S.A. RCrP Rule 3.380; Rule 3.660 note (1967).

2. WITNESSES 266.5
410 ----
410III Examination
410III(B) Cross-Examination
410k266.5 Effect of cross-examination or testimony.

Formerly 410k2661/2
Fla. 1988.
State could not rely on codefendant's testimony on cross-examination during defense's case to establish necessary elements of drug offense where state presented insufficient evidence in its case in chief connecting defendant to drug transaction and trial court denied defendant's motion for judgment of acquittal at the conclusion of the State's case.

***394** Robert A. Butterworth, Atty. Gen. and Mardi Levey Cohen, Asst. Atty. Gen., West Palm Beach, for petitioner.

Michael J. Wrubel of the Law Offices of Michael J. Wrubel, P.A., Fort Lauderdale, for respondent.

OVERTON, Justice.

The State of Florida petitions this Court to review Pennington v. State, 526 So.2d 87 (Fla. 4th DCA 1987), in which the Fourth District Court of Appeal held that the respondent had not waived his right to contest the trial court's denial of his motion for judgment of acquittal where a codefendant's testimony supplied the essential elements for the state's prima facie case against the respondent during the defense's case. In reversing the conviction, the district court expressly recognized conflict with Adams v. State, 367 So.2d 635 (Fla. 2d DCA), cert. denied, 376 So.2d 68 (Fla.1979), and certified the following question as one of great public importance:

> 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?

Pennington, 526 So.2d at 90. We have jurisdiction. Art. V, Sec. 3(b)(4), Fla. Const. We find that the federal waiver rule is not applicable under Florida Rule of Criminal Procedure 3.380, answer the question in the affirmative, and approve the district court's decision.

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The relevant facts reflect that the respondent and three codefendants were charged with drug offenses and tried jointly. In establishing the charges against the respondent, the detective indicated that their only contact with each other occurred in a supermarket parking lot where a drug transaction took place. He testified that the respondent stepped out of the driver's seat of a car and told the detective, " 'It's in the white car ... over there.' " Pennington, 526 So.2d at 88. There the detective found another defendant in possession of the contraband. The state presented no other evidence connecting the respondent to the transaction. The trial court denied respondent's motion for a judgment of acquittal at the conclusion of the state's case. During the defense's case, a codefendant, testifying on his own behalf, stated on cross-examination that he had conversations with respondent connecting the respondent to the drug deal. The codefendant's testimony sufficiently established the necessary elements of the offense. The jury convicted the respondent as charged.

The district court, relying on Richardson v. State, 488 So.2d 661 (Fla. 4th DCA 1986), and Wagner v. State, 421 So.2d 826 (Fla. 1st DCA 1982), concluded that the state could not rely upon this evidence to supply the missing link necessary to establish the state's prima facie case. In its opinion, the court concluded that Florida Rule of Criminal Procedure 3.380(b) mandated its decision, but expressly recognized conflict with the Second District's decision in Adams.

The state argues that we should adopt the waiver rule consistent with the Second District's view in Adams and a majority of the federal courts. Under this view, a defendant, on appeal, is not allowed to challenge the denial of a motion for a judgment of acquittal made at the close of the prosecution's case if any deficiency in the government's evidence is subsequently cured during the defense's case. In United *395 States v. White, 611 F.2d 531 (5th Cir.), cert. denied, 446 U.S. 992, 100 S.Ct. 2978, 64 L.Ed.2d 849 (1980), the Fifth Circuit Court of Appeals described the waiver rule's application as follows:

> Under the "waiver doctrine," however, a defendant's decision to present evidence in his behalf following denial of his motion for a judgment of acquittal made at the conclusion of the Government's evidence operates as a waiver of his objection to the denial of his motion. If a defendant fails to renew his motion for judgment of acquittal at the end of all the evidence, the "waiver doctrine" operates to foreclose the issue of sufficiency of the evidence on appeal absent a "manifest miscarriage of justice." If a defendant renews his motion for judgment of acquittal at the end of all the evidence, the "waiver doctrine" requires the reviewing court to examine all the evidence rather than to restrict its examination to the evidence presented in the Government's case-in-chief.

Id. at 536 (citations omitted). Following this reasoning, the Second District Court, in Adams, concluded:

> After appellant moved for judgment of acquittal at the close of the state's case and received an adverse ruling on that motion, he took the stand on his own behalf. On cross-examination he was asked whether he held a permit to possess an explosive and answered that he did not. It has been held in this state 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 motion for directed verdict or judgment of acquittal, that error is not grounds for reversal where the defendant takes the stand and in his testimony supplies the missing element. Roberts v. State, 154 Fla. 36, 16 So.2d 435 (1944); Kozakoff v. State, 104 So.2d 59 (Fla. 2d DCA 1958); Bullard v. State, 151 So.2d 343 (Fla. 1st DCA 1963). In the Bullard case, the court specifically rejected the contention that evidence presented after denial of a motion for directed verdict of acquittal cannot be considered on appeal in determining whether the denial of the motion was reversible error.

367 So.2d at 637 (footnote omitted).

Most federal courts apply this waiver rule. See United States v. Foster, 783 F.2d 1082 (D.C.Cir.1986); United States v. Contreras, 667 F.2d 976 (11th Cir.), cert. denied, 459 U.S. 849, 103 S.Ct. 109, 74 L.Ed.2d 97 (1982); United States v. Perry, 638 F.2d 862 (5th Cir.1981); Benchwick v. United States, 297 F.2d 330 (9th Cir.1961). Federal Rule of Criminal Procedure 29(a) governs motions for judgment of acquittal and states:

> Motions for directed verdict are abolished and

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motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of 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.

Florida Rule of Criminal Procedure 3.380 governs motions for judgment of acquittal and states, in relevant part:

(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 the evidence. Such motion must fully set forth the grounds upon which it is based.

(Emphasis added.) The Florida rule expressly states that a defendant's motion for judgment of acquittal at the close of the ***396** state's case is not waived by the defendant's subsequent introduction of evidence if properly preserved by a motion at the close of all evidence. Further, the committee notes reflect that "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." Fla.R.Crim.P. 3.660 committee notes (1967). (FN*) It is clear that our rule was written to prevent application of the federal waiver rule. Before we can accept the state's position, we must first amend Florida Rule of Criminal Procedure 3.380.

Further, we note that a majority of the jurisdictions utilizing the waiver rule would not apply it under these facts because the respondent in this case did not choose to introduce the unproven elements of the offense in his defense. Here, a codefendant presented the missing-link evidence during that defendant's case. See United States v. Belt, 574 F.2d 1234 (5th Cir.1978); United States v. Lopez, 576 F.2d 840 (10th Cir.1978); United States v. Arias-Diaz, 497 F.2d 165 (5th Cir.1974), cert. denied sub nom. Curbelo-Talvara v. United States, 420 U.S. 1003, 95 S.Ct. 1445, 43 L.Ed.2d 761 (1975); Franklin v. United States, 330 F.2d 205 (D.C.Cir.1963); Cephus v. United States, 324 F.2d 893 (D.C.Cir.1963).

[1][2] Accordingly, we answer the certified question in the affirmative, approve the Fourth District's decision, and disapprove all other conflicting decisions, including Adams; Bullard v. State, 151 So.2d 343 (Fla. 1st DCA), cert. denied, 162 So.2d 904, (Fla.1963), cert. denied, 377 U.S. 992, 84 S.Ct. 1915, 12 L.Ed.2d 1044 (1964); Kozakoff v. State, 104 So.2d 59 (Fla. 2d DCA 1958); and Roberts v. State, 154 Fla. 36, 16 So.2d 435 (1944).

It is so ordered.

McDONALD, SHAW, BARKETT, GRIMES and KOGAN, JJ., concur.

EHRLICH, C.J., concurs in result only with an opinion.

EHRLICH, Chief Justice, concurring in result only.

I agree with the result reached by the majority, that Pennington's conviction should be reversed and this cause remanded to the trial court to enter a judgment of acquittal. However, I do not believe we should answer the question certified by the district court because it is inapposite to the facts of this case. The certified question pertains to evidence presented in the defendant's own case. In the case at bar, however, the crucial evidence was presented not by Pennington, but by a codefendant. Therefore, we should not reach the question of whether the waiver doctrine generally applies in Florida, and we should decline to answer the question certified. As the majority notes, even most courts that apply the waiver doctrine would decline to do so where the unproven elements of the state's case are supplied in a codefendant's case. At 396.

We, of course, have the authority to rephrase the question to make it conform to the facts and to answer it as rephrased. Therefore, I would rephrase

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the question presented in this case as follows: 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 a codefendant's case, evidence is presented that supplies essential elements of the state's case, may that evidence be used to support denial of defendant's renewed motion for judgment of acquittal made at the conclusion of all evidence. I believe that question must be answered in the negative. Whether or not the waiver doctrine generally applies in Florida, it certainly does not apply where the evidence essential to the state's case is supplied by a codefendant. As the Fifth Circuit Court stated in United States v. Belt, 574 F.2d 1234, 1236-37 (5th Cir.1978):

> The waiver doctrine is not mere formalism but is an expression of our adversary ***397.** justice system which requires a defendant to accept the risks of adverse testimony that he introduces.... But the decision of a codefendant to testify and produce witnesses is not subject to the defendant's control like testimony the defendant elects to produce in his own defensive case, nor is such testimony within the government's power to command in a joint trial.

In the case at bar, Pennington's motion for judgment of acquittal made at the close of the state's case should have been granted. In no sense could evidence offered by a codefendant, in his own case, and over which Pennington had no control, be said to constitute a waiver by Pennington. I therefore agree that Pennington's conviction should be reversed, and this cause remanded to the trial court with orders to enter a judgment of acquittal.

FN* This rule was revised in 1972, amended in 1980, and renumbered Florida Rule of Criminal Procedure 3.380.

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