IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 91,161

BRYAN JOSEPH RAYDO,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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RESPONDENT'S ANSWER BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

Respondent, Bryan Joseph Raydo, appellant below, and defendant at trial, shall be referred to as "Respondent" or by name, Petitioner, the State of Florida, shall be referred to as "Petitioner" or the "state."

Citations in this brief to designate record references are **as** follows:

"V1.___" Record on appeal which includes the sentencing transcript (R.13-56).(Cited as "R" in the initial brief before the DCA, and not actually marked as to volume number.

"V2.___" Transcript of proceedings held November 30, 1995, the trial.(Cited **as** "T" in the initial brief before the DCA, and not actually marked as to volume number.

Raydo v. State, 696 So. 2d 1225 (Fla. 1st DCA 1997), issued June 2, 1997; Opinion of the 1st District Court of Appeal in this case, attached as an appendix to this brief.

"SB. " Petitioner's (State's) initial brief on the merits.

All other cites will be self-explanatory or will otherwise be explained.

11. STATEMENT OF THE CASE

Respondent, Bryan Joseph Raydo was charged by information with a robbery which took place November 13, 1994, in Escambia, Florida. (V1. 1, amended V1. 2).

Mr. Raydo was tried by jury on the robbery, found guilty, (V. 11, V. 173), adjudication was withheld, (V2. 48), and he was sentenced to 18 months community control with a special condition of 6 months county jail, (V1. 48), and one year probation consecutive to the community control. (V1. 49, 61-62).

Also included *in* this record is the information for a burglary and petit theft committed on November 18, 1994, (V1. 3), and respondent's "straight up" nolo contendere for that burglary and petit theft -- Circuit Case No: 94-5883. (V1. 7-8). Mr. Raydo was sentenced on the plea at the same time as he was on the robbery: adjudication was withheld and he received the same sentence as in the robbery, to be served concurrent to the robbery. (V1. 48-49, 61-62). Mr. Raydo was then adjudicated guilty of petit theft and sentenced to 60 days jail, also concurrent with jail time in the robbery. (V1. 49, 59).

Court costs and restitution were also ordered, (V1. 49-50), as were alcohol, drug and weapons provisions. (V1. 50). In order to allow Respondent to finish the semester he had just began in

college, the incarceration was delayed until the end of the current semester. (Vl. 53-54).

An appeal was filed (V1. 63), raising the issues of the verdict being contrary to the weight and sufficiency of the evidence and contrary to the law; the trial court's denial of a judgment of acquittal, and imposing incarceration in the county jail. (V1. 65).

The 1st District Court of Appeal (1st DCA), reversed respondent Raydo's conviction, vacated his sentence and granted a new trial. (OPINION ATTACHED). The State moved for certification of the case to this Court, but the motion was denied, The state then moved this Court for discretionary review, which was granted and brings the case to this point.

111. STATEMENT OF THE FACTS

In its statement of facts, Petitioner says: "On May 10th, he admitted his guilt and entered a plea of no contest. (V1, **7-8, 16-17)** ." (SB.l) (italics in ***original).*** This appears to imply some kind of confession and is therefore somewhat misleading. On May 10, 1995, Respondent ***signed his*** *plea* ***of*** no contest, which does indicate in the "factual **basis"** that he admitted braking into the victim's business and stealing meat. (V1. 07) . The second alleged admission cited by the state is after the ***trial*** in question, at sentencing on January 11, 1996, ***when Respondent's*** attorney said, "he does admit his guilt involved in the burglary." (V1. 17).

A. THE FACTS ADDUCED AT TRIAL

Respondent notes that the State's statement of the case and facts fails to address the actual evidence produced at the trial, material which this Court should be aware of in addressing certain aspects of the case before it -- such as harmlessness. Respondent respectfully addresses that below.

The details of the robbery itself are not contested. In the early morning hours of November 13, 1994, the victim, James T. Hartnett, was riding his bicycle home from work. A bottle was thrown at him by a passing car which returned and stopped. Three

or four men,[1] one black the others white got out of the car and attacked Mr. Hartnett beating him until he was stunned, seeing stars. The men then took his backpack with his wallet and credit cards inside, He was left along the road on foot as one of the men rode off on his bicycle and the others left in the car. (V2. 25-30) (V2. 15-17 (state's opening)) (V2. 19, 130 (Defense does not dispute robbery occurred)).

Thus, the only question before the jury was whether or not the respondent, Bryan Joseph Raydo, was involved in the robbery. (V2. 19, 130).

1. THE VICTIM

Officer Mallett showed the victim two photo arrays. (V2. 32). The first photo array, "a couple of sets of six," "Maybe 12" photos,[2] (V2. 32), was shown shortly after the incident and the victim was unable to identify anyone as a suspect. (V2. 32, 89).

> (HARNETT): I could not say any of those individuals were involved. They didn't have any meaning for me at that time.

(V2. 32)

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[1] Officer Mallett testified that Harnett had indicated 3 white males and 1 black male. (V2. 76, 89).

[2] The state's exhibit for that viewing (#1) consisted of only one set of 6 photos. (V2. 9).

Officer Mallett interviewed suspect/state witness Zachary Rogers, who implicated Mr. Raydo and two other persons. (V2. 78-79). The victim was shown another array and while he was unable to actually identify any suspects, he did say that the pictures of Zachary Rogers, Matthew Jones, and the respondent looked "familiar.[3]" (V2. 82). Hartnett testified:

> I could not positively say that any of those individuals in that series of pictures were those that were involved. But there were -- I would look at one, you know, and that picture of that individual to me had some meaning to me like there was -- you know, like I had seen that face before. That was the only thing I could say to [Officer Mallett].

(V2. 33).

When asked to identify Mr. Raydo at trial, victim Harnett was unable to positively do so:

> [E]ven right now I would say that I cannot say positively identify the defendant, but his face definitely looks familiar to me -- but he had longer hair than that. To me his hair was not that short.
>
> Q: Did he take part in beating you?
>
> A: Yes, Sir.

(V2. 34) (Direct Examination).

> Q: Can you from your heart today say that individual there is one of the ones that robbed you?

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[3] Again the witness indicates he was shown 12 or more pictures, yet only a 6 picture array is entered into evidence. (V2. 33) (State's Ex. #2, V1. 10)

A: I cannot positively identify -- not, you know -- now, when I see him and look at the pictures, his -- he definitely --

* * *

A: He looks very familiar to me with longer hair, though.

(V2. 34-35) (Cross Examination).

While Harnett indicated in places that 3 or 4 people came out of the car at him, he also testified that the black male and two white males actually beat and robbed him. (V2. 36, 89). Harnett also thought he saw one person remaining in the **car.** (V2. 28).

2. THE CO-DEFENDANT

The state and the defense both indicated that the entire trial rested on the credibility of the testimony of state's witness Zachary Rogers. (V2. 20, 156, 157). Rogers had plead nolo contendere to the charges prior to testifying in this trial. (V2. 15).

Rogers admitted driving the car which belonged to his "roommate" Annie Marie Leith.[4] (V2. 59, 63) . Rogers testified

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[4] At sentencing, Officer Mallett indicated that during his investigation he **had** been told by Darnell Richardson, another of the attackers, that Ms. Leith was present at the time of the attack. Mallett spoke to her by telephone and she "denied emphatically that she was present during the robbery,." (V1. 34-35, 37), so he "never asked her to come to the station for an

that Ms. Leith was in the car with him and the other men at the time of the robbery, (V2. 60), even though prior to trial he had not indicated she was present to either the prosecutor, the investigating officer or the defense. (V2. 60-61, 86). While he admitted that prior to trial he had told them he "didn't know" if she was in the car, he considered it not to be a lie, because he just didn't tell that she was there. (V2. 60). His justification was that 'at the time [he] wasn't cooperating with the police."[5] (V2. 61).

While on the witness stand, Rogers gave other details about the period just prior to the incident which apparently had not been revealed before, such as stating that he had been going to a Catherine Ray's house.[6] (V2. 64). He indicated that despite speaking with Mallett twice, the prosecutor three times and **at** least once with defense counsel, the new information had never come out because:

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interview or anything like that." (V1. 37). It **was** also noted at sentencing that Ms. Leith's father was a Mobile, AL police officer who had been a "victim of a crime involving Zachary Rogers." (V1. 23).

[5] Mr. Rogers also testified that he has changed because he has "found the Lord." (V2. 58).

[6] Officer Mallet admitted on the stand that Rogers "had mentioned a girl named Cathy that lived near there. He didn't indicate that they were going to her house." (V2. 87).

> I was never questioned. I have never been questioned this deeply before. I have never had the opportunity to actually get in depth, in detail.

(V2. 64).

Rogers admitted using drugs including cocaine, amphetamines, crystal meth, heroin, marijuana, and alcohol just prior to the incident, and having "shot up" with heroin just "hours before." (V2. 65-66). Yet, he still drove the vehicle. (V2. 66).

Rogers testified that while he knew the respondent struck the victim he never actually SAW the respondent strike the victim. (V2. 72).

Rogers also testified that he remained in the car and did not take part in the actual robbery. (V2. 66-67, 73). When asked by the defense how Hartnett could have recognized Rogers if Rogers never left the car, Officer Mallett indicated that Rogers was leaning out the window yelling when the car went by the first time. (V2. 90). This "fact" appears to have been unknown to the defense, though no objection was raised. (V2. 90).

3. INVESTIGATING OFFICER

In addition to the facts cited above as issuing from Officer Mallett, he testified that Darnell Richardson,[7] (V2. 84-85), said

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[7] Witness Rogers repeatedly indicated that this individual was Darnell Robinson, not Richardson, (V2. 46, 53, 59, 65), having identified "Darnell" from a photo array. (V2. 85).

it was he, not Rogers who stayed in the car and did not participate. (V2. 92). Mallett also said -- that Richardson said that -- the respondent was involved in the robbery. (V2. 92) (No objection).

Officer Mallett indicated that he had first shown a six person photo array to the victim, and that the array included two persons he thought may have been involved. (V2. 77). Mallett did not indicate if the respondent was included in that array, but noted that the victim was unable to identify anyone in the array.' (V2. 77, 89). Mallett testified that he went back later with another 6 photo array containing photos of Rogers, the respondent, and alleged co-defendant, Matthew Jones.[9] (V2. 79-80). While the victim picked out the three alleged co-defendants, he told the officer that he was not positive. (V2. 82-83).

The state rested, (V2. 93), and a motion for judgment of acquittal was made on lack of a prima facie case. (V2. 94). Denied. (V2. 95).

4. THE DEFENSE

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[8] The victim indicated he was shown two sets of 6 photos (12) at that time. (V2. 32).

[9] The victim indicated he was shown a group of 12 or more photographs. (V2. 33).

As Mr. Rogers' veracity was in question, the defense wished to introduce testimony by Matthew Jones that while Rogers indicated Jones arm was broken the night of the incident, it in fact was not broken until later. (V2. 95-99). *On proffer,* the defense asked when the arm was broken was told it was apparently 5 days after this incident. (V2. 99-100). The state considered this to be opening the door on the witnesses involvement in this and other crimes, and despite being told -- thus knowing that the witness would refuse to testify as such under the 5th Amendment, it proceeded with that line of questions. (V2. 101-106). This line of defense was then abandoned.

B. THE INSTANT ISSUE BEFORE THIS COURT....

Mr. Raydo wished to take the stand in his defense but a question arose as to "prior convictions." His only "prior" being that which is included in this record -- the burglary and petit theft to which he had only plead no context. While the plea agreement DOES NOT INDICATE whether this is a nolo contendere plea (V1. 7-8), the judgment and sentence is clear that the respondent "pleaded nolo contendere to 2) Petit Theft" (V1. 59) and 'ENTERED A PLEA OF NOLO CONTENDERE TO (94-5883)" (V1. 61). Furthermore, in its brief before this Court, the state admits

that Respondent plead nolo contendere to the charges and had neither been adjudicated nor sentenced. (SB. 1-2) .

At trial the state argued that it should be allowed to inquire forcing Mr. Raydo to admit that he had entered the plea and was awaiting sentencing. (V2. 107).

The Petitioner and Respondent are in substantial agreement as to the relevant facts from this point forward, starting with the ruling of the trial court found in Petitioner's brief at SB.1 and continuing through to SB.3.

IV. SUMMARY OF THE ARGUMENT

The trial court prevented the respondent from presenting a defense when it agreed to allow the state to inquire into a nolo contendere plea which had been made, but upon which the respondent had been neither adjudicated or sentenced. In so doing, the trial court erred as to the law, and as such, abused its discretion.

Such inquiry would have forced the respondent to admit a conviction which did not exist in direct contravention of case law and statutes. The facts at trial indicate that the case against Mr. Raydo was considerably less than overwhelming. There were questions as to identification, weight and sufficiency of the evidence, and discovery violations, which reduced this trial to a swearing match. The 1st DCA's opinion should be allowed to stand and a new trial granted, because "after a careful review of the record on appeal, [this Court will be] unable to conclude beyond a reasonable doubt that this error was harmless." Raydo, at 1227.

The Florida Legislature has given statutory guidance that is directly contrary to the state's position in this **case,** and the 1st DCA relied on this statute, which is the law of Florida. This Court should affirm said opinion. The 1st DCA simply applied the

statutory law of Florida, it did not interpret it, and its decision is not in conflict with that of any other District Court in Florida.

Finally, Petitioner has not produced a single cite which indicates a nolo plea, without a conviction, may be used to impeach a defendant.

V. ARGUMENT

ISSUE

(A) MUST THE DEFENDANT TESTIFY AT TRIAL TO PRESERVE FOR APPEAL A CLAIM OF IMPROPER IMPEACHMENT WITH A PRIOR CONVICTION?

(B) IF THE ANSWER IS NO, DID THE TRIAL COURT ABUSE ITS DISCRETION IN RULING THAT RAYDO COULD BE IMPEACHED WITH HIS PRIOR NOLO CONTENDERE PLEA IN THE EVENT HE TESTIFIED AT TRIAL?

OR RESTATED:

WAS THE TRIAL COURT'S RULING ALLOWING THE STATE TO INQUIRE OF THE DEFENDANT OF CRIMES TO WHICH HE HAS PLEAD NO CONTEST AND NOT BEEN ADJUDICATED GUILTY CLEAR ERROR NOT SUBJECT TO THE HARMLESS ERROR RULE.

Respondent, Bryan Joseph Raydo, hereby explicitly adopts the per curiam opinion of the 1st District Court of Appeal, wherein his conviction was reversed and his sentenced vacated. Raydo v. State, 696 So. 2d 1225 (Fla. 1st DCA 1997), is a well reasoned and correct statement of law which should be affirmed by this court.

Mr. Raydo was prevented from presenting a defense where the trial court erroneously applied the laws of Florida, and ruled that the state could inquire into crimes in which a plea of no contest (nolo contendere) had been entered, but in which no adjudication or conviction existed. The trial court indicated it would allow the following question concerning said plea:

> haven't you entered a plea and are you awaiting sentencing on a felony, and if so, how many?

(V2. 116).

Based on that ruling, Mr. Raydo did not testify.

The 1st District's well reasoned opinion should stand because it rests on state grounds. Article 1, Section 16 of the Florida Constitution 'guarantees one accused of a crime the right to be heard in person, by counsel, or both." (Raydo at 1226, n.2)(citing Hall v. Oakley, 409 So. 2d 93 (Fla. 1st DCA) rev. denied, 419 So. 2d 1200 (Fla. 1982). Furthermore, as the 1st District noted, Section 90.410, Fla. Stat. provides that evidence of a plea of nolo contendere is inadmissable in any civil or criminal proceeding. Raydo, 1226. The 1st District took its language directly from the Florida Statutes:

> Evidence of a plea of guilty, later withdrawn; ***a plea of nolo contendere;*** or an offer to plead guilty or nolo contendere to the crime charged or any other crime is ***inadmissible in any civil or criminal proceeding.*** Evidence of statements made in connection with any of the pleas or offers is inadmissible[10], except when such statements are offered in a prosecution under chapter 837.

Sect. 90.410 Fla. Stat. (1996)[11] ***(emphasis*** added).

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[10] In light of this part of the statute, consider the state's allegation that Petitioner ***admitted*** his guilt when he signed his plea of no contest. (V1, 7-8, 16-17)."(SB.1) ***(italics in original).***

[11] This case does **not** involve chap. 837 (perjury).

The state argues that the language of this statute is susceptible of a different interpretation, that a plea of nolo contendere may be used to impeach a defendant -- despite a lack of adjudication of guilt or conviction. (SB.16-17). However, the Florida Legislature has given clear guidance as to interpretation of the statutes. Section 775.021, Rules of Construction, clearly and explicitly states:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

Sect. 775.021(1) Fla. Stat. (1996).

When Sect. 90.410, Fla. Sat., is construed most favorably to the accused, it is clear that the trial court clearly erred as to the law, in allowing the state to inquire as to Mr. Raydo's plea, and Petitioner's arguments to the contrary are unsupported by any statute or case law.

Petitioner has chosen to address preservation, arguing that because Mr. Raydo did not testify, this error was not preserved. In its argument, the state relies almost entirely on Federal law, specifically Luce v. United States, 469 U.S. 38 (1984), and its progeny. In fact, it gives this Court 15 footnotes, of citations from various states, generally agreeing with Luce, but all based on a Federal case -- which the State of Florida has not adopted.

Hall v. Oakley, 409 So. 2d 93 (Fla. 1st DCA) rev. denied, 419 So. 2d 1200 (Fla. 1982) is the law in Florida, not Luce. Raydo, 1226, As the 1st District noted in Raydo, at 1226 (n.1), Hall is premised primarily on State constitutional grounds. Additionally, the instant case involves impeachment with a nolo plea where there has been no adjudication -- no conviction, and Luce itself concerns impeachment with a criminal **conviction.**

Petitioner argues that two Florida District courts "were persuaded to follow Luce." (SB.lO). It cites Parker v. St-ate, 563 so. 2d 1130, 1131-1132 (Fla. 5th DCA 1990); cause dismissed, 569 so. 2d 1280 (Fla. 1990), (SB. 10-11), but Parker is not on point. Like Raydo, Parker chose not to take the stand, and like Raydo, the trial court deferred both adjudication and sentencing until after the trial which was the subject of review. Parker at 1131. However, there is a critical difference in the cases -- Parker had been found *guilty* by a jury in a *felony* trial a few months earlier -- and impeachment with a guilty verdict is allowed under Sect. 90.410, Fla. Statutes. Raydo on the other hand had only entered a plea of nolo contendere -- there was no adjudication of guilt -- a totally different circumstance, which Sect. 90.410 says may not be used for impeachment. Thus, there is no conflict between the decision in Parker and either Hall or Raydo.

Petitioner also cites State v. Wilson, 509 So.2d 1281, 1292 (Fla. 3d DCA 1987) as being another Florida District Court which has adopted Luce. But, Wilson is also distinguishable. Wilson was a stabbing case which involved a ruling in limine allowing impeachment of character witnesses with a specific act of violence -- Wilson's stabbing of his wife twenty-five years prior to the trial. Here, it is the impeachment of the defendant himself, not character witnesses, which is in question. Here, the case involves a nolo plea without adjudication and Wilson involved a specific, similar act of violence. The court in Wilson noted that "[a] unanimous court in Luce held that a ruling on such an in limine motion is reviewable only where the character witnesses testify. Luce, 469 U.S. at 43." The instant case does concern not a character witness, but the defendant himself, thus, Wilson is not on point and there is no conflict between the decision in Wilson and either Hall or Raydo.

The crux of the state's Luce argument is that where the defendant does not testify, there is no harm. However, here, the case was based on the testimony of one alleged co-defendant, and had Mr. Raydo not been coerced into not testifying, it would have been a simple swearing match. Thus, knowledge of what was presented at trial is necessary in deciding this issue.

From the facts of the case above, it is shown that the victim could not positively identify Mr. Raydo as one of the robbers, (V2. 32-35), and even the victim's tentative identification was tainted by poor police practices. (V2. 9, 32, 33, 76, 79-80, 89). Officer Mallett made a hearsay statement that Darnell Richardson (Robinson?) had also implicated the respondent, but of course, Darnell was not present to testify and the record shows he lied about having not taken part in the crime. (V1. 34-35) (V2. 84-85, 92). Additionally, the state violated discovery by not telling defense that another person may have been in the robber's car, (V1. 35-35, V2. 60-61, 86), and independent witness, the daughter of a law enforcement officer. (V1.23, 37)

By a fair reading of the facts of the case, and as admitted by the prosecution and defense counsel, the testimony of Zachary Rogers -- his credibility -- was the state's entire case. There was no other evidence -- it was a swearing match, or would have been had Mr. Raydo testified. And had the trial court not ruled in error as to whether the state could inquire into this non-conviction, Petitioner Raydo would have taken the stand. As he said at sentencing:

> If I had taken the stand at the time, I had something to say about every single thing that went on in the

trial and huge disagreements with everything. And I think it was very obvious that Mr. Rogers was lying.

(V1. 20).

I really wish I had taken the stand. I had a lot to say at the time ...

(V1. 25).

This was not harmless error. The case was certainly not so strong that conviction was certain. We do not know what the respondent may have said on the stand. In the absence of knowledge of what the petitioner's testimony would have been this Court is unable to apply a test for harmless error. See e.g., Hall v. Oakley, 409 So.2d 93 (Fla. 1st DCA) Pet. for rev. denied, 419 So.2d 1200 (Fla. 1982).

Hall is very similar as to the issue of preservation. In Hall, the state had rested, the defendant indicated he wished to testify, and the state indicated it intended to impeach with a 5 year old petit theft conviction. The defendant's motion in limine was denied and the defendant elected not to take the stand. Id. at 95. The 1st District deemed that the action of the trial court in Hall deprived Hall of the right to be heard -- a fundamental Constitutional right, and as such no further preservation was needed. Id. at 95.

petitioner's argument may be interpreted as Respondent having waived his right to be heard by inaction. Such a waiver of a Constitutional right by inaction or by a silent record flies in the face of opinions of the United Supreme Court. In addressing a similar waiver (of speedy trial) the Court held:

> Such an approach, by presuming waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights. The Court has defined waiver as 'an intentional relinquishment or abandonment of a know right or privilege." (Cite omitted). Courts should "indulge every reasonable presumption against waiver," (Cite omitted) and they should not presume acquiescence in the loss of fundamental rights." (Cite omitted).
>
> * * *
>
> The Court has ruled similarly with respect to waiver of other rights designed to protect the accused. (Cites omitted) .

Barker v. Wingo, 407 U.S. 514, 525 (1972).

There was no waiver of the right to be heard, because Respondent refused to testify under circumstances foisted upon him by the trial court when it erred at law.

The trial court based its holding on Barber v. State, 413 So. 2d 482 (Fla. 2nd DCA 1982) where the court held that a finding of guilt by a jury was a sufficient conviction -- for the purposes of impeachment -- despite the lack of adjudication. Id. 484. The court found "no significant difference in probative value between a jury's finding of guilt and the entry of judgment

thereon." Id. **at 923.** This case is different in that, unlike Barber, Mr. Raydo was NOT ***found guilty by a jury,*** but had entered a no contest plea, and had not been adjudicated. A plea of nolo contendere is a vastly different legal animal than **a** conviction by a jury.

The trial court and Petitioner also mistakenly rely on the 1st District's decision in Johnson v. State, 449 So.2d 921 (Fla. 1st DCA 1984), again a case which **was** not on point. (SB.15). Johnson involved a WITNESS who had plead **guilty** to a felony and a jury instruction regarding whether or not the witness should be considered convicted. Here, the question is whether the state can even inquire of the DEFENDANT. In Johnson, the 1st District found 'no logical reason why a different result should obtain because the defendant pled guilty instead of being found guilty." Id. at 923. Johnson involved a ***witness*** who had pled **guilty** to **a** felony and here it is respondent who pled nolo contendere -- he did not plea guilty. There is a vast difference between **a** guilty (GUILTY) plea and a nolo contendere (NO CONTEST) plea and the reasoning in Johnson does not apply.

Finally, the trial court in Johnson had "agreed to be bound by the state's recommendation" of 3 to 10 years incarceration in prison. Adjudication of guilt could not be withheld. Here, unlike

Johnson, not only could adjudication be withheld -- it *was* withheld on the burglary. (R.48-49, 61-62). Petitioner's reliance on Johnson is obviously misplaced.

Petitioner next argues that Section 90.610, Fla. Stat. (1995) should be applied to this case -- but Sect, 90.610 is not applicable by its own terms. In Petitioner's brief highlighted in bold and underlined twice, are words which appear four times and which are the essence of why 90.610 is inapplicable: "convicted," **"convicted,"** and "conviction," "conviction." (SB.14-15) Here, there was no conviction at the time of trial.

Petitioner further alleges that the Florida Legislature amended subsection 90.610(1), Fla. Stat. to substantially conform to the language of Federal Rule of Evidence 609. It then quotes the "Advisory Committee Note to Fed. R. Evi. 609 [which] provides: As a means of impeachment, evidence of **conviction** of crime is significant only because it stands as proof of the commission of the underlying criminal act.'" (SB.15) **(emphasis** added). While this may be true, Mr. Raydo was not *convicted* of a crime at the time of trial. A plea of nolo contendere standing alone, without adjudication or sentence is certainly not **a** "conviction." Thus, if anything, the state's argument (SB.15), supports the holding of the 1st District.

But, the state continues, stating that "Section 90.610 does not require a *judgment* of conviction; a guilty plea or a verdict of guilty will suffice." SB.15 (emphasis in original). Again, this is a nolo plea, not a guilty plea, not a verdict of guilty, and not even a judgment of guilt based on a nolo plea. Had Florida Legislature had meant to include nolo pleas in Sect. 90.610, it certainly would have done so -- but it did not.

Guilty pleas, verdicts of guilt, and adjudication of guilt are evidence of guilt -- but a person entering a nolo "plea does not admit guilt, [and] evidence of the plea is irrelevant unless that plea results in a conviction, *i.e.*, an adjudication of guilt." Ravdo, at 1226 (citing Charles W. Ehrhardt, Florida Evidence, t . 410.1 at p.234 (1997)).

Petitioner continues by indicating that section '90.410 was intended 'to be an adaption of Rule 410 of the Federal Rules of Evidence."' (SB.16-17)(citation omitted). It then cites 1 McCormick on Evidence Sect. 42, at 149 n.35 (John W. Strong ed., 4th ed. 1992) as supporting its position that a naked nolo plea can be used for impeachment. (SB.17). Petitioner's error is blatantly highlighted where McCormick repeatedly states that a *conviction* is necessary to impeach when based on a nolo plea. The cite not only fails to support Petitioner, it supports Mr.

Raydo's position that a conviction is required for **a nolo** plea to be used for impeachment. Consider the actual words which Petitioner has cited from McCormick:

> Rule 609(a) . . . is silent as to whether **convictions** based on pleas of nolo contendere may be used to impeach. However, **Rule 410 renders a nolo plea inadmissible against the person making it, and Rule 803(22) recognizes a hearsay exception for felony convictions except on nolo pleas.** While these two provisions might be thought to preclude the use of nolo **convictions** to impeach, convincing countervailing factors strongly indicate a contrary answer. If Rule 410 applies to **convictions** used to impeach, then a nolo **conviction** could be used to impeach any witness except a party.
>
> * * *
>
> The conclusion must be that 609 is a complete scheme; since it does not exclude nolo **convictions,** they are usable.
>
> *** * ***
>
> In the Preliminary Draft of 1969, no mention of nolo **convictions** appeared. In the 1971 Draft they were expressly excluded However, the reference to nolo **convictions** did not appear in the Rules adopted by the Supreme Court in 1972 or in the Rules as enacted by the Congress. Since to a large extent the Congress drew on the 1971 Draft in making changes in the Rules, it must be assumed that it was aware that at one stage **convictions** based on nolo pleas were expressly excluded from the Rule,

(SB.17) **(bold** emphasis added)

As the 1st District Court opined in Raydo:

> ... the State has not furnished us with any citation to nor are we aware of any authority that would allow impeachment on the basis of **a** nolo contendere plea that has not yet become a conviction.

Id. **at 1226.**

Even Petitioner's reliance upon Luce is misplaced. Luce does not support Petitioner's position -- it too, infers the necessity of a ***conviction.*** As the Court in Luce held:

> to raise and preserve for review the claim of improper impeachment **with a prior conviction, a** defendant must testify.

Luce, 469 U.S. at 43.

Thus, **a** pattern is apparent in every case and every statute cited: ***Convictions*** based on nolo pleas are admissible for impeachment purposes -- naked nolo pleas, standing alone without adjudication of guilt are not **convictions and** are absolutely not admissible for impeachment purposes.

Bryan Joseph Raydo's Constitutional right to be heard was wrongly curtailed by the trial court. Such curtailment is fundamental error which is not subject to review for harmlessness. Even were it reviewable, since the respondent did not take the stand it is impossible to ascertain what he would have said. This, combined with the fact that the evidence of guilt was not overwhelming indicates the error was not harmless. We do not know what the respondent may have said on the stand. In the absence of knowledge of what the petitioner's testimony would

have been this Court is unable to apply a test for harmless error. See e.g., Hall, at 97.

Finally, petitioner concludes that in a new trial, the trial court would rule that Raydo could be impeached with a prior conviction. (SB.17-18). While this may be true, it is no reason not to grant a new trial. As Mr. Raydo said at sentencing: "I had something to say about every single thing that went on in the trial and huge disagreements with everything." (V1. 20). "I really wish I had taken the stand. I had a lot to say at the time..." (V1. 25). As seen from the statement of facts, the trial will again most likely be a swearing match between the state's convicted witness and Mr. Raydo. However, as also noted in the statement of facts, there were facts not released to the defense in discovery, such as the presence of a law enforcement officer's daughter in the robber's car -- her car -- facts which alone, may change the outcome of the trial. Those facts combined with Mr. Raydo's testimony certainly could cause a different outcome at trial.

The 1st District deemed that the action of the trial court in Hall deprived Hall of the right to be heard -- a fundamental Constitutional right, and as such no further preservation was needed. Id. At 95. There was error and the state is unable to

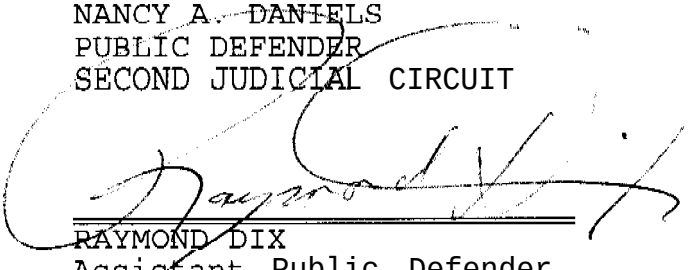
show beyond a reasonable doubt that the error was harmless. State v. DiGuilio, 491 so. 2d 1129 (Fla. 1986). Reversal of Mr. Raydo's conviction and sentence and remand for a new trial is required. Hall. Affirmation of the decision of the 1st District Court of Appeal in this case is proper.

VI. CONCLUSION

Respondent, Bryan Joseph Raydo, respectfully urges this Court to affirm the holding of the 1st District Court of Appeal in his case, affirming reversal of his conviction and sentence, affirming the order remanding the case to the trial court for a new trial, and granting such other relief as this Court **may** deem just and equitable.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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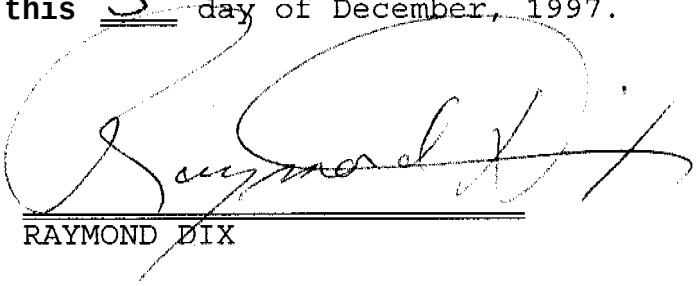
ATTORNEY FOR Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Carolyn J. Mosley, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, this 3 day of December, 1997.



RAYMOND DIX

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 91,161

BRYAN JOSEPH RAYDO,

Respondent.

APPENDIX

Ravdo v. State, 696 So. 2d 1225 (Fla. 1st DCA 1997)

Bryan Joseph RAYDO, Appellant,

v.

STATE of Florida, Appellee.

No. 96–370.

District Court of Appeal of Florida, First District.

June 2, 1997.

Following jury trial before the Circuit Court, Escambia County, Kim Skievaski, J., defendant was convicted of robbery and placed on community control. Defendant appealed. The District Court of Appeal held that: (1) defendant was not required to testify in order to challenge ruling on admissibility of impeachment evidence; (2) nolo contendere plea in another case on which defendant had not yet been sentenced was not conviction which could be used for impeachment purposes; and (3) error in ruling that nolo contendere plea could be used for impeachment was not harmless.

Reversed and remanded.

1. **Criminal Law -1036.2**

Defendant is not required to testify in order to challenge ruling on admissibility of impeachment evidence. West's F.S.A. Const. Art. 1, § 16.

2. Witnesses ⇐345(6)

Nolo contendere plea on which defendant had not yet been sentenced was not "conviction" for purposes of statute permitting impeachment on basis of prior convictions. West's F.S.A. § 90.610(1).

See publication **Words and Phrases for other** judicial constructions and definitions.

3. Witnesses ⇐345(6)

Defendant could not be impeached on basis of nolo contendere plea in another case that had not yet become a conviction. West's F.S.A. §§ 90.410. **90.6100).**

4. Criminal Law ⇐1170.5(1)

Error occurring when trial court announced it would permit state to impeach defendant's testimony with plea of nolo contendere that had not yet become conviction, which led defendant to decide not to testify, was not harmless. West's F.S.A. § 90.610(1).

Nancy A Daniels, Public Defender; Raymond Dix, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, Carolyn J. Mosley, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Appellant Joseph Raydo was charged with and, after a jury trial, convicted of robbery in Escambia County, Florida. At sentencing adjudication was withheld, and Raydo was placed on a period of community control to be followed by a probationary term. He also received a six-month county jail sentence as a special condition of community control.

Appellant raises three issues on appeal, one of which we find to be meritorious and to require reversal and remand for a new trial.

During appellant's trial, after the State presented its case, Raydo's counsel advised the court that Raydo would be the first defense witness called. At that time, the State sought a ruling from the trial court on whether Raydo could be impeached with evidence that he had entered nolo *contendere* pleas to a felony and a misdemeanor in an unrelated case even though he had not yet been sentenced in that case. Over defense objection, the trial court ruled that

> [t]he State can inquire, but the form of the question isn't it [sic] or haven't you entered a plea and are you awaiting sentencing on a felony, and if so, how many? And two. And that will be the way that it will be asked, as opposed to being convicted. I think that's the appropriate way to ask the question. Mr. Ellis [defense counsell, you will be allowed to inquire and to ask and establish that he has not been convicted of a crime and there is a possibility that the court can withhold adjudication. Nonetheless, until [sic] the authority of *Barber* vs. *State* which was approved by *Johnson vs.*

State, I am going to allow the State to do that.

With that ruling, Raydo's counsel announced the defense would present no witnesses. The appellant was subsequently sentenced as noted above, and this appeal ensued.

[1] Before addressing the merits of appellant's impeachment argument, we must first deal with whether this issue was preserved for appellate review. While conceding that under the law as it obtains in this District,' an accused is not required to testify in order to challenge a ruling on the admissibility of impeachment evidence, the State nonetheless argues that the federal cases upon which ***Hall*** relied have been overruled by *Luce* ***v. United States, 469*** U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984), which case held to the contrary. We do not find *Luce* to be persuasive authority for such proposition because we read *Hall* ***as*** being premised primarily on State constitutional grounds.[2] Consequently, we can see no compelling reason to reconsider our holding in *Hall*, and we decline the State's invitation to do so.

[2] Within the context of the undisputed facts in the case at bar, the first question presented is what constitutes a "conviction" for purposes of impeachment under section 90.610(1), Florida Statutes? The trial court based its impeachment ruling on ***Barber v. State,*** 413 So.2d 482 (Fla. 2d DCA 1982), and ***Johnson*** *v.* ***State,*** 449 So.2d 921 (Fla. 1st DCA), *review* ***denied*** 458 So.2d 274 (Fla. 1984).

In ***Barber, the State was*** allowed, over objection, to elicit from the testifying defendant that, a week earlier, a jury had found him guilty of a felony although he had not yet been adjudicated and sentenced. The Second District found "no significant difference in probative value between the jury's finding of guilt and the entry of a judgment thereon" and held that the jury's guilty verdict constituted a prior conviction for purposes of impeachment. 413 So.2d at 484.

In *Johnson*, this court could perceive "no logical reason why a different result [permitting a testifying defendant to be impeached on the fmding of guilt by a jury] should obtain because the defendant pled guilty instead of being found guilty." 449 So.2d at 923.

Thus, under ***Barber*** and ***Johnson,*** a defendant need not have been adjudicated guilty and sentenced before being impeached.

131 In the instant case, Raydo had neither pleaded guilty nor been found guilty by a jury of the offenses which formed the basis of the State's proposed impeachment evidence. He had entered pleas of nolo contendere to the offenses charged in the unrelated case and was awaiting disposition on those pleas.

Section 90.410, Florida Statutes, provides in pertinent part that "[e]vidence of a plea of nolo contendere . . , is inadmissable in any civil or criminal proceeding." The statute further provides that no statement made in connection with any such plea is admissible except when such statements are made in connection with a perjury prosecution.

[4] Testifying defendants or witnesses in criminal cases may only be impeached by convictions, ie., adjudications of guilt or the functional equivalent of such adjudication, *i.e.*, pleas of guilty or findings of guilt by a jury. Here, the State has not furnished us with any citation to nor are we aware of any authority that would allow impeachment on the basis of a nolo contendere plea that has not yet become a conviction. Because one entering such a plea does not admit guilt, evidence of the plea is irrelevant unless that plea results in a conviction, ie., an adjudication of guilt. See Charles W. Ehrhardt, Florida Evidence § 410.1, at p. 234 (1997). Accordingly, the form of question the trial

1. ***Hall v. Oakley, 409*** So.2d 93, 95 (Fla. 1st DCA), review denied 419 So.2d 1200 (Fla.1982) ("Inasmuch as the right to testify on one's behalf is a fundamental right, (see ***Moore*** *v. State,* [276 So.2d 504 (Fla. 4th DCA 1973)]), we conclude against requiring that a defendant must testify in order to preserve his or her argument for appellate review."), *disapproved on other grounds, State v. Page* 449 So.2d *813* (Fla.1984).

2. Article 1 section 16 of the Florida Constitution guarantees one accused of a crime the right to be heard in person, by counsel, or both. *Hall,* 409 So.2d at 95.

court below indicated it clearly erroneous, and aft of the record on appeal, conclude beyond a reason error was harmless. *See* 491 So.2d 1129 (Fla.1986).

Reversed and remande

MINER, ALLEN and concur.

KEY NUMBER

HARDY, Ap

v.

STATE of Flori

No. 95-0

District Court of Ap Second Di

June 4, 9

Defendant was conv Court, Pinellas County, of armed robbery and was taken. The Distri held that defendant suffi right to participate in p tion so that his absence peremptory challenges wa

Affirmed in part an

1. Criminal Law ⇐636(3)

Rationale behind r presence during peremp sure that defendant ha ceedings and is always counsel for input into cri ing case, and thus, purp fulfilled, and trial cour waiver results in harmle dant actively participates ty to consult with couns tion.

court below indicated it would permit is clearly erroneous, and after a careful review of the record on appeal, we are unable to conclude beyond a reasonable doubt that this error was harmless. See *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986).

Reversed and remanded for new trial.

MINER, ALLEN and MICKLE, JJ., concur.

HARDY, Appellant,

v.

STATE of Florida, Appellee.

No. 95-04903.

District Court of Appeal of Florida, Second District.

June 4, 1997.

Defendant was convicted in the Circuit Court, Pinellas County, Charles W. Cope, J., of armed robbery and grand theft. Appeal was taken. The District Court of Appeal held that defendant sufficiently exercised his right to participate in process of jury selection so that his absence from bench during peremptory challenges was harmless error.

Affirmed in part and remanded in part.

1. Criminal Law ⇐636(3), 1166.14

Rationale behind requiring defendant's presence during peremptory strikes is to ensure that defendant has knowledge of proceedings and is always readily available to counsel for input into critical decisions affecting case, and thus, purpose of requirement is fulfilled, and trial court's failure to obtain waiver results in harmless error, when defendant actively participates in or has opportunity to consult with counsel during jury selection.

2. Criminal Law ⇐1166.14

Defendant sufficiently exercised his right to participate in process of jury selection so that his absence from bench during peremptory challenges was harmless error; defense counsel was permitted to consult with defendant concerning jury selection before counsel accepted panel and their discussion resulted in one venireperson's excusal.

James Marion Moorman, Public Defender, Bartow, and Carol J.Y. Wilson, Assistant Public Defender, Clearwater, for Appellant.

Robert A Butterworth, Attorney General, Tallahassee, and Stephen D. Ake, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Henry Hardy appeals his convictions and sentences for armed robbery and grand theft. Hardy alleges, pursuant to *Coney v. State*, 653 So.2d 1009 (Fla.), cert. *denied*, — U.S. —, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995), that the trial court erred by failing to obtain a valid waiver of his right to be present at the bench where defense counsel exercised peremptory challenges. He also points out that the trial court inadvertently entered two judgments on the grand theft charge. We affirm appellant's convictions on the *Coney* issue, but remand to strike one of the grand theft judgments.

[1] The court in *Coney* indicated the trial court should make an affirmative inquiry in order to determine whether a criminal defendant makes a knowing and intelligent waiver of his right to be physically present at the immediate site where peremptory challenges are exercised. As Justice Overton explained in his concurring opinion in *Coney*, the rationale behind requiring the defendant's presence during peremptory strikes is to ensure that the defendant has knowledge of the proceedings and is always readily available to counsel for input into critical decisions affecting the case. 653 So.2d at 1015. When a defendant actively participates in or has the opportunity to consult with counsel during jury selection, this purpose is fulfilled, and a trial court's failure to obtain a *Coney* waiver