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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

BRYAN JOSEPH RAYDO,

Respondent.

CASE NO. 91,161

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, State of Florida, will be referred to as "State," and respondent, Bryan Joseph Raydo, will be referred to by his last name. The two-volume record on appeal will be referred to by volume and page number.

STATEMENT OF THE CASE AND FACTS

On January 4, 1995, in Case No. 94-5883, Bryan Raydo was charged with burglary of a structure and petit theft. (V1, 3-4) On May 10th, he admitted his guilt and entered a plea of no contest. (V1, 7-8, 16-17) Sentencing was postponed until disposition of the case discussed in the next paragraph. (V2, 115)

On November 2nd, by amended information in Case No. 94-5696, Raydo was charged with robbery. (V1, 2) He was tried by a jury in November for this offense. (V2, 1) After the State had rested its case and outside the jury's presence (V2, 93-94), defense counsel informed the judge that Raydo was going to testify (V2, 107). The prosecutor then disclosed his intention to impeach Raydo with his no contest plea to burglary and petit theft. (V2, 107) Defense counsel objected. (V2, 107, 113-115) After a lengthy discussion (V2, 107-115), the judge ruled the impeachment evidence admissible in the event Raydo testified:

> What I'm going to rule, the State can inquire, but the form of the question isn't it or haven't you entered a plea and are you awaiting sentencing on a felony, and if so, how many? Two. And that will be the way it will be asked, as opposed to being convicted. I think that's the appropriate way to ask the question. Mr.

> Ellis, you will be allowed to inquire and to ask and establish that he has not been convicted of the 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'm going to'allow the State to do that. (V2, 115-116)

Defense counsel then announced that he would not put on any witnesses. (V2, 116) The judge inquired of Raydo whether he wanted to testify, and he answered in the negative. (V2, 117) The defense rested without presenting any witnesses. (V2, 188) The jury found Raydo guilty as charged. (V1, 11; V2, 173)

In January 1996, Raydo was sentenced simultaneously in both cases. (V1, 13) During the sentencing hearing, Raydo told the judge that he did not testify at trial because "the issue of the burglary would have come out." (V1, 20) The trial court withheld adjudication of guilt on both felonies and placed Raydo on 18 months' community control, with the condition that he serve six months in jail, followed by one year on probation, sentences to run concurrently. (V1, 48-49) It adjudicated Raydo guilty of the petit theft and sentenced him to a 60-day concurrent jail sentence. (V1, 49)

On appeal to the First District, Raydo argued that the trial court's in limine ruling admitting impeachment evidence was erroneous. The State responded, in relevant part, that Raydo's failure to testify precluded review of this issue. The First District disagreed with the State, specifically stating:

> 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 (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. [footnotes omitted]

Raydo v. State, 696 So.2d 1225, 1226 (Fla. 1st DCA 1997).

The First District then proceeded to address the merits of the issue, ultimately reaching the conclusion that the trial court's ruling was "clearly erroneous" and that the error was harmful:

> Testifying defendants or witnesses in criminal cases may only be impeached by convictions, i.e., 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, i.e., an adjudication of guilt. See Charles W. Ehrhardt, Florida Evidence § 410.1, at p. 234 (1997) Accordingly, the form of question the trial 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. GiGuilio,* 491 So.2d 1129 (Fla. 1986).

The State sought discretionary review in this Court relating to the procedural issue based on two grounds (express and direct conflict and construction of state constitution). The case has been accepted for review.

SUMMARY OF ARGUMENT

(A) During the course of a trial, the judge is asked to make numerous rulings to either exclude or admit evidence. If the judge excludes evidence, and the evidence is proffered, the adverse ruling will be reviewed on appeal in the event of a conviction. If this were not the law, this type of ruling, as a practical matter, would be unreviewable. The other type of ruling is one that admits evidence, which falls into two categories: (a) the evidence is actually admitted at trial; or (b) the evidence is not admitted at trial.

Errors in both types of rulings (excluding/admitting evidence) are subject to the harmless error test, which focuses upon the likely impact of the error on the jury's evaluation of the case. If the erroneous ruling is one admitting evidence, but the evidence was not admitted at trial (for whatever reason), the error has to be harmless beyond all doubt. The jury was not entitled to know about the evidence, and it in fact did not know about it.

Criminal defendants have tried to circumvent the above restriction on needless litigation by creating in effect a new harmless error test: An erroneous evidentiary ruling admitting evidence, which is not actually admitted, is, nevertheless, reversible error when the defendant does not testify. The ruling at issue in the instant case was the trial court's ruling admitting impeachment evidence in the event the defendant testified. As it turned out, the defendant did not testify, and

thus, the jury never learned of the evidence. The First District, nevertheless, granted the defendant a new trial.

A criminal defendant is entitled to a fair trial, but not a perfect one, and though the defendant has a right to justice, so does the government. It is for these policy reasons that the harmless error test exists. The First District's decision emasculates that test.

Every ruling of the trial court has the potential for influencing trial strategy. However, "influence" does not equate with "prohibition." Unless the trial court tells the defendant he cannot testify, it has not prevented him from doing so.

(B) The trial court did not abuse its discretion in ruling that the challenged impeachment evidence was admissible. Fox impeachment purposes, the critical fact is that the witness committed a criminal act. A "conviction" is proof of that act. Section 90.610(1), Florida Statutes does not require a *judgment* of conviction. According to case law, a guilty plea or a guilty verdict will suffice, and by analogy, so will a nolo contendere plea. By pleading no contest, the defendant admits the State can prove its case against him.

If error occurred, it was harmless. Raydo has since been convicted of petit theft. Therefore, on remand, the trial judge again would rule this evidence admissible, and if Raydo testified, the jury would learn that not only was he a law violator, but that he had committed a crime involving dishonesty, evidence from which it could infer he was unworthy of belief.

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?

(A) Raydo was charged with robbery. During the trial, the prosecutor asked for a ruling on the admissibility of impeachment evidence in the event Raydo testified. The motion was granted and the impeachment evidence ruled admissible. Raydo chose not to testify because of the adverse ruling (V1, 20; V2, 114-115), but he did not proffer his testimony. The jury found him guilty without ever learning of his criminal record.

The question whether the defendant must testify to preserve for appeal his claim of improper impeachment with a prior conviction has been addressed by the United States Supreme Court in Luce v. United States, 469 U.S. 38 (1984). The defendant there was charged with conspiracy and a drug offense. During his trial, he moved for a ruling to exclude evidence of a prior conviction in the event he testified, but he did not say he would testify if the judge ruled in his favor. The judge ruled the evidence admissible but indicated that the nature and scope of the defendant's testimony could affect the court's specific rulings. The defendant neither testified nor proffered his testimony.

The Court unanimously held that "to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." 469 U.S. at 43. It expressed concern about (1) the possibility that the trial court's *in limine* ruling permitting impeachment by a prior conviction would change when the case unfolded; (2) the possibility that the prosecutor would not actually use the impeachment evidence, either because of what was said on direct examination or because the prosecutor would not want to risk jeopardizing a strong case with questionable impeachment evidence; (3) the possibility that an adverse ruling would not be the real, or sole, motivation for the defendant's refusal to testify; and (4) the possibility that if improper impeachment evidence was admitted, the error would be harmless. As to the last two concerns, the Court stated:

> Were *in limine* rulings under Rule 609(a) reviewable on appeal, almost any error would result in the windfall of automatic reversal; the appellate court could not logically term "harmless" an error that presumptively kept the defendant from testifying. Requiring that a defendant testify in order to preserve Rule 609(a) claims will enable the reviewing court to determine the impact any erroneous impeachment may have had in light of the record as a whole; it will also tend to discourage making such motions solely to "plant" reversible error in the event of conviction. Id., at 42.

The Court rejected a proffer of testimony as a solution to the problem, stating: "Requiring a defendant to make a proffer of testimony is no answer; his trial testimony could, for any number of reasons, differ from the proffer." Id., at 41 n 5. The State would add that in order to make the record complete, all of the State's rebuttal evidence would have to be proffered as well. In

the case at bar, the possibility existed that had Raydo testified, Darnell Richardson would have testified in rebuttal.

Most state supreme courts that have considered the issue have followed Luce. See, e.g., Alaska v. Wickham, 796 P.2d 1354, 1357 (Alaska 1990)[1]; Arizona v. Conner, 786 P. 2d 948, 953 (Ariz. 1990)[2]; Harris v. Arkansas, 907 S.W.2d 729, 731 (Ark. 1995)[3]; California v. Collins, 722 P.2d 173, 176 (Cal. 1986)[4]; Connecticut v. Harrell, 506 A.2d 1041, 1046 & n 11 (Conn. 1986)[5];

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[1] "[W]e find it persuasive that *Luce* was a unanimous decision and that a majority of state courts addressing the issue have adopted the *Luce* rule. Moreover, we believe that the justifications underlying the *Luce* rule apply with equal force to Alaska criminal practice. Therefore, we adopt the *Luce* rule as a rule of state criminal procedure." *Id.*, at 1357. "Because our decision establishes a new rule, arguably contrary to a prior rule in Alaska, we can elect to give it only prospective application." *Id., at 1358.*

[2] "We believe *Luce* and *Allie* are based on sound policy considerations. Without defendant's testimony, a reviewing court cannot properly weigh the probative value of the testimony against the prejudicial impact of the impeachment." *Id.*, at 953.

[3] "We further in Smith chose to adopt the doctrine promulgated in *Luce* . . . which states that in order to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." *Id.*, at 731.

[4] "The People urged us to adopt the rule announced in *Luce* ... that the denial of a motion to exclude a prior conviction offered for impeachment is not reviewable on appeal if the defendant fails to testify. We shall do so, but only prospectively." *Id.*, at 176. Those cases in which the defendant did not testify were remanded for a proffer of proof. *Id.*, at 183.

[5] "While we do not have this rule [609(a)] specifically articulated in our procedure, its amenability to our practice and the rationale of the *Luce* court in construing it is persuasive so that we have determined to follow *Luce*." 1046 n 11. "We follow

inois v. Whitehead, 508 N.E.2d 687, 693-694 (Ill. 1987)[6]; Jordan, 591 A.2d 875 875, 878 (Md. 1991)[7]; Michigan v. Finley, 431 N.W.2d 19, 25 (Mich. 1988)[8]; New Hampshire v. Bruneau, 552 A.2d 585, 552 (N.H. 1988) (Justice Souter)'; South Carolina v. Glenn, 330 S.E.2d 285, 286 (S.C. 1985)[10]; South

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Luce prospectively in order that those defendants who have relied on previous decisions of this court that did not require a defendant to testify will not be prejudiced by this rule." Id., at 1047.

'"But defense counsel may not have it both ways by altering their trial strategy to make the best of the trial court's order, depriving the reviewing court of a reviewable record, *** and still maintain that the order was erroneously entered. The logic of *Luce* applies to the testimony offered by both the defendant and other defense witnesses." Id., at 693-694.

[7]"Although *Luce* involved the issue of impeachment by prior conviction rather than a ruling grounded on the constitutional right not to be impeached with an involuntary confession, we are persuaded that its reasoning is applicable in the instant case." *Id.,* at 878.

[8]"In sum, we are persuaded that the need and rationale for the *Luce* rule are applicable in Michigan. We hold that a defendant must testify in order to preserve for review the issue of improper impeachment by prior convictions." *Id., at 25.* "We further hold that, in cases now pending on appeal, review of the impeachment issue is preserved: 1) if the defendant had in fact testified at trial, or 2) if the defendant had expressed his intention to testify in the event his prior record was excluded and had stated the nature of his expected testimony." *Id.,* at 27.

[9]"only if the defendant had taken the stand and suffered impeachment by the statement's use would an issue be ripe for adjudication here," with citation to *Luce*. *Id.,* at 592.

[10]"We agree with the reasoning of the *Luce* decision and refuse to engage in speculation in reviewing claims of improper impeachment. We therefore hold that when the trial judge chooses to make a preliminary ruling on the admissibility of prior convictions to impeach a defendant and the defendant does not testify at trial, the claim of improper impeachment is not

Dakota v. Means, 363 N.W.2d 565, 569 (S.D. 1985)"; Utah v. Gentry, 747 P.2d 1032, 1036 (Utah 1987)[12]; Washington v. Brown, 78.2 P.2d 1013, 1021 (Wash. 1989)[13]; West Viruinia v. Honaker, 454 S.E.2d 96, 108 (W.Va. 1994)[14]; Tennant v. Wyoming, 786 P.2d 339, 342 (Wyo. 1990)[15].

Two of the District Courts of Appeal in Florida were persuaded to follow Luce: Parker v. State, 563 So. 2d 1130, 1131-1132

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preserved for review." *Id.,* at 286.

[11]"We adopt the holding and rationale stated in *Luce*, and hold that Means did not preserve the issue for review on appeal. *** Since defendant chose not to testify, this evidence was never heard by the jury, and did not affect the result." *Id.,* at 569.

[12]"We are persuaded, however, that the rationale and holding of the *Luce* decision are proper and therefore announce, for the guidance of trial courts, defendants, and defense counsel, the following rule: To preserve for appellate review a claim of improper impeachment with a prior conviction, a defendant must testify. This rule will apply prospectively in all cases tried after the date of this opinion." *Id.,* at 1036.

[13]"We conclude that the Luce rule has as its underpinnings reasons which we agree justify its adoption in this state. Therefore, we hold that in order to preserve alleged error in a ruling admitting prior conviction evidence for impeachment purposes under ER 609(a), a defendant must take the stand and testify." *Id.,* at 1025. "[O]ur holding . . . will apply prospectively from the date this opinion is filed." *Id.,* at 1027.

[14]"Thus, to raise and preserve for appellate review the claim of improper impeachment of the defendant or improper rebuttal by the use of prejudicial collateral evidence, a defendant must testify or the rebuttal evidence must be introduced at trial," with citation to *Luce. Id.,* at 108.

[15]"Tennant did not testify, and his claim of error with respect to the denial of the motion in limine by the trial court on the use of prior convictions for impeachment is negated by *Vaupel" and* Luce. *Id.* at 342.

(Fla. 5th DCA 1990) ("The state . . . contends that this issue was not preserved for appeal because the defendant did not take the stand.... *** [W]e find that the impeachment issue has not been preserved for appellate review.... *** Accordingly, we affirm the conviction below...."), cause dismissed, 569 So. 2d 1280 (Fla. 1990); State v. Wilson, 509 So. 2d 1281, 1282 (Fla. 3rd DCA 1987) ("The trial court ruled that if the character witnesses testified concerning appellant's reputation for peacefulness, the State . . . could cross-examine them about specific instances of appellant's prior violent conduct. On that ruling a decision was made by the defendant not to present character evidence. *** The State [contends that] . . . the appellant cannot complain because, having made a tactical election not to present character witnesses, he has waived the right to complain. *** We, accordingly, need not reach the merits of the point. As presented by the record the in limine ruling is unreviewable"). Luce is cited with approval in both cases. Parker, 563 So.2d at 1131-1132; Wilson, 509 So.2d at 1281-1282.

In Parker, the nontestifying witness was the defendant, and the type of impeachment evidence at issue was a jury verdict of guilt without court adjudication. In Wilson, the nontestifying witnesses were defense character witnesses, and the type of impeachment evidence at issue was a specific act of violence of the defendant (stabbing of his wife to death 25 years earlier).

The result reached by the Third and Fifth District Courts of Appeal directly and expressly conflicts with the result reached

by the First District in Hall v. Oakley, 409 So. 2d 93 (Fla. 1st DCA 1982), review denied, 419 So. 2d 1200 (Fla. 1982), disapproved on other grounds, State v. Page, 449 So. 2d 813, 816 (Fla. 1984), and reaffirmed in the instant case. Although the First District in Hall had relied on federal law which subsequently was overruled, it, nevertheless, adhered to its prior decision in the instant case because of the belief that to hold otherwise would violate the accused's state constitutional right to testify at trial.

The State respectfully disagrees with the First District's reasoning. The only ruling of the trial court that violates the accused's right to testify is the ruling that he cannot testify. Any other ruling may motivate him not to testify, but it would not prevent him from doing so.

If the trial judge has erroneously and prejudicially admitted evidence, the remedy is a new trial, regardless of whether the accused testifies. The category of erroneously admitted evidence which is subject to the harmless error test includes confessions and collateral crimes. If the erroneous evidence is a confession, the jury, of course, will learn that the accused has admitted committing the very crime for which he is on trial. If the erroneous evidence is a collateral crime, the jury will learn not only that the accused committed another crime but all of its details. By contrast, all the jury learns when impeachment evidence is offered is that the accused has committed a prior

felony (no details) or a crime involving dishonesty or a false statement.

The approach taken by the First District has far reaching consequences for the criminal law, for it emasculates the harmless error rule. To the First District, the harm from an erroneous evidentiary ruling is the accused's failure to testify. To obtain a new trial, therefore, all the defendant has to do is show that he did not testify and that one of the trial court's evidentiary rulings was in error.

A common practice of criminal defendants is to merge two independent legal principles to obtain a result not otherwise obtainable. The two legal principles merged in the instant case relate to an evidentiary issue and the accused's constitutional right to testify. Each legal principle has its own body of law and must be kept separate. For example, in the case at bar, as to the first legal principle, the question to be answered is, "Was the defendant denied his right to testify?" The obvious answer is "no" because the judge never told him he could not testify. Turning to the second legal principle, the question to be answered is, "Did the trial court abuse its discretion in its evidentiary ruling?" Assuming, *arguendo*, that the answer is "yes," the final question to be answered is, "Was the error harmful?" There is only one answer: No. Since the impeachment evidence was not admitted at trial, the jury never knew about it.

(B) Assuming, *arguendo*, that the First District correctly analyzed the procedural issue, the State will proceed to the merits of the trial court's in limine ruling. Trial court rulings on the admissibility of evidence are reviewed under the abuse of discretion standard, Hannon v. State, 638 So.2d 39, 43 (Fla. 1994), which was explained in Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980).

Raydo pled nolo contendere to a felony (burglary of a structure) and a misdemeanor (petit theft), for which he was awaiting sentencing at the time of his trial for robbery in the instant case. He admitted committing burglary and theft. (V1, 7-8, 16-17) Post-verdict, the trial court adjudicated Raydo guilty of petit theft but withheld adjudication on both of the felonies (burglary and robbery). (V1, 48-49) On January 11, 1996, he was sentenced to 2 1/2 years on supervised release, with six months of the term to be served in jail. (V1, 48-49)

Section 90.610, Florida Statutes (1995) provides:

> (1) A party may attack the credibility of any witness, including an accused, by evidence that the witness has been **convicted** of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which the witness was **convicted**, or if the crime involved dishonesty or a false statement regardless of the punishment with the following exceptions [emphasis supplied]:
>
> (a) Evidence of any such conviction is inadmissible in a civil trial if it is so remote in time as to have no bearing on the present character of the witness.
>
> (b) Evidence of juvenile adjudications are inadmissible under this subsection.
>
> (2) The pendency of an appeal or the granting of a pardon relating to such crime does not render evidence

of the conviction from which the appeal was taken or for which the pardon was granted inadmissible. Evidence of the pendency of the appeal is admissible.

(3) Nothing in this section affects the admissibility of evidence under s. 90.404 or s. 90.608.

"In 1978, . . . the Florida Legislature amended subsection 90.610(1) to substantially conform to the language of Federal Rule of Evidence 609." State v. Page, 449 So.2d 813, 815 (Fla. 1984). The Advisory Committee Note to Fed.R.Evi. 609 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."

Section 90.610 does not require a *iudument* of conviction; a guilty plea or a verdict of guilty will suffice. See, e.q., Johnson v. State, 449 So. 2d 921 (Fla. 1st DCA 1984) (guilty plea constitutes conviction for purpose of impeachment), rev. denied, 458 So. 2d 274 (Fla. 1984); U.S. v. Vanderbosch, 610 F. 2d 95, 97 (2d Cir. 1979) (same); Barber v. State, 413 So. 2d 482 (Fla. 2d DCA 1982) (jury verdict constitutes conviction for purpose of impeachment); U.S. v. Mitchell, 886 F. 2d 667, 670-671 (4th Cir. 1989) (same); U.S. v. Smith, 623 F.2d 627, 630-631 (9th Cir. 1980) (same).

The fact that the defendant, here Raydo, entered a nolo contendere plea instead of a guilty plea or a not guilty plea (leading to jury verdict of guilty) should make no difference. A nolo contendere plea is an admission by the defendant that the State can prove its case against him. (If it were not, there would be no rational reason for entering such a plea.) See

generally Chesebrouah v. State, 255 So. 2d 675, 676 (Fla. 1971) ("The plea of nolo contendere was a formal declaration by defendant that she did not contest the charge against her. Such a plea has the same effect as a plea of guilty, so far as regards the proceeding on the information, and a defendant who is sentenced to imprisonment upon such a plea is convicted of the offense charged"). Accord U.S. v. Sonny Mitchell Center, 934 F. 2d 77 (5th Cir. 1991) ("We find . . . no error in the admission of prior convictions based on nolo contendere pleas for impeachment purposes"). In U.S. v. Lipscomb, 702 F. 2d 1049, 1070 (D.C. Cir. 1983), the court found "no policy reason why the government can impeach a defendant who does not admit guilt, goes to trial, and is convicted, but cannot impeach a defendant who does not admit guilt but concedes that he will be convicted if he goes to trial and therefore makes an *Alford* plea (guilty plea while maintaining innocence)." The Court held that "an *Alford* plea, like a nolo plea, does not preclude subsequent use of a conviction under Rule 609." Moreover, in the case at bar, as previously noted, Raydo actually admitted committing the crimes at issue (burglary and petit theft).

The First District in the instant case believed that section 90.410 prohibited the State from impeaching Raydo with his nolo contendere plea. The State respectfully disagrees. That section provides:

> 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, except when such statements are offered in a prosecution under chapter **837.**

Section 90.410 was intended "to be an adaptation of Rule 410 of the Federal Rules of Evidence." Strickland v. State, 498 So.2d **1350, 1352** (Fla. 1st DCA 1986). The reasons why § 90.410 does not affect the impeachment provision are presented in 1 *McCormick on Evidence § 42,* at 149 n. 35 (John W. Strong ed., 4th ed. 1992):

> 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. No reason for such a result is apparent. Rule 803(22) recognizes a hearsay exception for felony convictions, yet certain misdemeanors are usable for impeachment under Rule 609 which, if applicable, Rule 803(22) would exclude as hearsay. The conclusion must be that Rule 609 is a complete scheme; since it does not exclude nolo convictions, they are usable. This conclusion is reinforced by the history of the Federal Rule. 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.

Harmless Error Analysis. Assuming, *arguendo,* that the issue was preserved and the judge misconstrued section 90.610(a), the error, nevertheless, is harmless. Raydo has since been convicted

of petit theft, which is a crime involving dishonesty. State v. Paae, 449 So.2d 813, 816 (Fla. 1984) ("the commission of a petit theft is, per se, a crime involving 'dishonesty' and, therefore, bears directly on the witness' capacity to testify truthfully at trial") . Therefore, on remand, the trial court again would rule that Raydo could be impeached with a prior conviction. If Raydo testified, the jury would learn that not only was he a law violator but that he also was dishonest, from which it could infer that he was unworthy of belief. State v. Strasser, 445 So.2d 322, 322-323 (Fla. 1983) ("Strasser would gain nothing from a new trial. The only effect would be to increase the pressures on the already overburdened judicial system and, ultimately, on the taxpayer. We will not ignore the substance of justice in a blind adherence to its forms.")

CONCLUSION

Based on the foregoing argument, the State respectfully requests this Honorable Court to overrule the **decision** of the First District and affirm the trial court.

Respectfully submitted,

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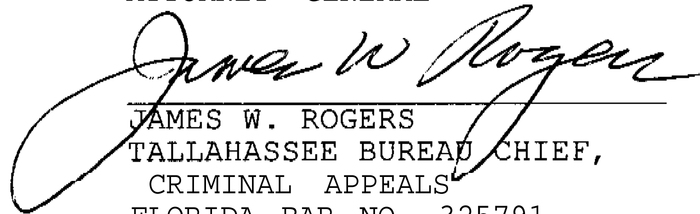

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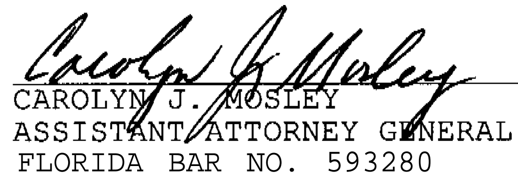

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing merits brief has been furnished by U.S. Mail to the following persons this 10th day of November, 1997:

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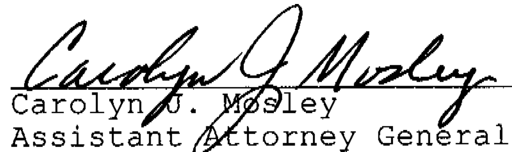

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