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IN THE SUPREME COURT OF FLORIDA

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By

*[Signature]*

STATE OF FLORIDA,

Petitioner,

V.

BRYAN JOSEPH RAYDO,

Respondent.

CASE NO. 91,161

JURISDICTIONAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS'

Respondent, Joseph Raydo, was charged with robbery and tried by a jury. After the State rested its case, defense counsel informed the trial court that Raydo was to be the first defense witness. The prosecutor then asked for a ruling on whether Raydo could be impeached with evidence of his nolo contendere pleas to a felony and a misdemeanor in an unrelated case on which he had not yet been sentenced. The trial court ruled that the prior no contest pleas were proper impeachment evidence. It framed the question to be asked as follows, "Haven't you entered a plea and are you awaiting sentencing on a felony, and if so, how many?" On redirect, defense counsel would be allowed to establish that Raydo had not yet been convicted, and there was a possibility that adjudication of guilt would actually be withheld. Subsequent to the trial court's ruling, defense counsel announced that the defense would present no witnesses. A jury found Raydo guilty as charged. The trial court withheld adjudication of guilt and placed Raydo on supervised release (community control, which included six months in the county jail, to be followed by probation). (Slip Opinion, 1-2)

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

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'All facts are taken from the slip opinion filed by the First District in this case, a copy of which is included in the appendix to this brief. Footnotes 2 and 3 in this brief are identical to footnotes 1 and 2 in the slip opinion.

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,<sup>2</sup> 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.<sup>3</sup> We do not find Luce to be persuasive authority for such proposition because we read Hall as being premised primarily on State constitutional grounds.<sup>3</sup> (Slip Opinion, 2-3)

The First District then proceeded to address the merits of the issue. It concluded that the trial court's ruling was "clearly erroneous," and that the error was harmful. (Slip Opinion, 3-5).<sup>4</sup>

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<sup>2</sup>"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)." (Slip Opinion, 3, n 1)

<sup>3</sup>"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." (Slip Opinion, 3, n 2)

<sup>4</sup>The jurisdictional brief is directed solely to the procedural issue.

## SUMMARY OF ARGUMENT

This Honorable Court has discretionary jurisdiction over the instant case on two independent grounds--express and direct conflict and construction of a provision of the state constitution.

Ground I. The First District's decision in the case at bar directly and expressly conflicts with the decisions from the Third and Fifth Districts. The issue in all three cases was the same--must a witness testify at trial to preserve for appeal a trial court's in limine ruling admitting impeachment evidence? The First District answered the question in the negative, whereas both the Third and Fifth Districts answered it in the affirmative. In all three cases, the witness against whom impeachment evidence was ruled admissible did not testify. Here and in Parker, infra, the nontestifying witness was the defendant, and in Wilson, infra, the nontestifying witnesses were defense character witnesses. In the case at bar, the impeachment evidence was a nolo contendere plea without court adjudication; in Parker, it was a jury verdict of guilt without court adjudication; and in Wilson, it was the defendant's act of stabbing his wife to death twenty-five years earlier. The First District granted the defendant a new trial, but the convictions in Parker and Wilson were affirmed.

Ground II. The First District in this case has held that the state constitutional provision which guarantees an accused the right to testify also guarantees a nontestifying defendant the

right to appeal the trial court's in limine ruling admitting impeachment evidence.

Based on these two grounds, the State respectfully urges this Honorable Court to exercise its jurisdiction and hear this case. The issue presented is one of great public importance. It has gained the attention of the United States Supreme Court and subsequently the attention of the highest courts of at least fifteen states: Alaska, Arizona, Arkansas, California, Connecticut, Illinois, Maryland, Michigan, New Hampshire, South Carolina, South Dakota, Utah, Washington, West Virginia, and Wyoming.

## ARGUMENT

### ISSUE

THIS COURT HAS DISCRETIONARY JURISDICTION TO REVIEW THE INSTANT CASE ON TWO GROUNDS:

(1) THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE THIRD AND FIFTH DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW--MUST A WITNESS WHO IS SUBJECT TO IMPEACHMENT TESTIFY TO PRESERVE FOR REVIEW THE TRIAL COURT'S IN LIMINE RULING ADMITTING THE IMPEACHMENT EVIDENCE?

(2) THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY CONSTRUED ARTICLE 1, SECTION 16 OF THE FLORIDA CONSTITUTION TO PERMIT A NONTESTIFYING CRIMINAL DEFENDANT TO RAISE ON APPEAL THE TRIAL COURT'S IN LIMINE RULING ADMITTING IMPEACHMENT EVIDENCE.

Discretionary jurisdiction is vested in this Court on two separate grounds. "The supreme court . . . [m]ay review any decision of a district court of appeal that . . . expressly construes a provision of the state . . . constitution, . . . or that expressly and directly conflicts with a decision of another district court of appeal . . . on the same question of law." Art. V, § 3(b)(3), Fla. Const. See generally, State v. Cappetta, 216 So.2d 749, 750 (Fla. 1968); City of Miami v. Florida Literary Distributing Corw., 486 So. 2d 569, 573 (Fla. 1986).

Ground I. The First District in the case at bar held that the witness against whom impeachment evidence is to be offered is not required to testify at trial to preserve for appeal the trial court's in limine ruling admitting the impeachment evidence. Ravdo v. State, Slip Opinion at 2-3 ("[W]e 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 [v. Oakley] relied have been overruled [by the United States Supreme court] . . . . \*\*\* [W]e can see no compelling reason to reconsider our holding in Hall [v. Oakley], and we decline the State's invitation to do so"). The witness in the case at bar was the defendant, and the type of impeachment evidence at issue was a nolo contendere plea without court adjudication. Although the defendant did not testify, the First District, nevertheless, reviewed the trial court's ruling that, in the event he did testify, he could be impeached with his prior nolo contendere plea. Raydo was granted a new trial.

The Third and Fifth District Courts of Appeal have held just the opposite: Parker v. Stat-e, 563 So. 2d 1130, 1131-1132 (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 and acknowledge conflict with Hall [v. Oakley]); 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").

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.

Ground II. The First District in this case has held that the state constitutional provision which guarantees an accused the right to testify also guarantees a nontestifying defendant the right to appeal the trial court's in limine ruling admitting impeachment evidence. More precisely, in Hall v. State, 409 So.2d 93, 95 (Fla. 1st DCA), review denied, 419 So. 2d 1200 (Fla. 1982), the First District held that "an accused is not required to testify in order to challenge a ruling on the admissibility of impeachment evidence." (Slip Opinion, 3) The First District in the case at bar explained that its Hall decision was "premised primarily on State constitutional grounds." (Slip Opinion, 3) It then identified which provision was relied on: "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."

(Slip Opinion, 3, n 2). Hall, was reaffirmed in the instant case.

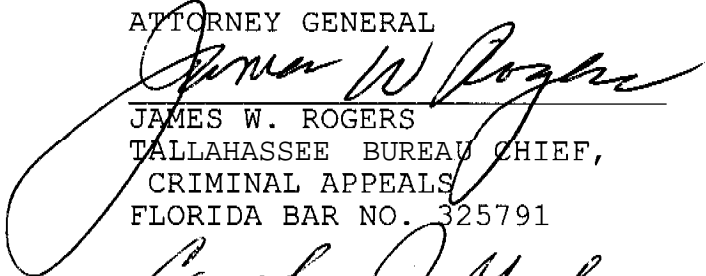
(Slip Opinion, 3)

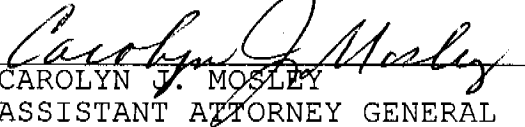
CONCLUSION

Based on the foregoing argument, the State respectfully requests this Honorable Court accept jurisdiction of the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE,

I HEREBY CERTIFY that a true and correct copy of the foregoing JURISDICTIONAL BRIEF OF PETITIONER has been furnished by U.S. Mail to the following persons this 6<sup>th</sup> day of August, 1997:

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