

IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,614

THE STATE OF FLORIDA,

Petitioner,

-vs-

GREGORY MCFADDEN,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Respondent, Gregory McFadden, was the defendant in the trial court and the Appellant in the Third District Court of Appeal. The Petitioner, the State of Florida, was the prosecution in the trial court and the Appellee in the Third District Court of Appeal. In this brief, the symbol “R” will be used to designate the record on appeal, the symbol “TR” will be used to designate the transcripts of the October 22, 1997 proceedings and the November 25, 1997 proceedings, and the symbol “A.” will be used to refer to the appendix attached hereto. All emphasis is added unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Gregory McFadden was charged with domestic battery against his girlfriend Sharon Hudgins (R. 7). The trial in this case amounted to a credibility contest between the two primary witnesses-- Mr. McFadden and Ms. Hudgins' son, Gavin Olsen (TR. 125-142, 165-178).¹ Gavin Olsen testified that Mr. McFadden pushed and hit Hudgins (TR. 128-131). In turn, Mr. McFadden testified that he argued with Hudgins on the night in question, but never committed a battery upon her (TR. 170).

During the cross-examination of Mr. McFadden, the prosecutor asked whether

¹ Hudgins was present at Mr. McFadden's trial but did not testify (TR. 114, 125-162).

McFadden had ever been convicted of a felony (TR. 173). McFadden responded that he had not (TR. 173). The prosecutor then announced, in the presence of the jury, "Your Honor, I'd like to offer proof that that is in fact not true." (TR. 174). Defense counsel immediately objected and asked to approach the bench (TR. 174). The prosecutor requested that he be allowed to impeach McFadden using a prior withhold of adjudication, where Mr. McFadden had pled guilty to the offense of aggravated battery against Ms. Hudgins (TR. 174). Defense counsel objected on the grounds that a withhold of adjudication cannot be used to impeach credibility (TR. 174). The trial court overruled the objection (TR. 175). The state was then allowed to ask Mr. McFadden, "Is it true that on March 6, 1996 you pled guilty to aggravated battery of Sharon Hudgins." (TR. 175). McFadden responded, "Yes. It is." (TR. 175).

On redirect, defense counsel attempted to rehabilitate McFadden by asking him whether he had denied being convicted of a crime because his plea to aggravated battery resulted in a withhold of adjudication, as opposed to a conviction (TR. 176). The state objected to this question before Mr. McFadden had an opportunity to respond (TR. 176). The objection was sustained (TR. 176). Defense counsel then attempted to question Mr. McFadden as to why he entered a plea of guilt in his previous case (TR. 176). Defense counsel was again interrupted by an objection, which was sustained, thereby precluding defense counsel from rehabilitating McFadden (TR. 176). McFadden was convicted of

domestic battery as charged (R. 152).

The Third District Court of Appeal reversed McFadden's conviction and ordered a new trial based upon three separate errors arising from the prosecutor's impeachment of the defendant (A. 1-5). First, the Third District held that there should have been no reference to the previous case because a withhold of adjudication is not a conviction, as is required to impeach a witness under section 90.610(1), Florida Statutes (1997).² (A. 2). The Third District further held that the lower court erred in allowing the prosecutor to point out both the precise nature of the previous conviction and the identity of the victim. The Third District explained that "even if the previous plea was properly referred to, it is plain, and independent error to introduce these (particularly damaging) specifics of the prior convictions." (A. 1-4). Finally, the Third District Court found that these errors were further compounded by a third independent error when Mr. McFadden was not allowed to explain to the jury that he had denied being previously convicted because adjudication had been withheld. The Third District concluded that "any or all of these errors" prejudicially affected the outcome of this case, and were therefore not harmless (A. 5).

²Section 90.610(1), Florida Statutes (1997), entitled "Conviction of certain crimes as impeachment," states that "a party may attack the credibility of any witness . . . 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 . . . or if the crime involved dishonesty or a false statement regardless of the punishment . . ."

Petitioner filed a notice of intent to invoke this Court's discretionary jurisdiction, based on alleged conflict with *Thomas v. State*, 424 So. 2d 193 (Fla. 5th DCA 1983), *Roberts v. State*, 450 So. 2d 1126, 1127 (Fla. 4th DCA 1984) (Anstead, J. specially concurring), *Johnson v. State*, 449 So. 2d 921 (Fla. 1st DCA 1984), *Barber v. State*, 413 So. 2d 482 (Fla. 2d DCA 1982), and *Raydo v. State*, 696 So. 2d 1225 (Fla. 1st DCA 1997) *quashed in part*, 713 So. 2d 996 (Fla. 1998).

SUMMARY OF THE ARGUMENT

Section 90.610, Florida Statutes (1997), states that a party may attack the credibility of any witness by evidence that the witness has been “*convicted*” of a felony or crime of dishonesty. The issue in this case is whether a guilty plea that resulted in a withhold of adjudication constitutes a “conviction” under the statute. Eighty years ago in *Smith v. State*, 78 So. 2d 530 (Fla. 1918), this court observed that where a statute provides that evidence of a “conviction” is admissible to impeach a witness’s credibility, the term “conviction” requires a judgment of guilt *by the court*, as opposed to a verdict or plea of guilt standing alone. It must be assumed that the legislature was aware of this definition of “conviction” and intended to adopt it when it enacted section 90.610.

The more recent Florida cases addressing impeachment by evidence of prior convictions uniformly note that a defendant may *not* be impeached with a guilty plea or verdict where the court ultimately declined to enter a judgment of guilt and withheld adjudication. Contrary to the petitioner’s assertions, there is no conflict among Florida courts on this issue.

The petitioner’s contention that a guilty plea with a withhold of adjudication should be admissible for impeachment is inconsistent with the purpose of section 948.01(2), Florida Statutes (1997). That statute permits a trial court judge to withhold a judgment of guilt following a jury verdict, no contest plea, or guilty plea where the court

finds that the defendant is not likely again to engage in a criminal course of conduct. As the petitioner notes, the theory that supports the admissibility of felony convictions for impeachment is that a person with a criminal record has demonstrated a willingness to violate the law, which bears upon the person's willingness to disregard the oath to tell the truth in a future proceeding. It follows that where a court specifically declines to impose a criminal record of conviction, finding instead that the defendant demonstrated that he is likely to become rehabilitated, it cannot be assumed that this person will disregard the oath to testify truthfully in a later proceeding. Moreover, where the purpose of a withhold of adjudication is to protect such persons against a blemished record of conviction with its attendant loss of civil rights, it is logical that the person should also retain the privilege to serve as a witness in a civil or criminal trial without being impeached with a prior offense where adjudication was withheld.

In sum, Florida courts have traditionally and consistently held that a defendant may not be impeached with a prior guilty plea where the trial court declined to enter a judicial finding of guilt based upon the defendant's ability to become rehabilitated. This established and well-reasoned rule should not be overruled.

ARGUMENT

**WHERE THE TRIAL COURT DECLINES TO ENTER
A JUDGMENT OF GUILT FOLLOWING A GUILTY
PLEA, AND CHOOSES INSTEAD TO WITHHOLD
ADJUDICATION, THERE IS NO "CONVICTION"**

**UNDER SECTION 90.610 OF THE EVIDENCE CODE,
AND THE PERSON'S CREDIBILITY CANNOT BE
IMPEACHED WITH EVIDENCE OF THE PRIOR
OFFENSE IN A SUBSEQUENT PROCEEDING.**

The petitioner argues that where a trial court declines to enter a judgment of guilt following a defendant's guilty plea, but determines instead to *withhold* adjudication, a "conviction" has nevertheless taken place under section 90.610, Florida Statutes (1997), and therefore, the person may be impeached with evidence of the prior offense when serving as a witness in any subsequent proceeding. Florida courts have traditionally and consistently rejected this assertion.

More than 80 years ago, in *Smith v. State*, 78 So. 2d 530 (Fla. 1918), this Court observed that where a statute provides that a "conviction" may be used to impeach the credibility of a witness, the term "conviction" necessarily refers to an adjudication of guilt by the court, as opposed to a jury verdict or plea standing alone. This Court noted:

'Conviction' is used in different senses. In its most common use it signifies the finding of the jury that the prisoner is guilty, but it is frequently used as implying a judgment and sentence of the court on a verdict or confession. As used in [a statute] providing that the 'conviction' of any crime may be shown to affect the credibility of a witness, etc., it means a judgment of the court. The conviction contemplated by the common-law rule disqualifying persons from testifying as witnesses who had been convicted of certain crimes, 'included the sentence or judgment of the court, and was satisfied with nothing else.'

Id. at 532. *Smith* has never been overruled.

In 1978, the Florida legislature adopted section 90.610(1) of the Florida Evidence Code in its present form. *See State v. Page*, 449 So. 2d 813 (Fla. 1984). The rule, entitled "Conviction of Certain Crimes as Impeachment," reads in relevant part as follows:

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 . . . or if the crime involved dishonesty or a false statement regardless of the punishment . . .

Thus, the rule permits the impeachment of witnesses, in both civil and criminal proceedings, only by use of certain "convictions."

It must be assumed that when the legislature adopted section 90.610, it was aware of the definition assigned to the term "conviction" for purposes of impeachment under *Smith*. *See Overstreet v. State*, 629 So. 2d 125, 126 (Fla. 1993) ("The legislature is assumed to know the meaning of words in the statute and to have expressed its intent by the use of those words."). As noted by then-Judge Anstead:

Since the Florida Supreme Court [in *Smith*] had already taken a clear-cut view of the meaning of 'conviction' [as referring to the judgment of guilt by the court] . . . we are bound to construe section 90.610(1) as intending to incorporate that definition when this provision was passed.

Roberts v. State, 450 So. 2d 1126, 1127 (Fla. 4th DCA 1984) (Anstead, J., specially

concurring). Moreover, since the Evidence Code was also adopted by the Supreme Court of Florida as a rule of court, *see In re Florida Evidence Code*, 372 So. 2d 1369 (Fla. 1979), "it is safe to assume that the Court itself was aware of its prior definition" in *Smith*, and intended to incorporate this definition in the impeachment rule. *Id.*

This conclusion is supported by reference to another rule of the Court, Florida Rule of Criminal Procedure 3.701 (1997), which governs sentencing guidelines procedures. For sentencing guidelines purposes, where the rule-makers intended to depart from *Smith* and construe the term "conviction" to mean a plea or verdict of guilt, *without* regard to the court's adjudication, this intent was specifically delineated in the rule.³ In contrast, where the term "conviction" is not specifically given this broader definition in the evidence code, the word must be interpreted pursuant to the established definition in *Smith*, for impeachment purposes, as the judgement of guilt or adjudication by the court. *See Rubiera v. Dade County*, 350 So. 2d 161 (Fla. 1974) (Ervin, J., dissenting) ("[T]he presence of a provision in one section and its absence from another effect an argument against reading it as implied by the section from which it is omitted."). Further, as the petitioner acknowledges, the most common definition of the term "conviction" requires an adjudication of guilt by the court. *See Brief of Petitioner* at 10-11. Therefore, in

³3.701(d)(2) states that conviction "means a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended."

the absence of any indication to the contrary, it must be assumed that the term is to be interpreted according to its standard meaning.

It is well established that when a court chooses to enter an adjudication or finding of guilt following a plea *of any kind*, this judgment by the court necessarily constitutes a conviction admissible for impeachment under section 90.610. *See Thomas v. State*, 424 So. 2d 193 (Fla. 5th DCA 1983). "The *fact of conviction* [by the court] makes the evidence admissible; and, *it is immaterial whether the conviction resulted after the witness pled not guilty, guilty, or nolo contendere.*" CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 610.4 (1999 Edition). Thus, a judgment of guilt on a plea, as determined by the court that heard the matter, constitutes a conviction for impeachment purposes, regardless of whether the defendant admitted guilt or refused to admit guilt by pleading no contest.

The petitioner acknowledges that where a court enters a judgment of guilt against a defendant, the offense constitutes a "conviction" that may be used to impeach that person in any future court proceeding. *Brief of Petitioner* at 24. This "conviction" or finding of guilt by the court is the final determination of the seriousness of the acts alleged, and is therefore the proper indicator of the admissibility of prior offenses for purposes of impeachment. Thus, *ajudicial* finding of guilt controls under section 90.610. The petitioner contends, however, that where a court *declines* to enter a finding of guilt,

but determines to withhold adjudication, then we must look to the defendant's underlying plea. If that plea was a guilty plea, and not a nolo contendere plea, then the petitioner argues that impeachment with the plea is proper, regardless of the court's decision, after hearing the matter, to withhold adjudication of guilt. This assertion has not only been rejected by Florida courts (*see* discussion below), but also makes little sense in light of the meaning and purpose behind the court's statutory power to withhold adjudication.

Section 948.01(2) of the Florida Statutes provides a trial court with the power to withhold adjudication of guilt and impose probation following a guilty verdict, a nolo contendere plea, *or* a plea of guilt "if it appears to the court upon a hearing of the matter that the defendant is *not likely again to engage in a criminal course of conduct.*" § 948.01(2), Fla. Stat. (1997). As the petitioner notes, the theory supporting the admissibility of felony convictions for impeachment is that "a person with a criminal record *has demonstrated a willingness to violate the law*, which bears upon the person's willingness to disregard the oath to tell the truth" in a future proceeding. *Brief of Petitioner* at 27, *citing* CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 610.1, at 419 (1993 Ed.). It follows that where a court specifically declines to impose a criminal record of conviction, finding instead that the defendant has demonstrated that he is likely to become rehabilitated, it cannot be assumed that such a person will disregard an oath to testify truthfully in a later proceeding. Therefore, evidence of the prior withhold of

adjudication should not be admissible to impeach that person.⁴

Moreover, the purpose of a withhold of adjudication is to protect such persons who are likely to be rehabilitated "against a blemished record of conviction" and its attendant loss of civil rights. *Accredited Surety & Cas. Co., Inc. v. State*, 319 So. 2d 554, 556 (Fla. 1st DCA 1975); *See also Delaney v. State*, 190 So. 2d 578 (Fla. 1966). Where a court withholds adjudication, and thereby allows a defendant to retain the civil rights that are otherwise forfeited when one is convicted of felony, such as the right to vote, *see* § 97.041(2)(b), Fla. Stat. (1999), the right to serve on a jury, *see* § 40.013(1), Fla. Stat. (1999), and the right not to be denied certain licenses or forms of employment, *see* § 112.011(1)(a) and (b), Fla. Stat. (1999), it is logical that the offender should also retain the privilege to serve as a witness in any subsequent civil or criminal proceeding without being impeached with a prior offense for which he received a withhold of adjudication.

Contrary to the petitioner's assertions, Florida courts are *not* in conflict on the issue

⁴The petitioner argues that "a defendant's *alleged* involvement in a subsequent criminal offense has bearing on their continued entitlement to the benefits extended to them by virtue of the withhold of adjudication." *Brief of Petitioner* at 31. This argument turns the presumption of innocence on its head and assumes that a person on trial for criminal charges must be guilty, even though he has not yet been found guilty by a judge or jury, and therefore should no longer be entitled to the benefits of a withhold of adjudication. Moreover, the latter argument in support of the petitioner's conclusion that a withhold of adjudication should be admissible for impeachment also ignores the fact a prior "conviction" under section 90.610 is not only admissible against a criminal defendant, but may be used to impeach any witness in a civil or criminal trial.

of whether a trial court's decision to withhold adjudication following a guilty plea qualifies as a "conviction" for impeachment purposes. Rather, Florida courts have uniformly found that "if adjudication is withheld, there would be no conviction under section 90.610(1)." *State v. Raydo*, 713 So. 2d 996, 1001 (Fla. 1998); *See also Barber v. State*, 413 So. 2d 482, 484 (Fla. 2d DCA 1982) ("[I]f the court ultimately chooses to withhold adjudication . . . for the crime of which the jury had previously found him guilty . . . appellant cannot thereafter be impeached by evidence concerning that crime"); *Johnson v. State*, 449 So. 2d 921 (Fla. 1st DCA 1984) (adopting the conclusion in *Barber* in the context of a guilty plea). Moreover, the federal Fifth Circuit Court of Appeals has ruled consistently with these Florida cases. In *U.S. v. Georgalis*, 631 F.2d 1199 (5th Cir. 1980), the court was directly faced with the issue of whether a Florida guilty plea with a withhold of adjudication constitutes a "conviction" under the analogous federal rule of impeachment by use of prior convictions, Rule 609. The court held that a Florida withhold of adjudication following a guilty plea is not a "conviction" that may be used to impeach a witness in federal court.⁵

⁵Several other states with provisions similar to Florida's withhold of adjudication have also held that a court's determination to suspend or defer judgment cannot be deemed a "conviction" for impeachment purposes, even where the defendant entered a plea of guilt to the offense. *See Harrell v. State*, 962 S.W.2d 325 (Ark. 1998) (plea of guilty under Arkansas's First Offenders Act, where court does not enter a judgment of guilt, does not constitute a prior "conviction" admissible for impeachment); *Matthews v. State*, 493 S.E.2d 136 (Ga. 1997) (guilty plea by first offender without adjudication of guilt was not conviction

The only conflict that exists among Florida courts relates to whether a defendant who pled guilty or was found guilty by a jury, but has not yet been adjudicated by a court, may be impeached with the prior plea or verdict *during the period when adjudication by the court on the prior offense is still pending*. In *Barber v. State, supra*, the Second District Court of Appeal answered this question in the affirmative where the defendant had been found guilty by a jury and was awaiting adjudication. The court acknowledged that "an anomaly will occur if the court ultimately chooses to withhold adjudication" on the verdict because the offender may not thereafter be impeached with evidence of that offense. *Barber*, 413 So. 2d at 484. However, the court reasoned that

the result under those circumstances would be no different then if a witness's judgment of guilt was ultimately reversed on appeal. Until such time as the reversal occurs, evidence of his judgment of guilt may be admitted for impeachment, and the fact that an appeal is pending may also be shown. Likewise, if a witness has been impeached by evidence that he has previously suffered an adverse verdict of guilt, evidence will also be admissible to show that no adjudication has yet been made.

for purposes of impeachment); *Malloy v. Vanwinkle*, 662 So. 2d 96 (La. Ct. App. 1996) (plea of guilty followed by discharge without court adjudication upon fulfillment of certain conditions is not a conviction that can be used to impeach); *Green v. State*, 663 S.W.2d 145 (Tex. Ct. App. 1983) (error to permit impeachment of defendant by evidence that he was on "deferred adjudication" at the time of trial); *Commonwealth v. Jackson*, 700 N.E.2d 848 (Mass. App. Ct. 1998) (No conviction occurs when a criminal case is disposed of under statute permitting plea of guilty to be "yoked" with a request that guilty finding not be entered).

Id. In *Johnson v. State*, the First District Court of Appeal followed *Barber* and applied its rationale where the defendant had previously entered a guilty plea but had not yet been adjudicated.

In *Roberts v. State*, 450 So. 2d 1126, 1127 (Fla. 4th DCA 1984) (Anstead, J., specially concurring), then-Judge Anstead disagreed with the *Barber* holding, stating:

I cannot agree with the Second District's suggestion that a person who is placed on probation, with adjudication withheld, cannot be subject to impeachment, whereas a person who has entered a plea or had a verdict returned against him, will be subject to impeachment, although not adjudicated, at least until a decision is made to place him on probation or otherwise 'finally' decide to withhold adjudication.

Justice Anstead noted that pursuant to *Smith v. State*, the term "conviction" in the impeachment statute refers to a judgment of guilt by the court. Thus, Justice Anstead concluded that this definition should apply uniformly in all situations, including the period when adjudication for the prior offense is pending, such that a defendant cannot be impeached with a prior offense in the absence of an adjudication by the court. The Fifth District Court of Appeal concurred with this view in *Parker v. State*, 563 So. 2d 1130 (Fla. 5th DCA 1990).⁶

⁶Prior to *Parker*, in *Thomas v. State*, 424 So. 2d 193 (Fla. 5th DCA 1983), the Fifth District Court of Appeal posed the question of whether a guilty plea or verdict could constitute a "conviction" for impeachment purposes where the trial judge withheld adjudication. The court declined to answer the question at that point because the issue in *Thomas* was not preserved for appeal. However, seven years later in *Parker*, the Fifth

Again, although Florida's district courts disagree as to whether a defendant may be impeached with a prior guilty plea or verdict during the time that adjudication is *pending*, there is no conflict among the courts regarding the issue at hand in this case: *A defendant may not be impeached with a prior offense where the trial court has determined to withhold adjudication.* The petitioner contends that *Raydo v. State*, 696 So. 2d 1225 (Fla. 1st DCA 1998), *quashed in part, affirmed in part, State v. Raydo*, 713 So. 2d 996, 1001 (Fla. 1998), conflicts with the decisions of the other district courts discussed above, and stands for proposition that a defendant may be impeached with a guilty plea that ultimately resulted in a withhold of adjudication. The petitioner misapprehends the holding of *Raydo*.

Whereas *Barber* held that a defendant may be impeached with a jury verdict of guilt while adjudication is pending, and *Johnson* adopted this holding in the context of a guilty plea pending adjudication, *Raydo* addressed the issue of whether a defendant could be impeached with a plea of nolo contendere where the court had not yet entered an adjudication for that offense. The *Raydo* court observed that section 90.410 of the Florida Evidence Code specifically states that evidence of a nolo contendere plea is inadmissible in any civil or criminal proceeding. Thus, the court concluded that a plea

District ultimately held that there can be no conviction in the absence of an adjudication of guilt.

of nolo contendere standing alone, whereby a defendant does not admit guilt, is inadmissible to impeach a person's credibility *unless* the plea ultimately results in an adjudication of guilt by the court. This holding was affirmed by this Court in *State v. Raydo*, 713 So. 2d 996 (Fla. 1998).

Having discussed the holdings in *Barber* and *Johnson*, the First District in *Raydo* noted that "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." *Raydo*, 696 So. 2d at 1226. Petitioner argues that this language is tantamount to a finding that a defendant may be impeached by a guilty plea where the plea resulted in a withhold of adjudication. However, contrary to this interpretation, it appears that the *Raydo* court adopted the *Barber* and *Johnson* holdings, and thus, the "functional equivalents" referred to in *Raydo* are pleas of guilt or verdicts of guilt where the court has *not yet entered an adjudication* to the contrary. As this Court noted in its review of *Raydo*, "the First District . . . indicated its approval of *Johnson* and *Barber*." *Raydo*, 713 So. 2d at 1001, n. 7. Again, *Barber* and *Johnson* specifically state that one cannot be impeached with a prior offense where the court ultimately withheld adjudication following a guilty plea or verdict of guilt. There is no conflict among Florida courts on this point.

Finally, the petitioner points to three cases where the term "conviction" is defined

as a verdict or plea of guilt, without regard to whether adjudication was withheld: *State v. Gazda*, 257 So. 2d 242 (Fla. 1971), *McCrae v. State*, 395 So. 2d 1145 (Fla. 1980), and *Garron v. State*, 528 So. 2d 353 (Fla. 1988). Unlike *Smith v. State*, *supra*, none of these cases address the meaning of "conviction" for purposes of impeachment. *Gazda* construed the term conviction as it is used in section 775.14, Florida Statutes (1971), a statute that governs time limitations for the imposition of a previously withheld sentence.⁷ The latter statute

used the term 'conviction' in a way that plainly indicated that there could be a conviction when a sentence was withheld. For this reason, the supreme court construed the statute's use of 'conviction' to mean the determination of guilty by verdict of the jury or by plea of guilty with no requirement of adjudication by the court. *Because the supreme court's construction of the term conviction in Gazda was so driven by its statutory context, that case is of limited precedential value for construing the term in differently worded statutes.*

State v. Keirn, 720 So. 2d 1085, 1087 (Fla. 4th DCA 1998).

The remaining two cases directly relied upon by the petitioner, *McCrae* and *Garron*, define the word "conviction" as it is used in section 921.141(5)(b), Florida Statutes (1975), which governs sentencing in capital proceedings. The statute states that

⁷Section 775.14 reads: "Any person receiving a withheld sentence upon conviction for a criminal offense, and such withheld sentence has not been altered for a period of five years, shall not thereafter be sentenced for the conviction of the same crime for which sentence was originally withheld."

the sentencing court may consider, among the possible aggravating circumstances, that the defendant was previously “convicted” of a felony involving the use or threat of violence. *McCrae* and *Garron* hold that a guilty plea or verdict of guilt with a withhold of adjudication constitutes a prior "conviction" under the statute. Where a defendant has already been found guilty of a capital offense and is facing sentencing, an in-depth analysis of the nature of the prior offenses, particularly violent offenses, is necessary in order for the jury to conduct the overall character evaluation that takes place in a capital sentencing proceeding. This consideration weighs in favor of broadly defining the term "conviction" in the context of capital sentencing, but has no application in the context of impeachment at trial. Again, the Florida Supreme Court case of *Smith v. State* defines the term conviction for purposes of impeaching a witness's credibility as the adjudication of guilt by a court. Thus, the *Smith* definition must be applied to interpret the term "conviction" in the impeachment statute, as opposed to the definition adopted in the context of different statutes with varying purposes.

It must be noted that even if this Court chooses to overrule *Smith*, and hold for the first time in Florida that a withhold of adjudication following a guilty plea is a conviction for impeachment purposes, the decision of the Third District Court of Appeal in this case must nevertheless be affirmed. The Third District correctly held that two additional independent errors, apart from the improper impeachment with a withhold of

adjudication, occurred in this case. First, the prosecutor improperly pointed out the *nature* of the defendant's previous offense with which he was impeached, as well as the identity of the prior victim. *See Sheffield v. State*, 585 So. 2d 396 (Fla. 1st DCA 1991), *approved*, 595 So. 2d 37 (Fla. 1992) (plain error to introduce specifics of prior convictions during impeachment). Second, the trial court erred by refusing to allow the defendant to explain to the jury that he had denied being previously "convicted" because adjudication in the previous case was withheld. *See Lawhorne v. State*, 500 So. 2d 519 (Fla. 1986). The Third District found that "*any or all* of these errors prejudicially affected the jury's resolution" in this case. Thus, even if the impeachment of Mr. McFadden with a prior withhold of adjudication is deemed proper, the Third District's reversal for a new trial in this case must be affirmed based upon the remaining harmful errors.

CONCLUSION

Based on the foregoing facts, authorities and arguments, Respondent respectfully requests that the decision of the Third District Court of Appeal be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to Linda Katz, Assistant Attorney General, Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite #950, Miami, Florida 33131, on this 29th day of November, 1999.

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CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times Roman.

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