

IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,614

DCA NO. 98-91

THE STATE OF FLORIDA,

Petitioner,

-vs-

GREGORY McFADDEN,

Respondent.

AMENDED BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MICHAEL J. NEIMAND
Senior Assistant Attorney General
Bureau Chief, Criminal Section
Florida Bar No. 0239437
Office of the Attorney General
Department of Legal Affairs
RiverGate Plaza Suite 950
444 Brickell Ave.
Miami, Florida 33131
(305) 377-5441

LINDA S. KATZ
Assistant Attorney General

TABLE OF CONTENTS

TABLE OF CITATIONS ii

INTRODUCTION 1

CERTIFICATION OF TYPE SIZE AND STYLE 1

STATEMENT OF THE CASE AND FACTS 2

QUESTION PRESENTED 5

SUMMARY OF THE ARGUMENT 6

ARGUMENT

 THE LOWER COURT’S HOLDING THAT A PLEA OF
 GUILTY WITH ADJUDICATION WITHHELD CAN NOT BE
 USED FOR IMPEACHMENT PURSUANT TO SECTION
 90.610 CONFLICTS WITH THE DECISION OF ANOTHER
 DISTRICT COURTS OF APPEAL IN RAYDO V. STATE,
 696 So. 2d 1225, (Fla. 1st DCA 1997) approved
 in part, quashed in part, 713 So.2d 996 (Fla.
 1998). 8

CONCLUSION 33

CERTIFICATE OF SERVICE 34

TABLE OF CITATIONS

CASES	PAGE
<u>Barber v. State,</u> 413 So. 2d 482 (Fla. 2d DCA 1982)	3,4,8,20,21,23
<u>Bobb v. State,</u> 647 So. 2d 881 (Fla. 4th DCA 1994)	27,30
<u>Capers v. State,</u> 678 So. 2d 330 (Fla. 1996)	28
<u>Delaney v. State,</u> 190 So. 2d 578 (Fla.1966), <u>appeal dismissed</u> , 387 U.S. 426, 87 S.Ct. 1710, 18 L.Ed.2d 866 (1967).	11,12
<u>In re Florida Evidence Code,</u> 372 So. 2d 1369 (Fla.1979)	29
<u>In re Florida Evidence Code,</u> 376 So. 2d 1161 (Fla.1979)	29
<u>Garron v. State,</u> 528 So. 2d 353 (Fla.1988)	20,32
<u>Johnson v. State,</u> 449 So. 2d 921 (Fla. 1st DCA 1984), review denied, 458 So. 2d 274 (Fla. 1984)	3,22
<u>Joyner v. State,</u> 158 Fla. 806, 30 So. 2d 304 (1947)	14
<u>Maxwell v. State,</u> 336 So. 2d 658 (Fla. 2d DCA 1976)	17
<u>McCrae v. State,</u> 395 So. 2d 1145 (Fla.1980)	20,31
<u>McFadden v. State,</u> 732 So. 2d 412 (Fla. 3d DCA 1999)	3, 29
<u>Overstreet v. State,</u> 629 So. 2d 125 (Fla. 1993)	17,19,31

<u>Raydo v. State,</u>	
696 So. 2d 1225 (Fla. 1st DCA 1997)	3,4,5,6,8,10,23,25,30,32
<u>Roberts v. State,</u>	
450 So. 2d 1226 (Fla. 4th DCA 1984), review denied,	
461 So. 2d 116 (Fla. 1984) 3,8,9,23
<u>Ruffin v. State,</u>	
397 So. 2d 277 (Fla. 1981) 15
<u>Scull v. State,</u>	
533 So. 2d 1137 (Fla. 1988) 15
<u>Smith v. State,</u>	
75 Fla. 468, 78 So. 530 (1918) 9,11
<u>Smith v. State,</u>	
75 So. 2d 468, 78 So. 530 (1918) 21
<u>State ex rel. Owens v. Barnes,</u>	
24 Fla. 153, 4 So. 560 (1888) 10
<u>State v. Finelli,</u>	
24 Fla. L. Weekly D2025 (Fla. 4th DCA Sept. 1, 1999)	. . 17
<u>State v. Gazda,</u>	
257 So. 2d 242 (Fla.1971) 12,31
<u>State v. Keirn,</u>	
720 So. 2d 1085 (Fla. 4th DCA 1998) 9

<u>State v. Page,</u>	
449 So. 2d 813 (Fla. 1984)	30
<u>State v. Peterson,</u>	
667 So. 2d 199 (Fla. 1996)	14,15,30
<u>State v. Raydo,</u>	
713 So. 2d 996 (Fla. 1998)	2,3,4,5,6,8,9,23
<u>State v. Snyder,</u>	
673 So. 2d 9 (Fla. 1996)	15
<u>Thomas v. State,</u>	
424 So. 2d 193 (Fla. 5th DCA 1983)	3,21
<u>United States v. Hartsfield,</u>	
387 F. Supp. 16 (M.D.Fla.1975)	19

STATUTES

§90.410, Fla. Statutes	25
§90.610, Fla. Statutes	5,8
§775.14, Fla. Statutes	13
§948.01(2), Fla. Statutes	11
§948.01(3), Fla. Statutes	12
Fla. R. Crim. P. 3.701(d)(2)	14
Erhardt, Charles, Florida Evidence, Sec. 610.1, at 419 (1993 ed.)	27

INTRODUCTION

The Petitioner, THE STATE OF FLORIDA, was the prosecution in the Circuit Court and the Appellant in the District Court of Appeal. Respondent, Gregory McFadden, was the Defendant in the Circuit Court and the Appellee in the District Court of Appeal. In this brief, the parties will be referred to as they appear before this Court. The symbols "R." and "T" and "Supplemental T" will refer to the record on appeal and the transcripts of the proceedings, respectively.

CERTIFICATION OF TYPE SIZE AND STYLE

Pursuant to the Court's Administrative Order regarding the type size of briefs filed in the Supreme Court of Florida, Respondent hereby certifies that the subject brief was typed in font Courier New, 12 point.

STATEMENT OF THE CASE AND FACTS

Respondent was convicted of a domestic battery against his wife, Sharon Hudgins, and filed a direct appeal in the Third District Court of Appeal. At trial, while attempting to impeach Respondent, the State introduced the fact that Respondent had previously pled guilty to a separate aggravated battery upon the same identified victim in a case in which adjudication was withheld. In its April 13, 1999, opinion, the Third District Court of Appeal concluded that there should have been no reference at all to the previous case because withholding adjudication does not result in the defendant's having been "convicted" of an offense as is required to impeach a witness under section 90.610(1), Florida Statutes (1997).¹ The court did not consider the Respondent's entry of a guilty plea to be any different than if he had entered a plea of nolo contendere, as in State v. Raydo, 713 So.2d 996 (Fla. 1998).

In so holding, the district court recognized the existence of

¹ 90.610. Conviction of certain crimes as impeachment

(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 ...

Florida authority which points in the opposite direction, and cited to Johnson v. State, 449 So.2d 921 (Fla. 1st DCA 1984) (guilty plea) review denied, 458 So.2d 274 (Fla. 1984); Barber v. State, 413 So.2d 482 (Fla. 2d DCA 1982) (jury verdict of guilt); see also Raydo v. State, 696 So.2d 1225, 1226 (Fla. 1st DCA 1997) (distinguishing between withhold after guilty plea and after nolo plea), approved in part, quashed in part, 713 So.2d 996 (Fla. 1998).

The court then went on to find that the basic error of allowing the guilty plea with adjudication withheld to be used for impeachment was compounded as well as an additional error committed when the trial court permitted the prosecutor to point out both the precise nature of the previous conviction and the identity of the victim. Lastly, the court held that the two above errors were further compounded when the Respondent was not permitted to explain to the jury that he had denied being previously convicted because adjudication had been withheld. McFadden v. State, 732 So. 2d 412 (Fla. 3d DCA 1999).

Petitioner thereafter 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 (Fla. 4th DCA 1984); Johnson v. State, 449 So. 2d 921 (Fla. 1st DCA 1984), review denied, 458 So.2d 274 (Fla.

1984); Barber v. State, 413 So. 2d 482 (Fla. 2d DCA 1982) and Raydo v. State, 696 So. 2d 1225 (Fla. 1st DCA 1997), approved in part, quashed in part, 713 So.2d 996 (Fla. 1998).

QUESTION PRESENTED

THE LOWER COURT'S HOLDING THAT A PLEA OF GUILTY WITH ADJUDICATION WITHHELD CAN NOT BE USED FOR IMPEACHMENT PURSUANT TO SECTION 90.610 CONFLICTS WITH THE DECISION OF ANOTHER DISTRICT COURTS OF APPEAL IN RAYDO V. STATE, 696 So. 2d 1225, (Fla. 1st DCA 1997) approved in part, quashed in part, 713 So.2d 996 (Fla. 1998)?

SUMMARY OF THE ARGUMENT

Pursuant to Florida Statute section 90.610 (1997), the State may attack the credibility of any witness, including the accused, by evidence of a prior felony conviction. The Petitioner maintains that a plea of guilty with an adjudication withheld constitutes a "conviction" for the purpose of impeachment pursuant to section 90.610. In its opinion below, the Third District Court of Appeal rejected this argument. The Third District's opinion is in express and direct conflict with the First District's opinion in Raydo V. State, 696 So. 2d 1225, (Fla. 1st DCA 1997) approved in part, quashed in part, 713 So.2d 996 (Fla. 1998).

In reaching its holding that a testifying witness or defendant in a criminal case could not be impeached by a nolo contendere plea in which he had not yet been adjudicated or sentenced, the First District noted the very crucial distinction between a plea nolo contendere and a guilty plea. The court reasoned that a nolo contendere plea that has not yet become a conviction could not be the basis of impeachment because the person entering such a plea does not admit guilt, as opposed to a guilty plea, which is an admission of guilt. The First District then held that testifying defendants or witnesses in criminal cases can only be impeached by "convictions", which for the purpose of impeachment pursuant to

90.610, are adjudications of guilt or the functional equivalents of an adjudication, which would be a plea of guilty or finding of guilt by a jury. Thus, an adjudication is not necessary in the case of a guilty plea, as the defendant has admitted guilt.

The sole purpose of impeachment by prior convictions, pursuant to rule 90.610, is to attack the credibility or believability of a witness. The body of the rule does not specifically preclude impeachment by evidence of a guilty plea with adjudication withheld. There is no authority on point which expressly prevents impeachment by evidence of a guilty plea with adjudication withheld. Thus, as a person's prior admission of guilt to a felony offense is clearly relevant in considering that person's willingness to abide by an oath to tell the truth, such an admission of guilt should be included within the rule's definition of "conviction". Accordingly, the lower court's decision should be reversed.

ARGUMENT

THE LOWER COURT'S HOLDING THAT A PLEA OF GUILTY WITH ADJUDICATION WITHHELD CAN NOT BE USED FOR IMPEACHMENT PURSUANT TO SECTION 90.610 CONFLICTS WITH THE DECISION OF ANOTHER DISTRICT COURT OF APPEAL IN RAYDO V. STATE, 696 So. 2d 1225, (Fla. 1st DCA 1997) approved in part, quashed in part, 713 So.2d 996 (Fla. 1998).

Pursuant to Florida Statute section 90.610 (1997), the State may attack the credibility of any witness, including the accused, by evidence of a prior felony conviction. The Petitioner maintains that a plea of guilty with an adjudication withheld constitutes a "conviction" for the purpose of impeachment pursuant to section 90.610. The lower court rejected this argument. The opinion below noted authority to the contrary from other districts, thereby acknowledging conflict, but relied on and followed the reasoning of Justice Anstead (then Judge Anstead) in Roberts v. State, 450 So.2d 1126, 1127 (Fla. 4th DCA 1984)(Anstead, J., specially concurring), review denied, 461 So.2d 116 (Fla.), which expressed his disagreement with Barber v. State, 413 So.2d 482 (Fla. 2d DCA 1982)² on the ground that:

² Then Judge Anstead summarized Barber as holding "that a finding of guilty by a jury should logically be just as sufficient as a finding followed by an adjudication, to serve as a predicate for impeaching a witness' veracity". Roberts v. State, 450 So.2d 1126, 127(Fla. 4th DCA 1984) rehearing denied.

However logical this view may appear, I presume the legislature was aware, when it enacted section 90.610(1) that the Florida Supreme Court had already announced:

This court has so often expressed the opinion that the word "conviction" includes the judgment of the court, as well as a plea or verdict of guilty, that such definition of the word as used in the statute or plea invoked to describe the effect of a former conviction in a subsequent cause may be said to be firmly established.

Smith v. State, 75 Fla. 468, 78 So. 530, 532 (1918). Since the Florida Supreme Court had already taken a clear-cut view of the meaning of "conviction," I believe we are bound to construe section 90.610(1) as intending to incorporate that definition when this provision was passed. In addition, since the evidence code was also adopted by the Florida Supreme Court as a rule of court, it is safe to assume that the court itself was aware of its prior definition.

Roberts, 450 So.2d at 1127. (Emphasis added).

McFadden v. State, 732 So.2d 412,413(Fla. 3d DCA 1999).

Based on the conflicting opinions authored subsequent to Smith, it appears that the definition of "conviction", both in the context of 90.610 and otherwise, is neither "clear cut" or "firmly established" throughout the District Courts. In State v. Keirn, 720 So.2d 1085 (Fla. 4th DCA 1998) the Fourth District stated that "[i]n Florida law, 'conviction' is a chameleon-like term which draws meaning from its statutory context." Id. at 1086. In State v.

Raydo, 713 So.2d 996 (Fla. 1998), the Florida Supreme Court specifically noted the disagreement among the District Courts as to the scope of the term "conviction" for purposes of impeachment pursuant to section 90.610(1). Id. at n.7. However, the issue was not before the Court in Raydo. The instant case now presents the Court with the opportunity to address the scope of the term "conviction" for the purpose of section 90.610 impeachment and answer the question of whether a plea of guilty with adjudication withheld can be used for impeachment pursuant to section 90.610.

In terms of the generally accepted meaning of "conviction", it has long been acknowledged that the term "conviction" may on occasion have different meanings depending upon the context in which it is used. State ex rel. Owens v. Barnes, 24 Fla. 153, 4 So. 560 (1888). Over 100 years ago, the Florida Supreme Court stated that in its "ordinary sense," the term "conviction" "means the ascertainment of the guilt of a party, either by a plea of guilty, or by the verdict of a jury." Yet, the Supreme Court also recognized that many authorities held that a "judgment or sentence was a necessary component part of a conviction." Id. The Petitioner readily admits that in the many years since Owens, the most common definition of a statute's use of the term "conviction" has required the trial court's adjudication of the defendant's

guilt after a plea or verdict. However, in looking at the scenarios in which adjudication was included within its meaning of "conviction" vis a vis those in which it was not, the reasoning for doing so is apparent within the purpose of the statute or rule involved. Surely, there is no one universal definition of "conviction" which can be applied across the board to the various criminal rules and statutes containing the term. Instead, the term must be defined on a statute by statute or rule by rule basis, with the purpose of the particular statute or rule as the governing factor.

Florida law provides a procedure whereby certain defendants may have adjudication of guilt and imposition of sentence withheld, and instead may be placed on probation. Section 948.01(2), F.S. (1997). The purpose of this statute was to provide defendant's who do not appear likely to again engage in criminal conduct with an opportunity for rehabilitation without formally and judicially branding the individual as a convicted criminal with the consequent loss of civil rights and other damning consequences. Delaney v. State, 190 So.2d 578, 580. (Fla.1966). The Florida Supreme Court has several times held that a legal conviction of crime includes a judgment of the court in addition to a plea or verdict of guilty. Smith v. State, 75 Fla. 468, 78 So. 530 (1918). An important factor

to bear in mind with regard to such holdings is that prior to the 1959 amendment of Section 948.01(3) of the Florida Statutes (Fla.Laws 1959, c. 59-130), a defendant could only be placed on probation after a formal adjudication of guilty by the court. Thus, only the imposition of sentence could be withheld. The question of the status of a defendant who has had both adjudication of guilt and imposition of sentence withheld has thus only presented itself to the courts subsequent to the 1959 amendment. In one case, the Florida Supreme Court found that a decision to place a defendant on probation pursuant to the provisions of Section 948.01(3) of the Florida Statutes without either adjudication of guilt or imposition of sentence constituted a "final judgment or decree" in order to give the Supreme Court jurisdiction to hear an appeal of the lower court's disposition of the case. Delaney v. State, supra.

In State v. Gazda, 257 So.2d 242 (Fla.1971), the Florida Supreme Court clearly attempted to distinguish the earlier decisions which had held that adjudication of guilt by the court was a necessary prerequisite to a legal conviction. In Gazda, the defendant had pleaded guilty to a charge of grand larceny. The court had ordered that adjudication and sentence be withheld pending a presentence investigation. The defendant then left the

court's jurisdiction and was not returned until six years later. The question before the Court was whether the defendant was "convicted" pursuant to section 775.14 of the Florida Statutes, which read: "Limitation of withheld sentences-- 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 Court found that the defendant had been "convicted" when he pled guilty.

The Court stated: "We agree with the majority opinion below that for purposes of construing § 775.14, supra, the term 'conviction' means determination of guilt by verdict of the jury or by plea of guilty, and does not require adjudication by the court." The Court then proceeded to distinguish earlier decisions which suggested a contrary result, indicating that what was said in all of the earlier cases related only to "judgment of conviction", and not to a mere "conviction". The Court held that an adjudication of guilt was a necessary prerequisite to a "judgment of conviction", but that it was not necessary before there could be a "conviction".

Among the cases which do require adjudication within the meaning of "conviction", there is a line of cases which goes further to question whether the term "conviction" requires an

appellate resolution. Joyner v. State, 158 Fla. 806, 808, 30 so.2d 304, 305 (1947) applies to habitual offender cases for the proposition that the conviction must be final before it can be relied upon to enhance the punishment in a subsequent case. In State v. Peterson, 667 So.2d 199, 200-01 (Fla. 1996), the Court held it was proper to include a conviction still pending appeal on a guidelines scoresheet. The Court distinguished Joyner by focusing on the definition of "conviction" contained in Rule 3.701(d)(2), Fla.R.Crim.P., which broadly defines the term as a "determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of a sentence was suspended."

However, the defendant argued that because the rule did not specifically address whether convictions must be affirmed on appeal before they can be properly scored, the statute is not clear and therefore the prior convictions pending appeal should not be included in the scoresheet. The Court declined the defendant's invitation to read into the rule the requirement that sentences pending appeal not be included as prior record. In rejecting comparisons between the sentencing guidelines and habitual offender statutes the Court reasoned that sentencing guidelines allow the

sentencing judge to have information concerning all past crimes regardless of whether the convictions were affirmed on appeal.

As was attempted by the Defendant in Peterson but rejected by the Court, it can not be argued that because section 90.610 does not specifically address whether the term "conviction" includes a guilty plea with adjudication withheld from being subject to impeachment, the rule is unclear and therefore such a guilty plea should not be included within the convictions which may be used for impeachment. To do so would require the Court to read something into the rule which is not there, and does not belong there.

In Ruffin v. State, 397 So.2d 277 (Fla. 1981) receded from on other grounds, Scull v. State, 533 So.2d 1137 (Fla. 1988), the Court held that a conviction pending appeal could still be considered as an aggravating circumstance in deciding whether to impose the death penalty. In explaining why appellate resolution was not necessary in this respect although it was required in the case of imposing an habitual offender sentence, the court explained the importance of assessing the defendant's propensity to commit violent crimes.

In State v. Snyder 673 So.2d 9 (Fla. 1996), the Court addressed the term "convicted" within the context of section 790.23, Florida Statutes (1991), which prohibits possession of a firearm by a

convicted felon. The issue presented was whether a defendant is "convicted" for purposes of section 790.23 when adjudicated guilty in the trial court, notwithstanding the fact that the defendant has the right to contest the validity of the conviction by appeal or by other procedures.

The Court ultimately held that an individual is "convicted" for purposes of section 790.23 from the point of being adjudicated guilty. In so holding, the Court recognized that section 790.23 is intended to protect the public by preventing the possession of firearms by persons who, because of their past conduct, have demonstrated their unfitness to be entrusted with such dangerous instrumentalities. In order to achieve this legislative purpose, 790.23 must apply following an adjudication of guilt. The fact that the predicate conviction is pending on appeal is irrelevant to the legislative purpose of protecting the public by preventing convicted felons from possessing firearms. Accordingly, the Court held that a defendant is convicted when adjudicated guilty in the trial court, regardless of the fact that the defendant has the right to contest the validity of the conviction by appeal or by other procedures.³

³ In this line of cases, an appellate resolution was only required in those cases which involved either a charge or sentencing enhancement statute. Accordingly, in State v. Finelli,

There are also certain rules and statutes which specifically include a withhold of adjudication within the statutory definition of "conviction". For example, in the realm of sentencing guidelines, Fla.R.Crim.P. 3.702(d)(2) defines "conviction" as "a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended." Also see Maxwell v. State, 336 So.2d 658 (Fla. 2d DCA 1976) where it was held Florida Statute section 893.14, which provided for conditional discharge and expungement of records for certain drug offenses and Florida Statute 775.084, the habitual offender statute, both showed the legislature's view that withholding of adjudication is to be treated as a judgment of conviction for purposes of subsequent punishments, at least where the second crime is committed during probation.

In Overstreet v. State, 629 So.2d 125 (Fla. 1993) the Supreme Court held that, pursuant to 775.084(2), Fla. Stat. (1991),⁴ when

24 Fla. L. Weekly D2025 (Fla. 4th DCA Sept. 1, 1999), the Fourth District held that in charging felony DUI pursuant to section 316.193(2)(b), Fla. Stat. (1997), a misdemeanor DUI conviction which was pending appeal could not serve as one of the three required underlying convictions.

⁴Subsection 775.084(2) provides as follows: For the purpose of this section, the placing of a person on probation without an adjudication of guilt shall be treated as a prior conviction if the subsequent offense for which he is to be sentenced was committed during such probationary period.

adjudication is withheld and a defendant who is sentenced as a youthful offender to incarceration followed by probation subsequently commits a felony while incarcerated for the prior offenses, the prior offenses which involved a withhold of adjudication can not be treated as prior convictions for purposes of felony offender sentencing. The Court held that, as a penal statute, subsection 775.084(2) had to be strictly construed in favor of the defendant.

In a dissenting opinion, Justice McDonald took issue with the Court's holding in that such a literal interpretation of subsection 775.084(2) permitted the defendant to evade classification as an habitual felon due to his incarceration with adjudication withheld when he committed the subject felony, as opposed to being on probation when he committed the felony. (Emphasis added). Justice McDonald stated: "The legislature did not intend such a result. Rather, the intended purpose of subsection 775.084(2) was to prevent all recipients of withheld adjudication from utilizing that benefit if they commit subsequent offenses while under any form of government control."⁵

⁵Justice McDonald explained that the reason subsection 775.084(2) includes only offenses committed during probation is because in 1971, when the current form of 775.084 was enacted, adjudication could only be withheld when the offender was placed on probation. Thus, at that time the legislature had no reason for expanding the scope of 775.084(2) beyond probation. However, the 1978 enactment of the youthful offender statute created the

In United States v. Hartsfield, 387 F.Supp. 16 (M.D.Fla.1975), the defendant was charged with knowingly making a false statement in connection with the purchase of a gun by declaring that he was not then under indictment or information, i.e. that no open criminal charges were pending against him. The issue of whether defendant's answer constituted a false statement pursuant to the federal law, turned on whether his earlier plea of guilty in a Florida court which resulted in a withholding of adjudication constituted a conviction under Florida law, thus closing the Florida charge. The federal court considered the plea with adjudication withheld as meeting the Florida definition of "conviction". The court held that "conviction", as distinguished from "judgment of conviction", had occurred when defendant entered his plea of guilty, and thus his statement that no charges were pending against him was true, the court dismissed the false statement case.

In McCrae v. State, 395 So.2d 1145, 1153-54 (Fla.1980) the Court was required to construe the term "convicted" in section 921.141(5)(b), Florida Statutes (1975), which describes an

unusual situation where an individual could have adjudication withheld but still be sentenced to a period of incarceration. Overstreet v. State, 629 So.2d 125, 126-7, (Fla. 1993).

aggravating circumstance in a capital sentencing proceeding as being that the "defendant was previously convicted of ... a felony involving the use or threat of violence to the person." The Court held that a defendant was "convicted" within the meaning of the statute if he had entered a guilty plea to a qualifying felony, but had not yet been sentenced. The Court reasoned that prior criminal conduct should be taken into consideration at sentencing where a defendant's plea of guilty amounted to an "in-court confession."

The subsequent case of Garron v. State, 528 So.2d 353, 360 (Fla.1988), is instructive as it refined the holding of McCrae to point out that it is a plea of guilty, and not a plea of nolo contendere, that "is an absolute condition precedent before the lack of adjudication can be considered a conviction." Although the instant case requires the Court to determine the meaning of the term "conviction" within the context of a different statute, this distinction between the type of plea is highly applicable and crucial to the instant case.

The first case to specifically construe the term "conviction" within the context of section 90.610 was Barber v. State, 413 So.2d 482 (Fla. 2d DCA 1982). The court in Barber was aware that the Court in Smith v. State, 75 So.2d 468, 78 So. 530 (1918) had construed the word "convicted" to be equivalent to "adjudicated".

Yet, the court held that a jury verdict of guilty where judgment and sentence have not (yet) been entered is admissible for impeachment purpose, so long as the defendant has the opportunity to explain to the jury the legal status of the "conviction", as would be the case where a conviction was pending appeal. The court clarified that it was not suggesting that a guilty verdict is for all purposes the equivalent of a conviction or that a mere plea of guilty may in all cases be used for impeachment. The court went on to note that if the trial court ultimately chose to withhold adjudication and place the defendant on probation, the defendant could not thereafter be impeached concerning that crime.

The uncertainty over the term "conviction" in the context of impeachment then arose in the Fifth District in Thomas v. State, 424 So.2d 193 (Fla. 5th DCA 1983), when the court was asked to decide whether a witness' credibility could be impeached by eliciting testimony from him, or otherwise proving that he had pled guilty to a crime, although adjudication of guilt was withheld and he was placed on probation. As the court found that this was not a fundamental error, it was not able to decide the question because the defendant failed to preserve the alleged error by making a timely objection.

The First District then decided Johnson v. State, 449 So.2d

921 (Fla. 1st DCA 1984) rehearing denied, and held that the trial court was required to regard a witness who had pled guilty but had not yet been adjudicated and sentenced as having been convicted. This decision was reached in context of the defendant's request for a jury instruction to the effect that in weighing the credibility of the witness, the jury should consider whether the witness has been convicted of a crime. The trial judge denied the request because the witness had not yet been adjudicated and sentenced.

The District Court held that for purposes of 90.610 impeachment, the witness was to be regarded as if he had been convicted. Thus, defendant was entitled to the requested instruction. Although this case is getting closer to the scenario present in the case sub judice in that it involves a plea of guilty as opposed to a guilty verdict, it is still confined to the time period prior to adjudication and sentencing. In anticipation of an ultimate withhold of adjudication, which is the situation in the case sub judice, the court quoted to Barber's treatment of this issue and the conclusion that thereafter the crime could no longer be used for impeachment. Of course, Petitioner disagrees with this position and will show authority and reasoning to support its position.

In Roberts v. State, 450 So.2d 1226 (Fla. 4th DCA

1984)(Anstead, J., specially concurring), review denied, 461 So.2d 116 (Fla. 1984) then -Judge Anstead stated his view that the legal meaning of conviction should include adjudication, without varying the definition for different situations. In deciding Roberts in direct conflict with Barber, Roberts began the present disagreement among the districts on the issue at bar.

The lower court's opinion in the instant case is in direct and express conflict with the First District case of Raydo v. State, 696 So. 2d 1225, (Fla. 1st DCA 1997) approved in part, quashed in part, 713 So.2d 996 (Fla. 1998).⁶

In Raydo v. State, 696 So.2d 1225 (Fla. 1st DCA 1997), approved in part, quashed in part, 713 So.2d 996 (Fla. 1998) the defendant decided not to testify because the trial court had ruled that he could be impeached with evidence that he entered a nolo contendere plea to a felony in an unrelated case even though he had not yet been adjudicated or sentenced in that case. In reaching its holding that the trial court committed reversible error in suggesting that defendant could be impeached by a *nolo contendere*

⁶In its Brief On Jurisdiction, the Petitioner mistakenly included Roberts v. State, 450 So.2d 1226 (Fla. 4th DCA 1984)(Anstead, J., specially concurring), review denied, 461 So.2d 116 (Fla. 1984) as being In direct conflict with the opinion entered In the instant case by the Third District Court of Appeal. Petitioner now recedes from that position.

plea, the First District Court of Appeal distinguished a nolo contendere plea from a guilty plea. In doing so, the court stated as follows:

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. (Emphasis added).

The District Court reasoned that a nolo contendere plea that has not yet become a conviction could not be the basis of impeachment, because one entering such a plea does not admit guilt.

Therefore, evidence of the nolo contendere plea is irrelevant unless that plea resulted in a conviction, i.e. adjudication of guilt. Based on this reasoning, although a plea of guilty with adjudication withheld is not the standard "conviction" because it is not an adjudication, it is still a "conviction" for the purpose of impeachment because a guilty plea is the functional equivalent of an adjudication. It is exactly this reasoning which must apply to the case sub judice. An adjudication is not necessary in order to allow impeachment in the case of a guilty plea as the defendant has in fact admitted guilt.

In its review of Raydo, this Court quashed the First District's opinion with regard to its holding on the constitutional

issue of whether the trial court's evidentiary ruling impermissibly violated Raydo's right to testify. The Court went on to hold that Raydo failed to preserve his claim of improper impeachment pursuant to section 90.610(1) because he did not testify, thereby preventing the impeachment evidence from being introduced. However, in order to clarify the law and provide guidance to trial courts in this area, the Court did address the substantive issue of whether a defendant's credibility may be attacked by a nolo contendere plea.

In order to resolve the precise issue in Raydo, the Court did not have to reach a decision as to the scope of the term "conviction" pursuant to 90.610(1). Instead, the Court did not need to look any further than section 90.410, Florida Statutes (1995), which explicitly precludes evidence of a nolo contendere plea in any criminal proceeding. Section 90.410's specific preclusion of evidence of nolo contendere pleas takes precedence over the more general impeachment provisions of section 90.610(1).

The Court then went on to acknowledge, as was done by the First District, that a defendant entering a plea of nolo contendere does not admit guilt. The Court further pointed out that if adjudication on such a plea was later withheld, there would be no conviction under 90.610(1). Thus, the Court approved this portion of the First District's decision and held that a defendant's nolo

contendere plea, without a conviction entered on the plea, is not admissible to attack a defendant's credibility pursuant to section 90.610(1). This holding is clearly applicable only to cases involving nolo contendere pleas. Once again, the reason being the distinction that, unlike a nolo contendere plea, a defendant who pleads guilty does admit guilt.

At this juncture it is necessary to look at the exact language of section 90.610, which reads, in its entirety, as follows:

90.610. Conviction of certain crimes as impeachment

(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:

(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.

The sole purpose of impeachment by prior convictions is to attack the credibility or believability of the witness. Bobb v. State, 647 So.2d 881 (Fla. 4th DCA 1994). As noted by Charles Erhardt in his comments to section 90.610 of the evidence code, the theory supporting the admissibility of a wide variety of convictions (as opposed to just convictions involving dishonesty or false statement) 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." Erhardt, Charles, Florida Evidence, Sec. 610.1, at 419 (1993 ed.). This same reasoning was expressed in the commentary on the 1978 Amendment to 90.610(1), which expanded the types of convictions that could be used to impeach to include all crimes punishable by death or imprisonment in excess of one year. The commentary stated:

This amendment, broadening the types of convictions that may be used to impeach, recognizes that when a person has evidenced his willingness not to follow certain significant criminal laws, he may also be willing to violate the rules relating to truth-telling.

Clearly, an admission of guilt evidences an individual's willingness to disobey certain criminal laws, and would therefore

bear upon his credibility as a witness.

A very important factor to consider In the course of analyzing whether section 90.610 intended to allow guilty pleas with adjudication withheld to be included within the scope of the term "conviction" is the fact that they were not specifically excluded, as was evidence of juvenile adjudications In subsection (1)(b). It is a general principle of statutory construction that the mention of one thing implies the exclusion of another (expression unius est exclusio alterius). Capers v. State, 678 So.2d 330 (Fla. 1996).

Thus, if the legislature intended to prohibit evidence of guilty pleas with adjudication withheld from being used for impeachment purposes, it could have expressly stated so, as it did in 90.410 regarding nolo contendere pleas or in 90.610(1)(b) regarding juvenile adjudications. Since the legislature only expressly precluded pleas of nolo contendere from evidence and evidence of juvenile adjudications from being used for impeachment, it is clear that a guilty plea with an adjudication withheld falls under the inclusive general rule allowing impeachment by evidence of a conviction. McFadden v. State, 24 Fla.L.Weekly S263 (Fla. 1999).

Also significant is the amendment to subsection (2) which changed the Code's provisions relating to the admissibility of a

conviction which had subsequently been pardoned. The fact that subsection (2) provides that the pendency of an appeal or the granting of a pardon relating to such crime does not render evidence of the conviction for said crime inadmissible indicates that the conviction does not have to be iron-clad to be admissible for the purpose of impeachment. This is not to say that it might not be advisable to amend the rule to specifically address the admissibility of a guilty plea with adjudication withheld and perhaps allow for evidence of the withhold to be addressed on redirect, as is the case in the pendency of an appeal.

The Florida Evidence Code enacted by the Legislature is both substantive and procedural. The Florida Supreme Court has adopted provisions of the Evidence Code as court rules insofar as they deal with procedural matters. In re Florida Evidence Code, 372 So.2d 1369 (Fla.1979), clarified by In re Florida Evidence Code, 376 So.2d 1161 (Fla.1979). The Court has also adopted amendments to the Evidence Code as court rules to the extent that they are procedural.

In State v. Page, 449 So.2d 813, 815 (Fla. 1984), the Florida Supreme Court held that subsection 90.610(1), dealing with the use of prior convictions for the purpose of impeachment, clearly fell within the realm of "procedure." Accordingly, if the Court

determines that the issue at bar also falls squarely within the realm of procedure, the analysis of the subsection would not be governed by legislative intent and it would not be necessary to apply principles of statutory interpretation. Id. Instead, the subsection must be read in conjunction with the limited purpose for which convictions have been historically admissible. Bobb v. State, 647 So.2d 881, 883-4 (Fla. 4th DCA 1994).

The pure purpose for which convictions have been admissible is to test the witness' credibility. In resolving the conflict which exists between the lower court's opinion and the First District's opinion in Raydo by reviewing the text of section 90.610, together with its purpose of calling the witness' veracity into question, it is logical to presume that the term "conviction" includes a plea of guilty with adjudication withheld. As the Court did in Peterson, the Court in the instant case should decline the Respondent's invitation to read into the rule the requirement that pleas of guilty with adjudication withheld are not included within the term "conviction."

The purpose of the withhold of adjudication and sentence was to provide a worthy defendant an opportunity at rehabilitation without the stigma and consequences of a "formal" conviction. Clearly, 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. They should not be entitled to cloak themselves in the protection of a withhold of adjudication in order to avoid being impeached by their admission of guilt. Overstreet. By allowing the guilty plea with adjudication withheld to be used for impeachment, the Court would avoid violating the purpose of withholding adjudication and placing a defendant on probation, and at the same time uphold the purpose of the impeachment statute, which is to test a witness' veracity by virtue of their involvement in past criminal acts.

A conclusion that a plea of guilty with adjudication withheld is included within 90.610's meaning of "conviction" is supported by the Court's reasoning in Gazda (which made an important distinction between a "judgment of conviction", which requires an adjudication of guilt versus a "conviction" which does not); in McCrae (where the Court reasoned that a defendant's plea of guilty amounted to an "in-court confession"); and in Garron (where the Court stated that it is a plea of guilty and not a plea of nolo contendere that is an "absolute condition precedent before the lack of adjudication can be considered a conviction").

Clearly, the existing conflict between the lower court's opinion and the First District's opinion in Raydo should be

resolved by holding that a witness who has previously entered a plea of guilty with adjudication withheld has admitted his guilt to that crime. That "confession" of guilt is the functional equivalent of an adjudication for the purpose of constituting a "conviction" pursuant to 90.610. Thus, a guilty plea with adjudication withheld should be admissible to test the veracity of a witness by virtue of impeachment pursuant to 90.610.

CONCLUSION

Based upon the arguments and authorities cited herein, Petitioner respectfully requests that the Court reverse the decision entered by the Third District Court of Appeal in the instant case and find that section 90.610 does allow for a witness to be impeached by a plea of guilty with adjudication withheld.

Respectfully Submitted,

ROBERT A. BUTTERWORTH
Attorney General

LINDA S. KATZ

Assistant Attorney General

Florida Bar No. 0672378

MICHAEL J. NEIMAND

Senior Assistant Attorney General

Bureau Chief, Criminal Section

Florida Bar No. 0239437
Office of the Attorney General
Department of Legal Affairs
RiverGate Plaza Suite 950
444 Brickell Ave.
Miami, Florida 33131
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner On The Merits was mailed this 29th day of November, 1999, to Maria E. Lauredo, Asst. Public Defender, 1320 N.W. 14th Street, Miami, FL 33125.

LINDA S. KATZ

MICHAEL J. NEIMAND

Assistant Attorney General

Senior Assistant Attorney General

Bureau Chief, Criminal Section