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FILED
DEBBIE CAUSSEAU

IN THE SUPREME COURT OF FLORIDA

JUN 14 1999

CASE NO. 95,614

CLERK, SUPREME COURT
By _____

THE STATE OF FLORIDA,

Petitioner,

-vs-

GREGORY MCFADDEN,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON JURISDICTION

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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. 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

Pursuant to Florida Rule of Appellate Procedure 9.210(c), Respondent Gregory McFadden accepts the Petitioner's statement of facts as a non-argumentative representation of the facts.

SUMMARY OF THE ARGUMENT

A defendant may not be impeached at trial with a prior case where adjudication was withheld, regardless of whether the withhold of adjudication followed a guilty plea or a jury verdict of guilt. There is no express or direct conflict among Florida courts regarding this rule. Therefore, the State's petition for discretionary review must be denied.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THIS CASE DOES NOT EXPRESSLY OR DIRECTLY CONFLICT WITH THE DECISIONS OF OTHER FLORIDA COURTS.

The State alleges that the Third District Court of Appeal's decision in *McFadden v. State*, 24 Fla. L. Weekly D941(Fla. 3d DCA April 14, 1999) expressly and directly conflicts with *Roberts v. State*, 450 So. 2d 1126 (Fla. 4th DCA 1984), *Thomas v. State*, 424 So. 2d 193 (Fla. 5th DCA 1983), and *Raydo v. State*, 696 So. 2d 1225(Fla. 1st DCA 1997) *quashed in part*, 713 So. 2d 996 (Fla. 1998). This assertion is incorrect; there is no express or direct conflict among these cases. Therefore, the State's petition for discretionary review must be denied.

In *McFadden*, the Third District held that a guilty plea resulting in a *withhold* of adjudication does not constitute a "conviction" as is required to impeach a witness under section 90.610(1), Florida Statutes (1997) (A. 1). The above cited decisions of other District Courts of Appeal do not hold otherwise. First, the majority opinion in *Roberts* states that the prosecutor's impeachment of the defendant in that case with a prior crime was improper, but does not specify why the impeachment was improper. The opinion makes no mention of whether a guilty plea resulting in a withhold of adjudication constitutes a prior conviction for impeachment purposes. In a

concurring opinion, Justice Anstead (then Judge Anstead) noted that in *Smith v. State*, 78 So. 530 (Fla. 1918), this Court established a “clear-cut legal meaning of conviction which *includes* adjudication”. *Roberts*, 450 So. 2d at 1127. Thus, *Roberts* in no way conflicts with the Third District’s decision in the present case.

In *Thomas v. State*, the Fifth District Court of Appeal specifically declined to reach the issue of whether a “conviction” requires an adjudication of guilt. Moreover, in the subsequent case of *Parker v. State*, 563 So. 2d 1130 (Fla. 5th DCA 1990), the Fifth District agreed with Justice Anstead’s conclusion in *Roberts* that the term “conviction” *includes* adjudication by the trial court. Therefore, the decisions of the Fifth District are also not in conflict with the Third District’s holding in this case.

Finally, in *Raydo v. State*, the First District addressed whether a prosecutor may impeach a defendant with a previous nolo contendere plea, where the trial court had not yet sentenced the defendant pursuant to that plea and therefore *had not yet passed upon the issue of adjudication*. The *Raydo* court held that a defendant may not be impeached on the basis of a nolo contendere plea that had not yet become a conviction, *i.e.* an adjudication of guilt. Therefore, *Raydo* does not expressly or directly conflict with the Third District’s holding that a guilty plea resulting in a

withhold of adjudication does not constitute a conviction.¹

In reaching its holding, “the First District [in *Raydo*] distinguished cases that interpreted the term ‘conviction’ under section 90.601(1) to include both a jury verdict of guilt and a plea of guilty, *even though there had been no adjudication.*” *State v. Raydo*, 713 So. 2d 996, 1001 note 7 (Fla. 1998). Specifically, the cases distinguished by the First District were *Barber v. State*, 413 So. 2d 482 (Fla. 2d DCA 1982) (jury verdict of guilt), and *Johnson v. State*, 449 So. 2d 921 (Fla. 1st DCA 1984) (guilty plea).

Neither *Barber* nor *Johnson* conflict with the Third District’s decision in this case. *Barber* and *Johnson* held that impeachment with a prior jury verdict of guilt or a prior guilty plea should be allowed where the trial court has *not yet determined whether adjudication will be imposed* in the prior case. However, the *Barber* and *Johnson* courts both specifically acknowledged that if a trial court “*ultimately chooses to withhold adjudication. . . [a defendant] cannot thereafter be impeached by evidence concerning that crime.*” *Barber*, 413 So. 2d at 484; *Johnson*, 449 So. 2d at

¹Moreover, in *Childers v. Department of Environmental Protection*, 696 So. 2d 962, 965 (Fla. 1st DCA 1997) the First District noted that “if a person pleads guilty or is found guilty by a jury but the sentencing judge withholds an adjudication of guilt, there has been no conviction and the person’s credibility cannot be impeached with it.” (quoting Charles W. Ehrhardt, *Florida Evidence* §610.4, at 434 (1994 Edition))

923.

The present case is such a case where the trial court ultimately chose to withhold adjudication following a guilty plea. Where adjudication is withheld, this Court and the District Courts of Appeal have uniformly found that a defendant may not be impeached by evidence concerning that crime, regardless of whether the withhold of adjudication resulted after a guilty plea or after a finding of guilt by a jury. *See State v. Raydo*, 713 So. 2d 996, 1001 (Fla. 1998) (“[A]t sentencing a trial court might decide to withhold adjudication. *If adjudication is withheld, there would be no conviction under section 90.610(1).*”); *Childers v. Department of Environmental Protection*, 696 So. 2d 962, 965 (Fla. 1st DCA 1997) (“If a person pleads guilty or is found guilty by a jury but the sentencing judge withholds an adjudication of guilt, there has been no conviction and the person’s credibility cannot be impeached with it.”); *Johnson v. State*, 449 So. 2d 921, 923 (Fla. 1st DCA 1984) (same); *Barber v State*, 413 So. 2d 482, 484 (Fla. 2^d DCA 1982) (same); *Roberts v. State*, 450 So. 2d 1126 (Fla. 4th DCA 1984) (Anstead, J., specially concurring) (concluding that the term “conviction” should always be interpreted to require an adjudication, without varying the definition for different situations); *Parker v. State*, 563 So. 2d 1130 (Fla. 5th DCA 1990) (agreeing with Justice Anstead’s concurring opinion in *Roberts*). There is no express or direct conflict among Florida courts

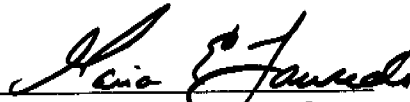
regarding the well established rule that a defendant may not be impeached with a prior case where adjudication was withheld by the trial court. Therefore, the State's petition for discretionary review must be denied.

CONCLUSION

There is no basis for the exercise of conflict jurisdiction in this case. Therefore, the Respondent respectfully requests that the petition for discretionary review be denied.


Respectfully submitted,

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CERTIFICATE OF SERVICE

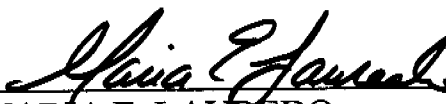
I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to Linda Katz, Assistant Attorney General, Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite #950, Miami, Florida 33131, on 11th day of June, 1999.



MARIA E. LAUREDO
Assistant Public Defender

CERTIFICATE OF FONT

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



MARIA E. LAUREDO
Assistant Public Defender