



TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
POINT INVOLVED	4
SUMMARY OF THE ARGUMENT	5-6
ARGUMENT	7-14
IT IS NOT REVERSIBLE ERROR FOR THE TRIAL COURT TO DENY THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL MADE AT THE CONCLUSION OF ALL OF THE EVIDENCE, WHERE THE STATE HAS FAILED TO MAKE A <u>PRIMA FACIE</u> CASE AND THE DEFENDANT MOVES FOR A JUDGMENT OF ACQUITTAL WHICH IS DENIED AND THEREFORE, DURING THE DEFENDANT'S CASE EVIDENCE IS PRESENTED THAT SUPPLIES ESSENTIAL ELEMENTS OF THE STATE'S CASE. (Certified question restated).	
CONCLUSION	15
CERTIFICATE OF SERVICE	15

TABLE OF CITATIONS

<u>CASE</u>	<u>PAGE</u>
<u>Adams v. State</u> , 367, So.2d 68 (Fla. 1979)	5,8,10
<u>Alvarez v. State</u> , 403 So.2d 1005 (Fla. 3rd DCA 1981)	5,8,10,11
<u>Benchwick v. U.S.</u> , 297 F.2d 330, (9th Cir. 1981)	9
<u>Bullard v. State</u> , 151 So.2d 343 (Fla. 1st DCA 1963)	10
<u>Cephus v. U.S.</u> , 324 F.2d 893 (D.C. Cir. 1963)	12
<u>Kozakoff v. State</u> , 104 So.2d 59 (Fla. 2d DCA 1958)	10
<u>McGautha v. California</u> , 402 U.S. 183 (1971)	10
<u>Pennington v. State</u> , 12 F.L.W. 2418 (Fla. 4th DCA opinion filed Oct. 14, 1987)	7,10,12,13,14
<u>Richardson v. State</u> , 488 So.2d 661 (4th DCA 1986)	7
<u>Roberts v. State</u> , 154 Fla. 36,16 So.2d 435 (1944)	10
<u>State v. DiGuilio</u> , 491 So.2d 1129 (Fla. 1986)	13
<u>State v. Murray</u> , 443 So.2d 955 (Fla. 1984)	13
<u>U.S. v. Contreras</u> , 667 F.2d 976 (11th Cir.) <u>cert. denied</u> , 459 U.S. 849(1982)	8,9
<u>U.S. v. Foster</u> , 783 F.2d 1082, (D.C.Cir. 1986)	7, 9,10,13,14
<u>U.S. v. Lopez</u> , 576 F.2d 840, 842 (10th Cir.)	12
<u>U.S. v. Perry</u> , 638 F.2d 862 (5th Cir. 1981)	8,9
<u>U.S. v. White</u> , 611 F.2d 531 (5th Cir. 1980)	5
<u>Wagner v. State</u> , 421 So.2d 826 (Fla.1st DCA 1982)	7,12
<u>RULES</u>	
Fla.R.Crim.P. 3.380 (b)	5,13

PRELIMINARY STATEMENT

Petitioner was the appellant in the Fourth District Court of Appeal and the prosecution in the trial court. The Respondent was the appellee and the defendant, respectively, in the lower courts.

In the brief, the parties will be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State.

The following symbols will be used:

"R"	Record on Appeal
"PA"	Petitioner's Appendix

All emphasis has been added by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE

Petitioner accepts respondent's rendition of the statement of the case as stated in respondent's initial brief in the Fourth District Court of Appeal. However, the State adds the following: (1) The Fourth District on October 14, 1987 reversed respondent's conviction remanding the case to the trial court with instructions to enter a judgment of acquittal. Pennington v. State, 12 F.L.W. 2418 (Fla.4th DCA Oct. 14, 1987). The court also certified a question of great public importance.

STATEMENT OF THE FACTS

Petitioner accepts the Fourth District's rendition of the facts as enunciated in its opinion of October 14, 1987. Pennington, 12 F.L.W. at 2418.

POINT INVOLVED

WHETHER IT IS REVERSIBLE ERROR FOR THE TRIAL COURT TO DENY THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL MADE AT THE CONCLUSION OF ALL OF THE EVIDENCE, WHERE THE STATE HAS FAILED TO MAKE A PRIMA FACIE CASE AND THE DEFENDANT MOVES FOR A JUDGMENT OF ACQUITTAL WHICH IS DENIED AND THEREFORE, DURING THE DEFENDANT'S CASE EVIDENCE IS PRESENTED THAT SUPPLIES ESSENTIAL ELEMENTS OF THE STATE'S CASE?

(Certified question restated).

## SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal has certified a question of great public importance. The Fourth District has held that a defendant does not waive his motion for judgment of acquittal, made at the close of the State's case, by presenting a defense in his behalf.

The Federal courts and several district courts of Florida hold to the contrary, adhering to the well-established "waiver rule". see, U.S. v. White, 611 F.2d 531 (5th Cir. 1980); Alvarez v. State, 403 So.2d 1005 (Fla. 3rd DCA 1981); Adams v. State, 367 So.2d 68 (Fla. 1979). Pursuant to this rule a defendant waives his right to contest a denial of his motion for judgment of acquittal made after the State's case where he presents a defense. This rule requires a defendant to choose between standing by his motion and not presenting a defense or accepting the denial of the motion and presenting a defense. Although this may present defendants with a difficult choice it does not outweigh society's interest in protection.

Additionally defendants cannot rely on Fla.R.Crim.P. 3.380(b) to obscure the "waiver rule". The proper interpretation of this rule is that an appellate court can review the defense case when a defendant contests the trial court's denial of its motion for judgment of acquittal which was made at the close of the State's case. Here, the rule is applied such that review of the defendant's case is allowed whether it hurts, or helps the defendant's case.

Pursuant to the above analysis the Fourth District's decision must be reversed and defendant's conviction must be affirmed.

## ARGUMENT

IT IS NOT REVERSIBLE ERROR FOR THE TRIAL COURT TO DENY THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL MADE AT THE CONCLUSION OF ALL OF THE EVIDENCE, WHERE THE STATE HAS FAILED TO MAKE A PRIMA FACIE CASE AND THE DEFENDANT MOVES FOR A JUDGMENT OF ACQUITTAL WHICH IS DENIED AND THEREFORE, DURING THE DEFENDANT'S CASE EVIDENCE IS PRESENTED THAT SUPPLIES ESSENTIAL ELEMENTS OF THE STATE'S CASE.

In Pennington v. State, 12 F.L.W. 2418 (Fla. 4th DCA opinion filed Oct. 14, 1987), the Fourth District Court of Appeal reversed a conviction and remanded to the trial court with instructions that it enter a judgment of acquittal in favor of defendant. The court relied on its holding in Richardson v. State, 488 So.2d 661 (4th DCA 1986) where it cited with approval Wagner v. State, 421 So.2d 826 (Fla. 1st DCA 1982). The Wagner court proposed that "The State may not rely upon evidence presented during defendant's subsequent defense to supply essential missing links in the State's prima facie case to support the denial of the motion for judgment of acquittal." Id. at 827. In essence, the Fourth District's holding espouses the view that a defendant does not waive his motion for judgment of acquittal made at the close of the State's case by presenting a defense in his behalf.

The Fourth District, in the instant case has in effect rejected the so-called "waiver-rule" adhered to by the federal courts. See U.S. v. Foster, 783 F.2d 1082, 1085,

N.1 (D.C. Cir. 1986); Wagner v. State, supra (Judge Smith, specially concurring). Two districts in Florida have also followed the analysis of the waiver rule. Adams v. State, 367 So.2d 635 (Fla. 2d DCA), cert. denied, 376 So.2d 68 (Fla. 1979); Alvarez v. State, 403 So.2d 1005 (Fla. 3rd DCA 1981). Also see, U.S. v. Contreras, 667 F.2d 976 (11th Cir.) cert. denied, 459 U.S. 849 (1982). The "waiver-rule" or "waiver doctrine" is defined by the Fifth circuit in U.S. v. White, 611 F.2d 531, 536 (5th Cir. 1980) as:

Under the "waiver doctrine," however, a defendant's decision to present evidence in his behalf following denial of his motion for a judgment of acquittal made at the conclusion of the Government's evidence operates as a waiver of his objection to the denial of his motion.

. . .

If a defendant fails to renew his motion for judgment of acquittal at the end of all the evidence, the "waiver doctrine" operates to foreclose the issue of sufficiency of the evidence on appeal absent a "manifest miscarriage of justice."

Id. at 536 [Citations omitted].

Pursuant to the waiver rule a defendant cannot on appeal contest a denial of a motion for judgment of acquittal, at the close of the prosecution's case, if any deficiency in the evidence is cured by evidence presented in the defendant's own behalf following such denial. U.S. v. Perry, 638 F.2d 862

(5th Cir. 1981); U.S. v. Contreras, 667 F.2d 976, 980 (11th Cir. 1982) ("...having chosen to present his own evidence after the denial of his motion for judgment of acquittal, Appellant took the risk that such evidence would bolster the government's case").

The waiver rule requires that a defendant stand behind his assertion that the State failed to prove a prima facie case against him. The defendant who believes that the State failed to make its case may thus have to choose between presenting no evidence in his defense, and in effect gambling on this assertion, or relinquishing the point and presenting a defense which may fill the holes in the State's case. Although this rule may present a defendant with a difficult choice, litigants in the course of many trials are confronted with difficult decisions. Several federal courts have recognized this "dilemma". One federal court has stated that although the waiver rule may present a defendant with a "hard choice" it ... "provides no basis for exempting the defendant from the provisions of the rule." Benchwick v. U.S., 297 F.2d 330, 335 (9th Cir. 1981). Additionally, the Foster court has stated:

"Requiring the defendant to accept the consequences of his decision to challenge directly the government's case affirms the adversary process."

Foster, at 783 at 1084.

In U.S. v. Foster, supra the court pointed out that

all eleven federal circuits and the District of Columbia Court of Appeals are on record as adhering to the waiver rule. U.S. v. Foster, at 1085, N.1. Additionally, the court noted that the United States Supreme Court, albeit in dicta, has approved the waiver rule in McGautha v. California, 402 U.S. 183, 216 (1971). Id. at 1085. Thus the Supreme Court in McGautha stated:

Further, a defendant whose motion for acquittal at the close of the Government's case is denied must decide whether to stand on his motion or put on a defense, with the risk that in so doing he will bolster the Government case enough for it to support a verdict of guilty.

Id. at 216.

In Florida, the Second District in Adams v. State, supra, held, contrary to the Fourth in Pennington, that where the State failed to prove an element of a statutory offense and the defendant provided the proof on cross-examination, the fact that the evidence presented by the State was insufficient was not grounds for reversal. In support of this holding the court cited several earlier decisions. See, Bullard v. State, 151 So.2d 343 (Fla. 1st DCA 1963); Kozakoff v. State, 104 So.2d 59 (Fla. 2d DCA 1958); Roberts v. State, 154 Fla. 36, 16 So.2d 435 (1944). The Third District in Alvarez v. State, supra has also followed the rule in Adams. In Alvarez the court held that "...failure of the State to establish an independent corpus

delicti was cured by the defendant's testimony at trial which supplied the missing proof..." Alvarez at 1005.

In the instant case, specifically, the Fourth District held that the prosecution failed to present sufficient evidence during its case to prove that respondent knowingly participated in the delivery of a controlled substance. However, the trial court hearing the evidence denied respondent's initial motion for judgment of acquittal. Subsequently, during the defense, valid admissible evidence was elicited which clearly linked respondent to knowingly participating in the drug transaction, ie. defendant had a conversation regarding the drug transaction. Here, any insufficiency in the State's case against respondent was cured by subsequent admissible testimony which provided the missing link. Respondent thus waived his right to contest the trial court's denial of his motion for judgment of acquittal by presenting evidence in his defense. This evidence supplied the missing link in the State's case. The defendant should not be set free where strong evidence implicating him in the crime was introduced and the jury found him guilty beyond a reasonable doubt based on all the evidence produced at trial.

The Fourth District although justifiably concerned with applying the waiver rule, as it requires a defendant to choose between standing on his motion or presenting a defense, may have looked at the waiver rule in a vacuum. The rule standing alone may limit an accused's right to have the

prosecution prove a prima facie case before he presents a defense. Notably, scholarly criticisms such as these have been made. see, Cephus v. U.S., 324 F.2d 893 (D.C. Cir. 1963); U.S. v. Lopez, 576 F.2d 840, 842 (10th Cir. 1978); Pennington v. State, supra; Wagner v. State, supra. However, the waiver rule must be viewed in relation to its broader effect on the resolution of a criminal case. The waiver rule may present serious limitations on a defendant's presentation of his case, theoretically; but pragmatically it eliminates the outcome of a guilty person walking free as a result of a technicality of the law. And this is the precise policy behind the waiver rule.

This policy can be illustrated by the following scenario: A defendant is charged with a heinous crime, such as a brutal rape and stabbing, at trial the State fails to present a sufficient case. The defendant takes the stand and on cross-examination he confesses to the crime. The defendant is found guilty beyond a reasonable doubt. The conviction is based on all the evidence adduced at trial. Pursuant to the Fourth District in Pennington, this defendant will be set free merely because, had a prior erroneous ruling been made correctly, the trial would have ended before sufficient evidence to convict had been presented. On the other hand pursuant to the policy behind the waiver rule this defendant would not be set free merely because of a procedural error. Here strong evidence was introduced against the defendant, and any procedural rights the defendant may have

had are clearly outweighed by the rights of society in being protected. U.S. v. Foster, supra. It is this policy of the waiver rule which the State now stresses must also be embraced by the laws of Florida.

Notably, this Court has in other circumstances recognized that strict rules of law cannot be viewed in a vacuum. Accordingly, in State v. Murray, 443 So.2d 955 (Fla. 1984) and State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) this Court held that strict rules of law must be viewed in light of all surrounding circumstances. For example, in State v. Murray, this Court held that prosecutorial misconduct must be viewed in relation to all circumstances and, where it is merely harmless error it will not be grounds for reversal per se.

In addition to the scholarly concerns of the Fourth District in Pennington the court also cited Fla.R. Crim.P. 3.380 (b) as a basis for its decision. The rule as interpreted by the Fourth District does not make sense for it allows defendants to ask for evidence to be viewed when it benefits them but not to be viewed when it does not benefit them.

The Fourth's interpretation allows an appellate court to review the defendant's case when reviewing a motion for acquittal which was made at the close of all the evidence. This evidence may be helpful to the defendant and its review may benefit him. However, pursuant to this interpretation the court cannot review the same evidence when reviewing the

motion of acquittal which was made at the close of the State's case. This evidence may be fatal to the defendant and therefore it would behoove the defendant to not have the court view the evidence.

Certainly this Court did not intend for the rule to benefit the defendant depending on whether his defense actually helped his case or hurt his case. The rule must be applied evenly, and not be interpreted to allow a court to review the evidence only when it is helpful to the defendant but not review it when it is hurtful to the defendant.

In light of the above analysis a mere procedural technicality should not doom an otherwise lawful and proper conviction. The testimony elicited at trial in Pennington was unequivocal and uncontroverted proof of the accused's knowing participation in the drug transaction. The Respondent should not be set free under these circumstances. The law in Florida should be no different from that in the federal courts as both have the identical goal of protecting the interests of society. See, U.S. v. Foster, supra.

CONCLUSION

WHEREFORE, based on the reasons and authorities cited therein, Petitioner respectfully requests that this Court answer the certified question of the Fourth District in the negative and reverse the Fourth District's decision, thus affirming defendant's conviction.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
Attorney General  
Tallahassee, Florida

*Mardi Levey Cohen*

MARDI LEVEY COHEN  
Assistant Attorney General  
111 Georgia Avenue - Suite 204  
West Palm Beach, Florida 33401  
Telephone: (305) 837-5062

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits has been furnished by United States mail to: MICHAEL J. WRUBEL, ESQUIRE, Law Offices of Michael J. Wrubel, P.A., 915 Middle River Dr., Ste.206, Fort Lauderdale, Florida 33304, this 30th day of November, 1987.

*Mardi L. Cohen*

Of Counsel