IN THE SUPREME COURT OF FLORIDA

WILFRED BERNARD HOLLAND,

PETITIONER,

-VS-

CASE NO. 63,830

STATE OF FLORIDA,

RESPONDENT.

FILED

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RESPONDENT'S BRIEF ON THE MERITS

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IN THE SURPEME COURT OF FLORIDA

WILFRED BERNARD HOLLAND,

PETITIONER,

-VS- CASE NO. 63,830

STATE OF FLORIDA,

RESPONDENT. /

RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner Wilfred Bernard Holland, the criminal defendant and appellant below in Holland v. State, ___ So.2d ___ (Fla.1st DCA, opinion filed March 29, 1983, opinion on motion for rehearing filed June 7, 1983), 8 F.L.W. 905, 1539, will be referred to as "petitioner." Respondent, the State of Florida, the prosecuting authority below, will be referred to as "respondent."

References to the record on appeal will be designated (R)." References to the transcript of testimony and proceedings will be designated (T)."

All emphasis is supplied by respondent.

STATEMENT OF THE CASE AND FACTS

This case is before this Court only upon its Fla.R.App. P. 9.030(a)(2)(A)(V) acceptance of certiorari over the following questions certified to be of great public importance by the First District:

> WHETHER RELEVANT EVIDENCE OF A DEFENDANT'S PARTICIPATION IN A COLLATERAL OFFENSE WHICH HAS BEEN NOLLE PROSSED IS ADMISSIBLE?
>
> IF NOT, WHETHER THE ERROR MAY BE HARMLESS?

Respondent rejects petitioner's statement of the case and facts because it presents, in a highly subjective manner, many matters which are wholly irrelevant to a resolution of the legal issues presented upon appeal. Respondent therefor substitutes the following statement of the case and facts:

On January 8, 1980, an information was filed charging petitioner with committing one count of robbery with a firearm at the Duval Federal Savings and Loan Association on December 5, 1979 (R 3). The case went to trial, where petitioner presented an alibi defense and contested the issue of identity. Pursuant to Williams v. State, 110 So.2d 654 (Fla.1959), cert.denied, 361 U.S. 847 (1959), respondent was permitted to rebut this defense by presenting the testimony of Geraldine Johnson, the branch manager of another bank, that her bank was robbed in a similar manner by petitioner on December 17, 1979. On appeal, the First District initially held that evidence of the December 17 robbery

was properly received and affirmed petitioner's conviction, rejecting his contention that respondent's proof of his identity prior to the introduction of evidence of the collateral crime had removed identity as an issue in the case. However, upon motion for rehearing, the First District was forced to reverse petitioner's conviction based on the trial court's failure to instruct the jury on the minimum and maximum possible penalties for the offense charged, contrary to this Court's decision in Tascano v. State, 393 So.2d 540 (Fla.1980), thus necessitating a new trial. Holland v. State, 400 So.2d 767 (Fla.1st DCA 1981).

After the first trial, respondent "nolle prossed" the charges which had been preferred against petitioner for the December 17, 1979, collateral crime. Petitioner thus filed a motion in limine seeking to prevent respondent from introducing evidence of the collateral crime upon retrial (R 44-45). This motion was denied (R 53) following a hearing (T 32-37). Immediately prior to trial, petitioner unsuccessfully moved orally that he be allowed to announce from the stand that respondent had "nolle prossed" the charges preferred against him as a result of the December 17, 1979, collateral crime, purportedly to prevent the jury from inferring that the prior conviction which he planned to admit from the stand was for the collateral crime (T 76-83).

At trial, respondent presented the testimony of two bank tellers, Jackie Parillo and Maria Thorpe, that petitioner had robbed their bank on the morning of December 5, 1979, as charged (T 130,150). A videotape of the robbery was shown to the jury in

both its original and an enlarged form (T 123-128, 189-191). Geraldine Johnson, the branch manager of another bank, repeated her testimony from the earlier trial that her bank had been robbed by petitioner on December 17, 1979 (T 177).

In defense, petitioner presented a series of alibi witnesses. Doctor E. Clement Allen testified that he had seen petitioner five days after the robbery for an infected tooth which had inflammed petitioner's jaw (T 199-206). Margaret Fox, a former public defender, testified that she had seen petitioner two days before the robbery and that he had a swollen jaw. Ms. Fox also related that petitioner had briefly appeared in court with her on the afternoon of December 17, 1979, the day of the collateral crime, and that his jaw was swollen at that time as well (T 208-219). Robert Runion, program director of River Region Human Services, a drug abuse treatment house, testified that petitioner was a resident of the house on December 5, 1979, and that the house records did not reflect petitioner's absence. Mr. Runion had no personal knowledge that petitioner was present at the house on December 5, 1979, however (T 219-242). Velma Williams, petitioner's mother, testified that petitioner had a swollen jaw in December of 1979, that he had appeared in court with Ms. Fox on December 17, 1979, and that she had gone out to lunch and to Dr. Allen's with him following his court appearance (T 242-246). Petitioner took the stand in his own defense and denied his participation in either the December 5 or the December 17 robberies, but conceded that he had once been convicted of a crime punishable by more than one year in state prison (T 250-251,254).

After the jury heard closing argument and received instructions, they found petitioner guilty as charged (R 56; T360). On Thursday, December 17, 1981, the trial court adjudicated petitioner guilty and sentenced him to thirty-five years imprisonment (R 57-60, T 371). The court told petitioner "I will give you ten days within which to file a motion for new trial" (T 368), but petitioner waited until Tuesday, December 29, 1981, before filing such a motion (R 64-67). That this motion was untimely evidently escaped all of the participants below, for the trial court conducted a hearing upon the motion on January 19, 1982 (T 375-399). On February 2, 1982, the court filed an order denying petitioner's motion for a new trial (R 68).

Notice of Appeal was filed on February 16, 1982 (R 69). Due to the untimeliness of petitioner's motion for new trial and the ensuing delay while the trial court considered the motion, the notice of appeal appeared untimely. Respondent filed a motion to dismiss and argued these facts, but though petitioner conceded in response that respondent's "contentions are correct with regard to the untimely nature of the motion for new trial and, consequently, the notice of appeal", the First District denied respondent's motion to dismiss and, paradoxically, granted petitioner a belated appeal. Thus, petitioner seemingly had both a direct appeal and a belated appeal in this cause[1]. On appeal, the First District affirmed,

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[1] Respondent would ask the Court to consider whether this cause should be dismissed as a result of the untimely appeal. Petitioner did allege that this filing resulted from ineffective assistance of counsel, but did not allege that he had consistently informed counsel of his desire to appeal. Respondent believes a defendant must allege and prove both to win a belated appeal. See State v. Meyer, ___ So.2d ___ (Fla.1983), 8 F.L.W. 130.

Holland v. State, ___ So.2d ___ (Fla.1st DCA 1983), 8 F.L.W. 905, holding that evidenced of the "nolle prossed" December 17 collateral crime was properly admitted under this Court's decision in State v. Perkins, 349 So.2d 161 (Fla.1977); that petitioner was properly precluded from testifying that the collateral crime had been "nolle prossed" because "[t]he record in the present case suggests that the charge was nolle prossed for reasons unrelated to the strength of the state's evidence"; and stating that any error involving these "nolle pross" issues would be harmless in view of the overwhelming evidence that petitioner had committed the December 5 robbery for which he was charged and convicted. The First District thereafter denied petitioner's motion for rehearing, but did certify the aforecited questions regarding evidence of a "nolle prossed" collateral crime as matters of great public importance. 8 F.L.W. 1539. This proceeding follows.

ISSUE

RELEVANT EVIDENCE OF A DEFENDANT'S PARTICIPATION IN A COLLATERAL OFFENSE WHICH HAS BEEN "NOLLE PROSSED" IS ADMISSIBLE AND SHOULD REMAIN ADMISSIBLE.

ARGUMENT

In State v. Perkins, this Court, in interpreting, inter alia, Ashe v. Swenson, 397 U.S. 436 (1970) and Williams v. State, 110 So.2d 654 (Fla.1959), cert.denied, 361 U.S. 847 (1959), held that:

> . . . evidence of crimes for which a defendant has been acquitted is not admissible in a subsequent trial. Nothing we say here forbids admission under the "Williams Rule" of relevant evidence of collateral crimes for which acquittals have not been obtained.

349 So.2d 161, 164.

The current case demonstrates why that portion of the State v. Perkins holding which permits the introduction of relevant evidence of collateral crimes which have been "nolle prossed" must remain good law. As noted, at petitioner's first trial, respondent was permitted to rebut petitioner's defenses of misidentification and alibi by presenting evidence that petitioner had robbed another bank twelve days after committing the robbery from which the instant charge arose. In Holland v. State, 400 So.2d 767 (Fla.1st DCA 1981), the First District initially held that evidence of the collateral crime was properly admitted, but was subsequently forced to reverse petitioner's conviction and

order a new trial based upon the trial court's failure to instruct the jury on the minimum and maximum possible penalties for the offense charged, contrary to Tascano v. State. Respondent then "nolle prossed" the charges which had been preferred against petitioner for the collateral crime. At petitioner's retrial, respondent was again permitted to rebut petitioner's same defenses of misidentifiation and alibi by presenting evidence of the collateral crime. In Holland v. State, ___ So.2d ___(Fla.1st DCA 1983), 8 F.L.W. 905, the First District again held that evidence of the collateral crime was properly admitted.

The First Distirct's implicit conclusion that the "nolle pross" of the collateral crime between trials in no way diminished its relevance to the question of petitioner's identity as the perpetrator of the principal offense, is eminently sound. The probative value of the collateral offense vis-a-vis the principal offense determines admissibility, not the potentially transient legal status of the collateral offense. While a prosecutor is ethically precluded from instituting criminal charges in the absence of probable cause, DR 7-103(A), Code of Professional Responsibility, the decision to "nolle pross" criminal charges is within his absolute discretion, AGO 50-184, see State v. Eash, 367 So.2d 661 (Fla.2d DCA 1979), cert.denied, 374 So.2d 101 (1979); Soverino v. State, 356 So.2d 269 (Fla.1978); Fla.R.Crim.P. 3.191(h)(2). A prosecutor may elect to "nolle pross" criminal charges for a myriad of reasons irrelevant to his assessment of the strength of the evidence against a defendant. To list but a few:

1. Charges against one defendant may be "nolle prossed" as part of an agreement to secure the defendant's cooperation in an ongoing investigation and/or his testimony against a co-defendant;

2. Charges against a defendant may be "nolle prossed" in return for a plea of guilty to other charges;

3. Charges against a defendant may be "nolle prossed" because the defendant has already been convicted of or stands to be convicted of other charges which will subject him to a suitably lengthy term of incarceration, notwithstanding the "nolle pross";

4. Charges against a defendant may be "nolle prossed" because the victim of the charged crime does not wish to prosecute;

5. Charges against a defendant may be "nolle prossed" after his successful completion of a pretrial intervention program;

6. Charges against a defendant may be "nolle prossed" in response to technical defects in the case, such as a speedy trial problem.

Certainly respondent should not be precluded from introducing relevant evidence of a collateral crime which was "nolle prossed" for one of these reasons. Moreover, if a collateral crime has indeed been "nolle prossed" due to a prosecutor's accurate assessment that the evidence against the defendant was weak, the defense can parlay this weakness of the evidence into a ruling of its inadmissibility. In essence, the criminal defendant can already prevent the admission of weak collateral crime evidence, and should not also be allowed to prevent the admission of strong collateral crime evidence merely because this crime has been "nolle prossed." The administrative problems inherent in any switch to such a standard--for example, the potential flood of Fla.R.Crim.P. 3.850 motions from prisoners whose convictions were

in part based upon evidence of collateral crimes which were at some point "nolle prossed"--also augurs against a switch.

For these reasons, respondent strongly believes that that portion of the State v. Perkins holding which permits the introduction of relevant evidence of collateral crimes which have been "nolle prossed" must remain good law. Because there is no error in admitting such evidence, the question of whether admission of such evidence may constitute "harmless error" is moot. Respondent would note that at least one court has held that the admission of questionable "Williams Rule" evidence may constitute harmless error in view of the overwhelming evidence of the defendant's guilt, Clark v. State, 378 So.2d 1315 (Fla.3rd DCA 1980). If the Court for some reason determines that admission of the "nolle prossed" collateral crime was error in the instant case, respondent would assert that such error was harmless in view of the overwhelming evidence of petitioner's guilt of the principal robbery. As noted, the jury viewed a videotape of petitioner committing the robbery.

As a point of academic interest, respondent would note ironically that the other half of the State v. Perkins holding--that "evidence of crimes for which a defendant has been acquitted is not admissible in a subsequent trial", id., 349 So.2d 161,164--may not be wholly good law under all circunstances. This Court has long recognized that "[W]here it is impossible to give a complete or intelligent account of the crime charged without referring to (another simultaneous) crime", evidence of the simultaneous

crime is admissible, Nickels v. State, 106 So. 479, 489 (Fla.1925)[2]. In Ashe v. Swenson, 397 U.S. 436, our Supreme Court held that the test to be applied in determining whether the prosecution is collaterally estopped from retrying a criminal defendant acquitted of one charge on a separate charge arising from the same criminal transaction is "whether a rational jury could have grounded its verdict" of acquittal on the first charge "upon an issue other than that which the defendant seeks to foreclose from consideration" in his trial for the second charge. In Gragg v. State, ___ So.2d ___ (Fla.1983), 8 F.L.W. 138, this Court, following Ashe v. Swenson, held that "[i]n determining whether collateral estoppel applies, a court should limit its inquiry to whether there was a factual basis, rather than an emotional basis, upon which the jury's verdict could have rested." This Court has thus recognized that, even though a criminal defendant has been acquitted of committing one offense in the course of a criminal transaction, evidence of this offense may be used in a subsequent prosecution for the commission of a simultaneous and factually unseverable offense, unless the acquittal for the first offense necessarily implied an acquittal for the second offense as well. The State v. Perkins holding that "evidence of crimes for which a defendant has been acquitted is

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Such admission does not present a "Williams Rule" problem. See United States v. Kloock, 652 F.2d 492, 494 (5th Cir.1981), holding that "evidence of an uncharged offense arising out of the same transaction or series of transactions is not an 'extrinsic' offense (i.e. is not a collateral offense) within the meaning of Fed.R.Evid. 404(b)", the federal equivalent of §90.404, Fla.Stat., which codifies the "Williams Rule."

not admissible in a subsequent trial", id., 349 So.2d 161,164, is thus overbroad. Earlier in State v. Perkins, the court had stated:

> [T]he Ashe v. Swenson rule forbids the admission in a subsequent trial of evidence of an acquitted collateral crime only when the prior verdict clearly decided in the defendant's favor the issue for which admission is sought. From Ashe we know the double jeopardy clause of the Fifth Amendment to the U. S. Constitution does not forbid the admission of all evidence of acquitted collateral crimes, but only that evidence which the state is collaterally estopped from introducing.

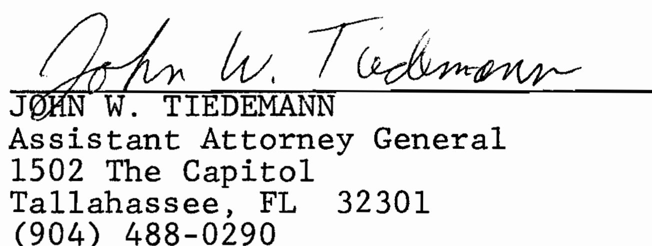
Id., 349 So.2d 16., 163. This is a more accurate statement of the law, a fact which the Court may wish to make clear should it decide that any housecleaning of the State v. Perkins decision is in order.

CONCLUSION

WHEREFORE, respondent submits that the first certified quesiton should be answered in the negative, thus rendering the second certified question moot; and that the decision appealed from be affirmed.

Respectfully submitted,

JIM SMITH
Attorney General



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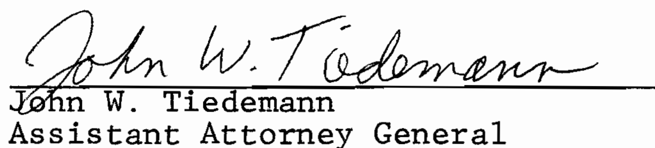
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on the Merits has been forwarded to Melanie Ann Hines, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 23rd day of August 1983.



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