IN THE SUPREME COURT OF FLORIDA

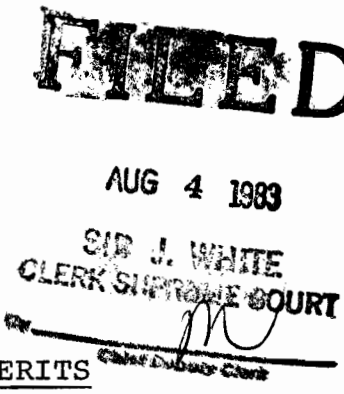
WILFRED BERNARD HOLLAND,

Petitioner,

v. CASE NO. 63,830

STATE OF FLORIDA,

Respondent.



PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

		PAGE
TABLE OF CONTENTS		i
TABLE OF CITATIONS		ii
I	PRELIMINARY STATEMENT	1
II	STATEMENT OF THE CASE AND FACTS	2
III	ARGUMENT	8
	CERTIFIED QUESTIONS	
	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?	
IV	CONCLUSION	23
CERTIFICATE OF SERVICE		24

TABLE OF CITATIONS

CASES	PAGES
Allied Fidelity Insurance Company v. State, 408 So.2d 756 (Fla. 3d DCA 1982)	16
Ashe v. Swenson, 397 U.S. 436 (1970)	9,13
Blackburn v. Cross, 510 F.2d 1014 (5th Cir. 1975)	10
Davis v. McCrory Corporation, 262 So.2d 207 (Fla. 2d DCA 1972)	15
Engdall v. State, 319 So.2d 144 (Fla. 4th DCA 1975)	11
G.C. Murphy Company v. Freshko, 293 So.2d 791 (Fla. 3d DCA 1974)	15
Gatto v. Publix Supermarket, Inc., 387 So.2d 377 (Fla. 3d DCA 1980)	15
Holland v. State, 400 So.2d 767 (Fla. 1st DCA 1981)	2
Holley v. State, 328 So.2d 224 (Fla. 2d DCA 1976)	19
Ivester v. State, 398 So.2d 926 (Fla. 1st DCA 1981)	14
Jackson v. Biscayne Medical Center, Inc., 347 So.2d 721 (Fla. 3d DCA 1977)	15
Lawson v. State, 304 So.2d 522 (Fla. 3d DCA 1974)	9,12
Messer v. State, 120 Fla. 95, 162 So. 146 (1935)	22
Perkins v. State, 332 So.2d 649 (Fla. 4th DCA 1976)	9,10,12,17
Ponsell v. State, 393 So.2d 635 (Fla. 4th DCA 1981)	14
State v. Perkins, 349 So.2d 161 (Fla. 1977)	8
Williams v. State, 110 So.2d 654 (Fla. 1959)	2,9
Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972)	10,12
CONSTITUTIONS AND STATUTES	
Section 90.404(2)(a), Florida Statutes	2
Fifth Amendment, United States Constitution	9

MISCELLANEOUS

PAGES

ABA Standards, The Prosecution Function, Section 3.9(b)(i)(1970) 13,14

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PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

WILFRED BERNARD HOLLAND was the defendant in the trial court and the appellant in the First District Court of Appeal. The State of Florida was the prosecution in the trial court and the appellee below. Both parties will be referred to herein as they appear before this Court.

Reference to the attached appendix, containing a copy of the district court's opinion and order on rehearing, will be by use of the symbol "App" followed by the appropriate page number in parentheses. The record on appeal in the instant case consists of five volumes. The volume containing the pleadings and documents filed in the trial court will be referred to herein by use of the symbol "R." The four volumes containing transcripts of the trial and hearings will be referred to by use of the symbol "T."

II STATEMENT OF THE CASE AND FACTS

By information filed on January 8, 1980, petitioner was charged with one count of armed robbery alleged to have been committed at the Duval Federal Savings and Loan Institution on December 5, 1979 (R-3). Petitioner's first trial resulted in a conviction as charged. On appeal, the First District Court of Appeal reversed for a new trial because the trial court failed to instruct the jury on the penalties which could be imposed. Holland v. State, 400 So.2d 767 (Fla. 1st DCA 1981).

Prior to petitioner's first trial on the charge of armed robbery, the state filed a notice of intent to introduce similar fact evidence pursuant to Section 90.404(2)(a), Florida Statutes, and Williams v. State, 110 So.2d 654 (Fla. 1959). The collateral evidence consisted of the facts supporting a charge pending against petitioner for armed robbery of the same banking institution in the same geographic location on December 17, 1979, which charge named DeAnn Molisani as the person from whom the money was taken. At a hearing on the motion for new trial filed after petitioner's initial conviction for the December 5th robbery, the state announced that it would not prosecute the December 17th armed robbery charge against petitioner. No reason for the nolle pros was stated on the record. Prior to the trial which resulted in the instant conviction, defense counsel moved to prohibit the state's use of the collateral crime evidence because of the nolle pros (R-44-45). The trial court denied

this motion, and the evidence was introduced at trial (R-47).

On Wednesday, December 5, 1979, at approximately 10:30 to 11:00 a.m., the Duval Federal Savings and Loan of Neptune Beach was robbed of approximately $3,000.00 by a lone gunman (T-110,112,119,140). The robber entered the bank, approached Maria Dempsey Thorpe, a teller, and asked for change (T-112,141). Ms. Jacqueline Parillo, an experienced bank manager, was working at the next teller window, and gave Maria Dempsey Thorpe the change requested (T-112-141-142). No one else was in the bank (T-112,140). The robber then pulled a small, silver, derringer type handgun from his right coat pocket and a paper bag from his left coat pocket and ordered the women to give him all the money in the bank (T-113,117,142). The women, who had both received FBI training in observation techniques, complied and concentrated their efforts on observing and memorizing facial characteristics of the robber (T-117,142-143). After receiving the money, the robber told the women to lie on the floor and not hit any alarms (T-114,144).

Jacqueline Parillo memorized the details of the robber's face from a distance of about a foot, while Maria Dempsey Thorpe observed from a vantage point of about two feet (T-115, 144). No obstructions blocked their view of the gunman's face, and the bank was well lit during the robbery, which lasted for less than two minutes (T-120,131,146-147). Ms. Parillo described the robber as a medium complected black male, standing five foot eleven with a medium build, large brown eyes, behind smoky sunglasses, having a gold tooth, a hook shaped

nose, and stubble under his chin (T-115,118,136,146,147). Ms. Thorpe's description varied in her estimation of the robber's height, and she did not notice any facial hair or gold tooth (T-149). The robber was wearing a blue ski jacket, a blue skull cap, and a silver watch (T-114,145). Ms. Parillo wrote a description of the robber immediately after the incident and gave it to the FBI, but has not seen it since (T-132). Ms. Thorpe also wrote a description which she claimed was to help her remember significant details which she might otherwise forget (T-151-152,157-158). The written description did not contain any information about the robber's distinctive nose (T-158). Both women identified petitioner in court as the perpetrator of the robbery (T-130-150).

Two functioning surveillance cameras, located behind the teller area, recorded the events of the robbery and the appearance of the robber (T-120). The state played the original videotape to the jury (T-120-128), as well as one which was blown up from the original tape at the direction of the defense (T-185-192).

On December 17, 1979, the Duval Federal Savings and Loan of San Jose was robbed in an arguably similar manner by a gunman identified in court as the petitioner by Branch Manager Jeraldine Johnson, who was present during the robbery (T-165-178). The woman named in the information as the one from whom the money was taken, DeAnn Molisani, did not testify at the trial.

Petitioner's defense at trial was two-fold. To meet the crime charged of December 5th, petitioner disputed the identification testimony. He presented the testimony of an oral surgeon who testified that petitioner was referred to him by another physician after having a wisdom tooth extracted in November (T-199-202). On December 10, 1979, Dr. Allen saw petitioner because of the extreme swelling on the right side of the petitioner's face which was accompanied by discoloration of the skin visible to the naked eye (T-202-203). The program supervisor of the Jacksonville residential drug abuse program, where petitioner was residing in December of 1979, testified that the house records did not show petitioner as being absent on December 5, 1979 (T-219-230). Mr. Runion, who emphatically believed in the honor system of accounting for attendance, which system was composed of specific checks and balances, testified that his records were accurate (T-230-242).

To meet the collateral crime evidence, petitioner presented the testimony of former Assistant Public Defender, Margaret Fox, who testified that she saw petitioner in court on December 3, 1979, and his face was extremely swollen (T-206-209). She also testified that petitioner was in court with her on his invalid driver's license charge on December 17, 1979, until approximately 12:30 to 1:00 p.m. (T-210-219).

Petitioner's mother verified the trouble petitioner was having with his jaw (T-243-244). She also testified that petitioner was in court with her and Ms. Fox on December 17,

1979. Petitioner's mother accompanied her son to court from the drug abuse program and left with him between 12:00 and 1:00 p.m. that day (T-244-245). After they left the courthouse, she and her son went to a Dairy Queen Restaurant, got some food, and went home to eat it. They stayed at home until they left for an appointment with Dr. Allen at 3:00 or 3:30 p.m. (T-245).

Petitioner testified as to his actions on December 5, 1979, and denied leaving the drug abuse program home (T-247-248). He described the problem he had through November and December with his swollen jaw (T-248-249). Petitioner also testified about his court appearance with Ms. Fox on December 17th, and that he left there between 12:30 and 1:00 p.m. at which time he and his mother went to the Dairy Queen (T-249). Petitioner denied committing the robberies which occurred on December 5th and December 17, 1979 (T-250-251).

Following the jury verdict of guilty, petitioner was convicted as charged and sentenced to 35 years imprisonment with the three year minimum mandatory required by statute (R-57-61). Petitioner's motion for new trial was denied (R-68).

Petitioner's appeal to the First District Court of Appeal raised four issues: (1) that the trial court deprived him of his constitutional right to a fair trial when it allowed the introduction of evidence of a collateral offense with which petitioner had initially been charged, but which

the state expressly chose not to prosecute; (2) that the trial court committed reversible error in refusing to allow petitioner to testify that he was not charged, at the time of trial, with the collateral offense; (3) that the trial court erred in excluding the testimony of a witness, who had confessed to committing the robberies prior to trial, but who claimed the Fifth Amendment privilege when his testimony was proffered by petitioner; and (4) that the trial court erred in failing to grant a new trial upon evidence that the prosecutor improperly tampered with the defense witness, which resulted in his invoking his Fifth Amendment privilege on proffer. The First District Court of Appeal affirmed petitioner's conviction, and discussed only the first two issues raised, those regarding the collateral crimes evidence (App-1-3). The court held that the evidence of the nolle prossed collateral crime was admissible, that the trial court did not err in denying petitioner's request to inform the jury that the collateral crime charge had been nolle prossed, and that any error on these issues would be considered harmless. On rehearing, the district court certified these issues as questions of great public importance (App-4).

Petitioner timely invoked the jurisdiction of this Court to review the certified questions. This brief follows.

III ARGUMENT

CERTIFIED QUESTIONS

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?

Petitioner contends that the certified questions must be answered by this Court in the negative. In holding that the nolle prossed collateral crimes evidence was admissible, and that any error in its admission would be harmless, the district court relied on this Court's opinion in State v. Perkins, 349 So.2d 161 (Fla. 1977). As argued herein, however, the issue of nolle prossed collateral crimes evidence was not presented to this Court in Perkins by the facts or, as verified by undersigned counsel, by arguments in the briefs. Petitioner urges this Court to re-examine the language in the Perkins opinion upon which the district court relies in the instant case.

In State v. Perkins, this Court granted certiorari because of a conflict between the opinions from two district courts concerning the admissibility of collateral crimes evidence for which there had been an acquittal. Perkins was tried and convicted for the attempted rape of a six year old girl. Evidence that Perkins had committed a similar offense some years earlier was admitted despite Perkins' acquittal on the charge arising from that incident. The Fourth District

Court of Appeal held that evidence of collateral crimes for which a defendant has been acquitted is barred from admission because of the constitutional ban against double jeopardy. Perkins v. State, 332 So.2d 649 (Fla. 4th DCA 1976). The opinion conflicted with that written by the Third District Court of Appeal in Lawson v. State, 304 So.2d 522 (Fla. 3d DCA 1974), holding that such evidence was not always barred. This Court held that the Fourth District Court had incorrectly applied the doctrine of collateral estoppel, which flows from the Fifth Amendment ban on double jeopardy, by announcing an absolute rule. This Court, citing Ashe v. Swenson, 397 U.S. 436 (1970), stated:

> The Ashe 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.
>
> Perkins, 349 So.2d at 163.

This Court thus held that Lawson, not Perkins,was correctly decided.

This Court further expounded on the merits of the issue. Noting that Williams v. State, 110 So.2d 654 (Fla. 1959), did not distinguish between evidence of acquitted collateral crimes and evidence of collateral crimes for which there has not been an acquittal — into which category this Court lumped uncharged crimes, nolle prossed crimes, and convicted crimes — this Court adopted the minority federal rule which does not permit admission of evidence of acquitted collateral crimes.

Citing Blackburn v. Cross, 510 F.2d 1014 (5th Cir. 1975) and Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972), this Court held:

> We agree with Wingate that it is fundamentally unfair to a defendant to admit evidence of acquitted crimes. To the extent that evidence of the acquitted crime tends to prove that it was indeed committed, the defendant is forced to re-establish a defense against it. Practically, he must do so because of the prejudicial effect the evidence of the acquitted crime will have in the minds of the jury in deciding whether he committed the crime being tried. It is inconsistent with the notions of fair trial for the state to force a defendant to resurrect a prior defense against a crime for which he is not on trial. Therefore, we hold that evidence of crimes for which a defendant has been acquitted is not admissible in a subsequent trial.
>
> Perkins, 349 So.2d at 163-164.

Although the issue of non-acquitted collateral crimes evidence was not presented to the court by the facts in Perkins or, as verified by undersigned counsel, by arguments in the briefs, this Court went on to state:

> Nothing we say here forbids admission under the "Williams Rule" of relevant evidence of collateral crimes for which acquittals have not been obtained.
>
> Perkins, 349 So.2d at 164.

Petitioner contends that this Court's blanket rule on an issue not squarely presented to it should be re-examined in the instant case.

In Perkins, this Court recognized the decision of the

Fourth District Court of Appeal in Engdall v. State, 319 So.2d 144 (Fla. 4th DCA 1975), by footnote citation. The reference acknowledged the existence of the only case in this state which deals with collateral crime charges which have been dropped. In Engdall, the defendant was charged with burglarizing an apartment and taking various household goods and a set of car keys. A few days after the burglary occurred, for which the police had a latent fingerprint by which to find their suspect, the defendant was seen in the apartment parking lot tampering with the burglary victim's car. The defendant was arrested for loitering and prowling and later charged also with breaking and entering an automobile. The defendant's fingerprints matched one found in the apartment. At some point, the state dropped the loitering and prowling and automobile charge, but introduced the evidence of the defendant's activities in the parking lot at his trial on the burglary charge. In a brilliant dissent, obviously drafted as a majority opinion, Judge Mager wrote:

> The unusual facts in this case suggest one additional comment regarding the utilization of the "collateral crime" evidence. The relevancy of any "collateral crime" evidence is dubious, indeed, where it is shown that the charges giving rise to such collateral crimes have been dropped. Recent decisions of the First and Third Districts have recognized that an acquittal of collateral crime charges does not render evidence of such crimes inadmissible; however the able dissent in those decisions present persuasive argument to the contrary. Blackburn v. State, Fla. App. 1968, 208 So.2d 625; Wingate v.

> State, Fla.App. 1970, 232 So.2d 44; Johnson v. State, Fla.App. 1973, 285 So.2d 436; see, in particular, State v. Little, 87 Ariz. 295, 350 P.2d 756 (Ariz. 1960). Moreover, there is an obvious difference between the effect of an acquittal and the circumstance where criminal charges no longer exist. The fundamental notion of justice and fair play is somehow offended by the prospect of introducing evidence of collateral acts that cannot be raised to the level of a criminal charge. It is as efficacious as gossip or rumor which certainly have no place within the framework of our criminal justice system.
>
> Engdall at 146-147 (emphasis in original).

Judge Mager's logic, grounded on "fundamental notions of justice and fair play" comports with that used by the Fifth Circuit in Wingate, supra, and exercised by this Court in Perkins, supra, on the issue presented to it.

Thus it is clear that where collateral estoppel can be appropriately used as a bar against evidence of nolle prossed collateral crimes such as in Ashe and Lawson, supra, then the evidence should not be admitted. In the Perkins dictum regarding nolle prossed criminal charges, this Court completely ignored this possibility. Furthermore, petitioner contends that where the facts of a particular case warrant a finding of fundamental unfairness, the evidence should also not be admitted. The defendant, at the mercy of the state's prosecutorial discretion, should have the benefit of both arguments. An application of each argument to the instant case is enlightening.

The Ashe, supra, rule of collateral estoppel requires that the prior acquittal be a clear decision in the defendant's favor on the issue for which the collateral evidence is sought to be admitted. In the instant case, the state introduced the collateral evidence to prove the identity of the December 5th bank robber. The state relied upon the testimony of one bank teller, not the actual victim, to identify petitioner as the perpetrator of the December 17th bank robbery. It is obvious from the facts of each robbery, that identification would be the only factual issue disputed by the defense. By relying on a secondary witness to the December 17 robbery, rather than on the bank teller alleged in the information to be the victim, and the one who actually gave the robber the bank's money, the state indicated its doubt that it could prove the December 17th robbery as charged. The manner of proving up the December 17th offense raises doubts, in and of itself, that the state could prove its "open and shut case" against the defendant, and indicates that the case was not dropped solely for the convenience of the state and preservation of resources.

The American Bar Association, in its effort to guide the ethical practice of criminal law, has indicated that the decision not to prosecute can properly be based on "the prosecutor's reasonable doubt that the accused is in fact guilty." ABA Standards, The Prosecution Function, Section 3.9(b)(i)(1970). Assuming the validity of the decision not

to prosecute petitioner for the December 17th robbery on this basis, then the same evidence should not have been used to assist the state in meeting its burden as to the identity of the December 5th bank robber. In both cases, identity must be proved by the state beyond a reasonable doubt. Ivester v. State, 398 So.2d 926 (Fla. 1st DCA 1981); Ponsell v. State, 393 So.2d 635 (Fla. 4th DCA 1981). Clearly, the decision not to prosecute petitioner for the December 17th crime is a decision in petitioner's favor on the identification issue. None of the other factors listed by the American Bar Association so obviously fit the facts of this case. These factors are:

> (ii) The extent of the harm caused by the offense; (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender; (iv) possible improper motive of a complainant; (v) prolonged non-enforcement of a statute, with community acquiescence; (vi) reluctance of the victim to testify; (vii) cooperation of the accused in the apprehension or conviction of others; (viii) availability and likelihood of prosecution by another jurisdiction.
>
> ABA Standards, The Prosecution Function, Section 3.9(a)(b)(1970).

In the civil tort of malicious prosecution, six elements must be proven to establish a case:

> (1) A criminal proceeding was commenced or continued against the plaintiff; (2) the defendant commenced or caused the commencement of such proceeding; (3) the criminal proceeding had a bona fide termination in the defendant's favor;

> (4) there was no probable cause for causing the commencement of the criminal proceeding;
> (5) the defendant acted with malice; and
> (6) the plaintiff suffered damage.
>
> Shidlowsky v. National Car Rental System, Inc., 344 So.2d 903 (Fla. 3d DCA 1977); Applestein v. Preston, 335 So.2d 604 (Fla. 3d DCA 1976); Liabos v. Harman, 215 So.2d 487 (Fla. 2d DCA 1968) (Emphasis Supplied).

The courts have allowed a plaintiff to prove element number 3 (termination of the criminal proceeding in the plaintiff's favor) by proof of an adjudication on the merits favorable to him or proof of a good faith nolle pros or declination to prosecute. Gatto v. Publix Supermarket, Inc., 387 So.2d 377 (Fla. 3d DCA 1980); Jackson v. Biscayne Medical Center, Inc., 347 So.2d 721 (Fla. 3d DCA 1977); G. C. Murphy Company v. Freshko, 293 So.2d 791 (Fla. 3d DCA 1974); Davis v. McCrory Corporation, 262 So.2d 207 (Fla. 2d DCA 1972). Surely if a plaintiff in a malpractice action can use a nolle pros as clear and convincing proof of the essential element of favorable termination of the criminal action against him, then the defendant in a criminal action should be allowed to use a nolle pros as a shield to prevent the state from using the evidence which it chose not to prove beyond a reasonable doubt in order to prove beyond a reasonable doubt that he committed a crime. In other words, if a civil plaintiff who has a lesser burden of proof can say that a nolle pros proves one of his essential elements, how can the state say the same

nolle pros has no effect on their proofs which must be established beyond a reasonable doubt?

The state chose not to prosecute petitioner for the December 17th offense, and it should accept the consequences of its action. Cf., Allied Fidelity Insurance Company v. State, 408 So.2d 756 (Fla. 3d DCA 1982). The district court opined that "the record in the present case suggests that the charge was nolle prossed for reasons unrelated to the strength of the state's evidence." (App-3, fn.1). Petitioner contends that this is simply not so. The record created by the state is absolutely silent on the reason for the nolle pros. The only safe assumptions are that the decision to nolle pros reflects the strength of the state's case on the identity issue or reflects the state's concern for its own convenience. If the nolle pros arose from the former assumption, the evidence should not have been admitted. If the nolle pros arose from the latter assumption, the state could always make the claim of convenience as an excuse to deprive a defendant of an opportunity to obtain the only bar to introduction of collateral crimes evidence — an acquittal. The state should not be allowed to ensure that the evidence supporting a charge which it chose not to prosecute can be forever used against a criminal defendant in a relevant, similar case by depriving the defendant of an opportunity to obtain an acquittal on the collateral charge.

Applying Judge Mager's analysis of fundamental fairness, it is obvious that petitioner was forced to "resurrect a

prior defense against a crime for which he [was] not on trial." Perkins, supra, at 163. Petitioner called an Assistant Public Defender who represented him on prior offenses to testify that he was in court on the day of the collateral offense and that she saw him on the day of the instant offense (T-207-219). This attorney testified that she represented petitioner on a traffic offense and a loitering charge (T-211). Thus, petitioner was forced to present, on his behalf, even other prejudicial evidence concerning events totally irrelevant to the crime charged. To have ignored the state's collateral acts evidence would have been unthinkable.

Fundamental unfairness is the instrument by which courts balance the prejudicial impact of particular proceedings against a defendant. In the instant case, the balance was clearly tilted toward the extremely unfair. Petitioner not only had to reconstruct a defense to a crime with which he was no longer charged, but, due to circumstances beyond his control, introduced into the instant trial, evidence which could only have worked to his detriment. On these facts, petitioner was denied a fair trial.

Petitioner does not contend that a nolle pros is an evil thing which must be abolished. Petitioner obviously received some benefit from not having to defend against the collateral charge. However, petitioner had no choice in the matter. It may be that he would have gladly gone to trial on the December 17th bank robbery in a separate proceeding

rather than having the unproven evidence of the charge introduced against him in the instant case. In any event, he should have been given the opportunity to make that decision for himself.

If this Court is of the opinion that the state can hold all of the strings on collateral crimes evidence, with the result that a defendant is stripped of the opportunity to obtain an acquittal and must, therefore, disprove the collateral crimes evidence at trial on the original charge, surely this Court cannot also deprive the defendant of the opportunity to inform the jury that the charge is no longer pending against him at the time of trial. The defendant who so testifies assumes the risk that the jury will believe the charge was disposed of against him, but that decision should rest with the defendant. The exclusion of such testimony deprives the jury of all relevant, material information regarding the charge and deprives the defendant of the constitutional right to present a defense to the evidence presented against him.

The district court of appeal obviously misapprehended the argument raised by petitioner in the initial brief on this issue. The petitioner did not desire to inform the jury that the December 17th charge had been nolle prossed. Rather, trial counsel wanted to inquire on direct examination if the defendant was presently charged with the offense. For the convenience of this Court, counsel for petitioner quotes from

the transcript directly:

> DEFENSE COUNSEL: My position would be, Your Honor, that the state, on 5-16-80, nolle prossed that case. I — it would be my intention subject to ruling by the court, Your Honor, I would ask the court to give us a ruling in advance, to ask my client, Mr. Holland, are you presently charged with the bank robbery of the Duval Federal Savings and Loan, and give the address and the date in his response, which would be, "No."
>
> (T-76-77) (Emphasis supplied).

Nothing in this line of inquiry would inform the jury that the state had nolle prossed the collateral crime. Rather, it would inform the jury of the status of the collateral crime charge as it related to petitioner at that time. As the Second District Court of Appeal has so eloquently opined:

> If Williams rule testimony is relevant enough to be permitted, competent evidence tending to disprove the Williams rule testimony is equally important.
>
> Holley v. State, 328 So.2d 224, 226 (Fla. 2d DCA 1976) (Emphasis supplied).

Holley was reversed and remanded because the court could not determine if the jury's verdict would have been different if the evidence had been introduced — thus dismissing the harmless error argument adopted by the First District Court of Appeal in the instant case. If the nolle pros is "not necessarily of any probative value as to the accused's guilt or innocence" (App-2-3), neither is the Williams rule evidence itself. The state chose to use evidence of a collateral offense against petitioner with which he was not then charged, but would not

allow petitioner to inform the jury of the true state of affairs. It is clear that the trial court erred in preventing the information about the status of the collateral offense from going to the jury. In view of the significance which the state attached to the collateral crimes evidence, it is inconceivable that such a ruling could be deemed harmless error. The state obviously believed it could not prove petitioner's identification as the perpetrator of the crime charged without introducing evidence of a collateral offense. Petitioner was deprived of the meaningful opportunity to challenge that collateral evidence, both at a trial on the collateral charge itself and during the trial on the instant charge. Again, fundamental guarantees of due process require a different result on this issue.

Finally, the First District Court of Appeal concluded that "any error regarding the above-discussed issues would be harmless." (App-3). Again, this conclusion misconceives the significance which the state attached to the collateral crimes evidence. The state's obvious need for the evidence blatently contradicts the conclusion that the error in introducing the evidence was harmless. The state obviously believed that it could not prove petitioner's identity as the perpetrator of the December 5th robbery without introducing evidence of a collateral crime. This position is the cause of the entire battle over the collateral crimes evidence. Without the evidence, the state believed it could not obtain a conviction; without the error of the trial court, the

defendant would not have been convicted. Furthermore, as noted previously, petitioner was forced to defend against the collateral crimes evidence with evidence of yet other, separate criminal court appearances. Surely, the position in which the petitioner was forced was a prejudicial one. Neither the district court nor this Court can presume to say what the jury's verdict would have been had the evidence not been introduced and had petitioner not been forced to defend against it at the trial on the instant charge. It is significant to note that, although the witnesses of the December 5th robbery identified petitioner as the perpetrator of the crime in court, the descriptions of that perpetrator were dissimilar (See pp. 3-4, supra).

Should this Court be inclined to favor the district court's harmless error decision, petitioner urges this Court to consider the following eloquence from the United States Court of Appeals for the Fifth Circuit in reviewing this issue.

> Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), may open a hatch for harmless constitutional error to appear, but its aperture is not so gargantuan that constitutional rights are minimized to infinitesimality. We must be confident that the scales of justice are not tilted, are not skewed. The Chapman harmless error rule was not intended to be a cover up for every prosecutorial error. It was really intended as a Band Aid for what is, under the circumstances, a minor, albeit constitutional, legal abrasion. The Constitution speaks in cosmic

> concepts or cosmic principles, and they are not to be grudgingly applied nor miniturized. We must be careful lest the purgatory of the harmless error doctrine erode our sacred constitutional rights.
>
> United States v. Hammond, 598 F.2d 1008, 1013-1014 (Emphasis in original).

This Court has approved of a similar position in years past.

See Messer v. State, 120 Fla. 95, 99, 162 So. 146 (1935):

> [O]ur harmless error law is not to be considered as affording an omnibus panacea for all the ills that may afflict cases brought to this Court for treatment on writ of error, where the error found to exist is a substantial one to the prejudice of an accused convicted and sentenced for a serious offense.

Petitioner respectfully requests that this Court reaffirm the limited boundaries of the harmless error rule in this case.

IV CONCLUSION

Based on the foregoing reasons and authorities, petitioner respectfully requests that this Court answer the certified questions of the First District Court of Appeal in the negative and disapprove the decision issued in this case by recalling the mandate, reversing the conviction, and ordering a new trial.

Respectfully submitted,

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief on the Merits has been furnished by hand to Mr. John W. Tiedemann, Assistant Attorney General, The Capitol, Tallahassee, Florida, Attorney for Respondent; and, a copy has been mailed to petitioner, Mr. Wilfred Bernard Holland, #073380, Post Office Box 158, Lowell, Florida, 32663, this 4th day of August, 1983.

MELANIE ANN HINES