IN THE SUPREME COURT OF FLORIDA

WILFRED BERNARD HOLLAND,

Petitioner,

v. CASE NO. 63,830

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

References to respondent's brief on the merits will be by use of the symbol "BR" followed by the appropriate page number in parentheses. References to petitioner's original brief on the merits will be by use of the symbol "BP" followed by the appropriate page number in parentheses. References to the appendix filed with petitioner's original brief will be by use of the symbol "App."

In respondent's brief, an attempt is made to resurrect the procedural point regarding the timeliness of the appeal to the First District Court (BR-5). Petitioner respectfully requests that this Court reject this attempt as it is not properly before the Court when raised in a brief on the merits of a substantive, certified question. Should this Court choose to review the district court's decision to exercise its appellate jurisdiction, petitioner requests

the opportunity to separately brief the issue in response to a question properly presented by or to this Court.

Petitioner relies on the facts previously stated in his brief on the merits, despite respondent's assertion that they are "highly subjective" and "wholly irrelevant" (BR-2). The facts presented by petitioner are supported in the record and are necessary to a complete resolution of the questions presented. Moreover, respondent's factual summary is in error on one major point: Petitioner did not request the opportunity to inform the jury that the collateral crime had been nolle prossed (BR-3), but rather that he was not presently charged with the offense (T-76-77). The district court also made this mistake (App-3). Petitioner urges this Court to review the record and rule on the facts actually presented therein.

II 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?

Respondent has asserted several reasons for which a prosecutor may elect to nolle prosse criminal charges. Respondent further argues that a prosecutor should not be precluded from introducing relevant evidence of a collateral crime which was nolle prossed for one of the reasons cited (BR-8-9). Petitioner urges this Court to reject respondent's attempts to reconstruct the record on appeal with hypothetical justifications for the prosecutor's actions below. Contrary to the hypothetical argument of the state and the general, unsupported conclusion of the district court (App-3, fn-1), there is absolutely no evidence in the record to support the argument that the prosecutor acted for the reasons suggested by respondent. Rather, as argued in petitioner's brief on the merits, the record does support the position that the evidence of the collateral offense was simply too weak to proceed with in a separate trial (BP-13-16). The prosecutor had the opportunity to perfect the record on appeal at the time the admissibility of the collateral crimes evidence was challenged simply by giving the reason to the trial court for his decision to nolle prosse the case. The state is as responsible for the appellate record as is the defendant,

and any assumptions which favor the state's neglect should not be indulged.

Respondent argues that a defendant can already, under current law, "prevent the admission of weak collateral crime evidence." (BR-9). If sufficiently similar evidence of a separate offense is "weak", then it is because it does not demonstrate that a separate crime was committed and that the defendant on trial committed it. Thus, its probative value is considered outweighed by the prejudicial impact of its introduction. Petitioner contends that there is no better way to demonstrate the weakness or the irrelevance of collateral crimes evidence than to rely on a prosecutor's decision to drop the collateral charge. Without the continuing imprimatur occasioned by the prosecutor's initial decision to prosecute the collateral crimes offense, the evidence can no longer be considered strong enough or viable enough to be relevant, without a contrary explanation from the state for the decision to nolle prosse the charges. Petitioner urges this Court to readdress the language in State v. Perkins, 349 So.2d 161 (Fla. 1977), and declare such evidence inadmissible as lacking in probative value.

Respondent contends that this Court's primary holding in State v. Perkins, supra, is "overbroad." (BR-10-12). Respondent urges this Court to withdraw from its ruling in Perkins that "evidence of crimes for which a defendant has been acquitted is not admissible in a subsequent trial." Perkins at 163-164.

Respondent overlooks the fact that this Court went beyond the Ashe v. Swenson, 397 U.S. 436 (1970), rule of collateral estoppel by finding that evidence of acquitted collateral crimes is inadmissible on the ground of fundamental fairness. This Court went beyond the double jeopardy question inherent in a collateral estoppel argument and held that such evidence is not admissible because it denies a defendant a fair trial to which he is entitled under the Constitution.

Petitioner agrees with this Court's ruling inasmuch as it is predicated on both the collateral estoppel and the fundamental fairness grounds. However, on the issue of nolle prossed collateral crimes, this Court should also apply the test of collateral estoppel and fundamental fairness, and allow a defendant the opportunity to assert those arguments in relation to such evidence. As argued in petitioner's original brief on the merits, where a defendant is successful on either argument, the evidence of a nolle prossed collateral crime should not be admitted (BP-13-18).

Again, to hold that the introduction of such evidence is harmless error in a situation such as the one at bar, is to deny the significance which the state attached to the evidence. If the videotape of the main offense were sufficient, the collateral crimes evidence was overkill. Obviously the state did not believe that to be the case as hard as it fought, and still fights, for a favorable ruling on its admissibility. Petitioner relies on his brief on the merits for further analysis of the harmless error question.

III CONCLUSION

Based on the foregoing reasons and authorities, and the reasons cited in petitioner's original brief on the merits, 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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Reply Brief on the Merits has been furnished by hand to Mr. John W. Tiedemann, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Mr. Wilfred B. Holland, #073380, Post Office Box 158, Lowell, Florida, 32663, this 12th day of September, 1983.

MELANIE ANN HINES