IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

FRANK MARS,

Respondent.

CASE NO. 67,159

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent adopts petitioner's designation of record references. In this brief petitioner will be referred to as the state and respondent will be referred to as defendant or by name.

STATEMENT OF THE CASE AND FACTS

The defendant's specific disagreement with the state's statement of the facts and case concerns their completeness. Their statement of the case and facts (Petitioner's Brief 2-4) is supplemented as follows:

The defendant was indicted by the Grand Jury of Palm Beach County in case 83-650 for the premeditated murder of Willie Berry on March 15, 1983. The indictment alleged that the defendant:

> On or about the 30th day of January in the year of our Lord One Thousand Nine Hundred and Eighty Three, did unlawfully from a premeditated design to effect the death of a human being, kill and murder WILLIE BERRY, a human being by shooting the said WILLIE BERRY with a revolver and in the commission of said offense did use and have in his possession a deadly weapon, to-wit: a revolver, said revolver being a firearm as defined in Florida Statute 790.001(6), contrary to Florida Statutes 782.04(1)(a) and 775.087(2).

(SR-1).

The defendant never requested a statement of particulars. The state said it was filed "gratuitously" (SSR-49). In actuality, the time limit was supplied by the state in order to demand notice of alibi as required by Florida Rule of Criminal Procedure 3.200 (R-29,32,35-38). The defendant did not rely on alibi in the trial of 83-650 (SSR-26). The state conceded that the exact time of death was not fixed (SSR-26). The record does not contain any of the testimony by which the state sought to prove the allegations of the indictment 83-650. The concessions and unobjected to statements of the court and lawyers for the parties

in case 83-650 establish that the defendant did not move for judgment of acquittal at the close of the evidence on the grounds of a time variance (SSR-26). The record does not establish that the defendant ever claimed that there was any material evidence between the proof and allegations of the indictment in case 83-650.

An additional supplemental record of the charge conference in case 83-650, filed at the time of rehearing in the district court, establishes that the jury was also instructed on the necessarily lesser-included offenses of second degree murder and manslaughter to the charge of first degree murder (Charge Conference at page 8).

Over the state's objections that the court should not receive the jury verdict because the state would have no appellate process if the verdict was not guilty and that the court on its own motion should therefore dismiss the case or send the jury home for several days in order to give the state time to take common law certiorari to the District Court of Appeal, Fourth District, a jury verdict was returned and filed in 83-650 which found:

> WE, THE JURY find the Defendant FRANK MARS, not guilty, so say we all.
>
> July 1, 1983 Harvey Cole
> West Palm Beach, Florida Foreman

(SR-4).

Pursuant to this verdict, the circuit court entered judgment in favor of the defendant on July 1, 1983, as follows:

> You, Frank Mars, being now before the Court, attended by your attorney, ... and your having been found NOT GUILTY of:
>
> First Degree Murder as Charged in Count I of the Indictment
>
> now therefore I adjudge you to be NOT GUILTY of the offense or offenses to which you were found not guilty.

(SR-3).

Thereafter, the prosecutor announced that the defendant had been "reindicted" for the second degree murder of Willie Berry (R-3,15). This second indictment 83-4125 was filed on July 7, 1983, and it alleged that:

> On the 30th day of January in the year of our Lord One Thousand Nine Hundred and Eighty Three, unlawfully killed a human being, to-wit: WILLIE BERRY, by shooting the said WILLIE BERRY with a revolver and in the commission of said offense did use and have in his possession a deadly weapon, to-wit: a revolver, said revolver being a firearm as defined in Florida Statute 790.001(6), said act being imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, contrary to Florida Statute 782.04(2).

Shortly after filing this indictment, the state moved to interview the jurors in case 83-650 to ascertain the reason for the acquittal to "support its refiling" (R-2). The circuit court held that inquiry to determine what motivated and influenced the jury in arriving at its own independent verdict was improper and denied the motion (R-7,27).

To this indictment 83-4125, the defendant entered a plea of former jeopardy and moved to dismiss on the grounds of former jeopardy pursuant to Florida Rule of Criminal Procedure 3.190 (c)(2) and Section 910.111(1), Florida Statutes (R-39,41). At the hearing on the motion to dismiss the defendant also argued that retrial was barred on grounds of collateral estoppel (R-10). During that hearing, the circuit court asked the state to provide it with citation of law that gave the state an opportunity to retry a case once it went to a general verdict of not guilty (R-11), but the state said it had no case law that dealt with those specific facts (R-12).

The court granted the defendant's motion to dismiss on the grounds of double jeopardy and collateral estoppel finding that the defendant had previously been placed in jeopardy for this same offense in 83-650 (R-25). The court found the authority cited by the state to be inapplicable because the cause preceeded to a general verdict of not guilty and the defendant never demanded judgment of acquittal on the statement of particulars (R-24). A written order dismissing indictment 83-4125 on the grounds of double jeopardy was entered on August 8, 1983, nunc pro tunc July 13, 1983 (R-51-52).

The state's statement of the case and facts regarding the proceedings before the District Court of Appeal, Fourth District, are correct but are supplemented with the following additional facts:

In the first decision of the district court in this case on December 12, 1984, the district court erroneously assumed, without any record support, that the defendant requested the instruction on the statement of particulars (Petitioner's Appendix I-5, Appendix II-1). The court noted that in most instances it would not venture behind the jury's general verdict of acquittal but did so in this case, "with some trepidation," on the authority of State v. Beamon, 298 So.2d 376 (Fla. 1974). (Appendix I-6).

Thereafter, the court vacated its prior opinion on rehearing on May 8, 1985, and affirmed the trial court's order of dismissal. The district court certified a question of great public importance as set forth in the state's Initial Brief on the Merits (AB-4).

SUMMARY OF ARGUMENT

Mr. Mars was acquitted of first degree murder of Willie Berry and all of the necessarily included lesser degrees of first degree murder by the jury's general verdict of not guilty in 83-650. The state does not argue that indictment 83-4125 for second degree murder of Willie Berry charged the defendant with a different offense. The constitutional protections against double jeopardy are determined only through reference to the allegations of the indictment and by considering the statutory elements of the charged offenses. Here, the defendant was acquitted on the entire count of first degree murder of Willie Berry. Therefore, he may not be reprosecuted for the same offense of second degree murder of Willie Berry when in fact only a single crime has been committed; Willie Berry could only have been murdered once.

The courts are constitutionally prohibited from looking behind a general verdict of not guilty to determine the reason for the acquittal so as to allow reprosecution for the same offense on a different theory of liability. The reason for an acquittal is immaterial in determining whether the offenses are the same for double jeopardy purposes. In assessing a defendant's claim of collateral estoppel, which arises when a defendant is prosecuted for a different offense on a factual issue which was determined in the defendant's favor at a first

trial, the courts may look to the record and evidence to determine the probable reason for an acquittal. Therefore, a second prosecution for the same offense is barred by double jeopardy even though no collateral estoppel bar exists.

Here, the state relies only on State v. Katz, a collateral estoppel case, to support its theory that reprosecution for the offense of murder of Willie Berry is permissible since the state claims to know the reason for the acquittal. However, the state did not provide the district court with an adequate record to overturn the trial court's ruling that reprosecution was barred by collateral estoppel, nor does the state argue that second degree murder of Willie Berry is not the same offense as first degree murder of Willie Berry, for which the defendant has been finally acquitted. Dismissal on grounds of double jeopardy and for collateral estoppel involve two separate issues.

The law allows a defendant to establish alibi as a defense to crime and to insist that time is a material element of an offense so as to entitle him to a specific judgment of acquittal on his motion (State v. Beamon, State v. Bentley and Stang v. State); but this Court has repeatedly recognized that this rule does not allow the courts to look behind a general verdict of not guilty and assume a material variance when the defendant has not relied on, established nor claimed a variance between indictment and proof as a basis for acquittal (Driggers v. State, State v. Bentley, State v. Katz).

A general verdict of acquittal on an indictment undertaking to charge murder is final and a defendant may not thereafter be reindicted and reprosecuted for the same killing. The prosecutor may not claim his own negligence in drawing an indictment was the reason for the acquittal so as to permit reprosecution. Where a defendant has been acquitted at trial, he may not be reprosecuted no matter how erroneous the legal rulings underlying the acquittal may be. The result is the same whether an acquittal on an entire count results from an erroneous court ruling limiting the state's proof or from the state's erroneously, negligently and gratuitously limiting its own proof. An acquittal on the entire count as charged in the indictment is final and the defendant may not thereafter be reprosecuted for the same offense on a different theory of liability.

ARGUMENT

POINT INVOLVED

THE RULE OF STATE v. BEAMON, WHICH PERMITS THE FILING OF SUBSEQUENT CHARGES DOES NOT APPLY IN A CASE WHERE THE DEFENDANT WAS ACQUITTED BY A GENERAL VERDICT IN THE INITIAL PROCEEDINGS AND THE DEFENDANT DID NOT SEEK A DIRECTED VERDICT OF ACQUITTAL OR REQUEST AN INSTRUCTION TO THE JURY AS TO THE BINDING NATURE OF A BILL OF PARTICULARS IN THOSE PROCEEDINGS (FOR TO PERMIT SUCH A RULE WOULD BE A VIOLATION OF THE DEFENDANT'S PROTECTIONS AGAINST DOUBLE JEOPARDY UNDER THE FLORIDA AND FEDERAL CONSTITUTIONS).

The state cannot seriously contend and in fact does not argue to this Court that the indictment 83-650 against the defendant for first degree murder of Willie Berry by shooting him with a revolver on or about January 30, 1983, (SR-1) and indictment 83-4125 against the defendant for second degree murder of Willie Berry by shooting him with a revolver on January 30, 1983, (R-33) do not charge the same offense. It is the allegations of the indictment which serve to protect the accused from another prosecution for the same offense. Raulerson v. State, 358 So.2d 826 (Fla. 1978). In Sanabria v. United States, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978), the Court said:

> The precise manner in which an indictment is drawn cannot be ignored, because an important function of the indictment is to ensure that, 'in case any other proceedings are taken against [the defendant] for a similar offence, ... the record [will] show with accuracy to what extent he may plead a formal acquittal or conviction'.

Id., 437 U.S. at 66-67. (Citations omitted).

The test for determining whether two separate charges constitute the "same offense" for double jeopardy purposes was reiterated recently by this Court in Bell v. State, 437 So.2d 1057 (Fla. 1983):

> If two statutory offenses have the exact, same essential constituent elements, or when one statutory offense includes all of the elements of the other, those two offenses are constitutionally 'the same offense' and a person cannot be put in jeopardy as to both such offenses unless the two offenses are based on two separate and distinct factual events.

Id. at 1060.

Therefore, in assessing double jeopardy claims, the courts are bound to consider only the statutory elements and not the allegations or proof in a particular case. Scott v. State, 453 So.2d 796 (Fla. 1984), State v. Baker, 452 So.2d 927 (Fla. 1984).

Second degree murder is a necessarily lesser-included offense of murder in the first degree, Harris v. State, 438 So.2d 787 (Fla. 1983), and a verdict alternative rejected by the jury's acquittal of the defendant in case 83-650. (See transcript of charge conference). Thus, when the jury returned a verdict in the defendant's favor of not guilty of first degree murder and a judgment of not guilty was entered on the entire count, "as charged in Count I of the indictment" (SR-3), the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 9 of the Florida Constitution forever prohibited the state from again trying the defendant for any degree of

murder for unlawfully killing Willie Berry by shooting him on or about January 30, 1983. Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

In Sanabria petitioner had been charged in a one count indictment under 18 U.S.C. Section 1955, which makes it illegal to participate in a single gambling business. Petitioner was charged with participation in a gambling business by numbers betting and horse betting. The trial judge granted a motion to exclude evidence on the numbers betting holding that this was not forbidden under the relevant state statute and subsequently granted a motion to acquit on the horse betting charge due to insufficient evidence. The Supreme Court found that even if horse betting and numbers betting had been pled in separate counts "petitioner was acquitted for insufficient proof of an element of the crime which both such counts would share -- that he was 'connected with' the single gambling business" and thus this finding would bar any further prosecution for the offense of participation in that business. Id. at 72-73. The Court said:

> We must assume that the trial court's interpretation of the indictment was erroneous. See n 13, supra. But not every erroneous interpretation of an indictment for purposes of deciding what evidence is admissible can be regarded as a "dismissal." Here the District Court did not find that the count failed to charge a necessary element of the offense, cf. Lee v. United States, 432 U.S. 23, 53 L.Ed.2d 80, 97 S.Ct. 2141 (1977); rather, it found the indictment's description of the offense too narrow to warrant the admission of certain evidence. To this extent, we believe the ruling below is properly to be characterized as an erroneous evidentiary ruling, which led to an acquittal for insufficient [437 U.S. 69]

> evidence. That judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error. United States v. Martin Linen Supply Co., 430 U.S., at 571, 51 L.Ed.2d 642, 97 S.Ct. 1349; Fong Foo v. United States, 369 U.S. 141, 7 L.Ed.2d 629, 82 S.Ct. 671 (1962); Green v. United States, 355 U.S., at 188, 2 L.Ed.2d 199, 78 S.Ct. 221, 77 Ohio L.Abs. 202, 61 ALR2d 1119; United States v. Ball, 163 U.S., at 671, 41 L.Ed. 300, 16 S.Ct. 1192.

Sanabria v. United States, 437 U.S. at 68-69. (Footnote omitted) (Emphasis supplied).

Here, the Constitution required a determination whether the indictment for second degree murder of Willie Berry charged the same offense as the first indictment for first degree murder of Willie Berry by examining the statutory elements. In Sanabria v. United States, supra, the Court said:

> It is Congress, and not the prosecution, which establishes and defines offenses. Few, if any, limitations are imposed by the Double Jeopardy Clause on the legislative power to define offenses. Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). But once Congress has defined a statutory offense by its prescription of the 'allowable unit of prosecution,' (citations omitted), that prescription determines the scope of protection afforded by a prior conviction or acquittal. Whether a particular course of conduct involves one or more distinct 'offenses' under the statute depends on this congressional choice.

Id., 436 U.S. at 69-70 (Emphasis supplied).

Whether the charge of second degree murder of Willie Berry is the same offense for which the defendant was acquitted on the first degree murder indictment of Willie Berry cannot be analyzed

under the "same evidence" test because "only a single violation of a single statute is at issue here." Sanabria v. United States, supra, at footnote 24. Willie Berry could only have been murdered once and any unlawful killing of Willie Berry would constitute but a single violation of the homicide statute in whatever degree. Where a single crime has been committed, the prosecution may not fragment what is in fact a single crime into its components or avoid the limitations of the Double Jeopardy Clause by the simple expedient of dividing a single crime into a series of temporal or spatial units. See Sanabria v. United States, 437 U.S. at 72 and Brown v. Ohio, 432 U.S. 161,169, 97 S.Ct. 221, 53 L.Ed.2d 187 (1977).

Not once in its brief to this Court does the state contend that the indictment in 83-4125 did not charge the same offense as the indictment in 83-650. The state is obviously aware that the second indictment charged the same offense as the first indictment, for in the circuit court the state candidly referred to case 83-4125 as a "refiling," that the defendant had been "reindicted on the charge of Second Degree Murder" (R-2,3).

The only theory the state advances to this Court as a reason why the defendant may be retried for the same offense of murder of Willie Berry is its contention that the jury verdict is based solely on a material variance and that if it can be discerned that the variance is the reason for an acquittal, then the defendant may be retried for the same offense under a different statement of particulars (Petitioner's Brief at page 10-11). As

the defendant will demonstrate, the factual assumptions underlying this argument are incorrect and not supported by the appellate record nor do the cases of State v. Beamon, 298 So.2d 376 (Fla. 1974) and State v. Katz, 402 So.2d 1184 (Fla. 1981), allow the state or the courts to attack the finality of a jury verdict of acquittal and attempt to ascertain or review the reasons for the acquittal so as to allow reprosecution for the same offense. Stang v. State, 421 So.2d 147 (Fla. 1982), State v. Beamon and State v. Katz, supra, are not applicable to the facts of this case where the defendant was found not guilty by a general verdict.

First of all, those cases involve offenses charged by way of informations and not by indictments. The statement of particulars could not amend or define the offense of capital murder on which the Grand Jury indicted the defendant and on which the defendant was placed in jeopardy and then acquitted. Both the Florida and Federal Constitutions require that no person shall be held to answer or tried for a capital crime except upon an indictment returned by a Grand Jury. Article I, Section 15, Florida Constitution; Fifth and Fourteenth Amendments, United States Constitution. Only a Grand Jury, not the prosecutor, has the authority to alter an indictment. Perez v. State, 371 So.2d 714 (Fla. 2d DCA 1979), Russell v. State, 349 So.2d 1224 (Fla. 2d DCA 1977), Pickeron v. State, 94 Fla. 268, 113 So. 707 (1927). Not even a Grand Jury can amend an indictment to charge an additional or different offense; it may only alter an indictment

by filing a new one after an independent examination of the evidence, even though a prior indictment is pending. Smith v. State, 424 So.2d 726,729 (Fla. 1983). Consequently, neither Stang, Katz or Beamon mention the constitutional limitations which would prohibit a prosecutor from altering or amending an indictment and do not clarify or amend the double jeopardy protections guaranteed to the defendant when he was acquitted of the crime charged under the protections of the allegations of the indictment.

The state's argument also ignores critical differences between a jury's general verdict of not guilty and a judgment of acquittal or directed verdict upon the defendant's motion on specific grounds of a fatal variance as occurred in State v. Beamon and State v. Bentley, 81 So.2d 750 (Fla. 1955), or upon the judge' s specific order of dismissal on the grounds of a fatal variance even though not requested by the defendant as occurred in State v. Katz.[1]

In State v. Beamon, supra, the defendant obtained a judgment of acquittal from the judge on the ground that there was a material variance between the proof and the date alleged in the

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1 It is important to note that none of the cases cited by the state deal with reprosecution for any homicide offense. Unlike burglary, robbery or larceny offenses which may occur more than once, a charge of murder of a particularly named individual can only be a single offense. That the state limited its proof under the indictment does not render the jury's verdict any less of an acquittal on the "offense" charged. Sanabria, 437 U.S. at 72.

bill of particulars. The trial judge granted the motion and declared the defendant "not guilty of the crime of robbery on November 24, 1972." Id. at 378. This specific judgment of acquittal did not bar a subsequent prosecution for robbery on November 26. The rule of State v. Beamon protects a defendant's right to a establish an alibi to an accusation of crime and to insist that time is a material element of the offense entitling him to a specific judgment of acquittal on that ground, but Beamon then prohibits the defendant from assuming an inconsistent position in asserting double jeopardy protections when a second charge is filed to meet the fatal variance.

Beamon, Bentley and Katz all deal with the trial court's granting a judgment of acquittal on specific grounds of a fatal variance. Those cases do not purport to look behind a jury's general verdict of not guilty nor to limit a defendant's double jeopardy protections by assumptions of a specific reason for the jury's verdict so as to permit reprosecution for the same offense on a different theory of liability. In fact, both Bentley and Katz recognized the situations involved in those cases are completely distinguishable from an acquittal entered on a jury's general verdict of not guilty. In State v. Katz, this Court said:

> In State v. Bentley, 81 So.2d 750 (Fla. 1955), this Court distinguished situations such as the ones at bar from one in which the defendants went to trial on the first charge and were acquitted by a jury in spite of a variance between the pleading (larceny of a cow) and proof (larceny of a calf). See Driggers v. State, 137 Fla. 182, 188 So. 118 (1939). In

> the latter instance "from all that appears in the record, the jury could have found [the defendants] not guilty on the actual merits of the case." 81 So.2d at 751. See also LeRea v. Cochran, 115 So.2d 545 (Fla. 1959), cert. denied, 362 U.S. 946, 80 S.Ct. 867, 4 L.Ed.2d 865 (1960).

State v. Katz, 402 So.2d at 1186. (Emphasis supplied).

Likewise, in State v. Bentley, the defendants moved for and were granted a directed verdict of acquittal on the grounds that there was a material variance between the allegation of larceny of a cow and proof of larceny of a bull. Having done so, they could not then contend that the variance was not material and that the two offenses charged were in actuality one and the same offense. Driggers v. State, 137 Fla. 182, 188 So. 118 (1939), was distinguished because there "the defendants did not, by motion for a directed verdict or other affirmative action, undertake to establish in the first trial the materiality of the variance." State v. Bentley, 81 So.2d at 750.

Before this Court, the state in no way asserts that Mr. Mars took any affirmative action to establish a material variance in the trial of 83-650. Such a position would be clearly untenable in any event. Here Mr. Mars did nothing but let the state try its case. The defendant did not establish nor claim a material variance at trial, he did not request nor demand a statement of particulars; it was filed gratuitously by the state in order to demand notice of alibi under Florida Rule of Criminal Procedure 3.200 (R-29-32). He did not move for a judgment of acquittal on the statement of particulars. The defendant did not request a

charge to the jury on the statement of particulars but claimed excusable or justifiable use of force (see charge conference) and did not assert alibi as a defense. The defendant did oppose a state's tardy motion to amend the statement of particulars made after the jury had been deliberating its verdict for over two hours. But the defendant's opposition to the motion can hardly constitute "affirmative action" to "establish" a "material variance" for if there were a material variance, it had long since been established by the state without any assistance, action, demand or request by the defendant that the state limit its proof.

The state's contention before this Court that it knows the reason the jury acquitted (Petitioner's Brief 10-11) is belied by the record. The state clearly does not know the reason for acquittal, as it moved to interview the jurors in the trial court in order to ascertain the jury's reasoning to support its "refiling" of a charge of second degree murder (R-2). That motion was denied (R-7,27).

Since Mr. Mars did not affirmatively establish a material variance nor take inconsistent positions which would preclude a claim of double jeopardy as in State v. Beamon, the state relies solely on Katz' interpretation of Beamon to justify its attempts to reprosecute Mr. Mars for the same offense of murder of Willie Berry (Petitioner's Brief at 10-11). In Katz, the defendant was charged with burglary of a 1977 Buick but the evidence showed burglary of a 1975 Chevrolet. When Katz moved to dismiss the

charges at the close of the evidence, the trial judge granted the motion because of a discrepancy between a 1975 Chevrolet and a 1977 Buick, which grounds were not asserted by Katz. Katz reviews this dismissal of an information solely on the basis of collateral estoppel under Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). Katz' claim of collateral estoppel was denied because the factual issue of whether the defendant stole anything else but a 1977 Buick had not been resolved in Katz' favor. Therefore, the state was not collaterally estopped from litigating the issue of whether Katz stole a 1975 Chevrolet on a new information.

There was no question in Katz but that the two offenses, burglary of a 1975 Chevrolet and burglary of 1977 Buick, were different offenses just as the robbery of a poker player Knight was a different offense from the robbery of a separate poker player Roberts in Ashe v. Swenson. The principle of collateral estoppel embodied in the Fifth Amendment guarantee against double jeopardy arises when the prosecution seeks to try a defendant on a different offense where the issue to be litigated by that prosecution has been resolved in the defendant's favor by a previous judgment of acquittal. Therefore, a claim of collateral estoppel requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury

could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Id., 397 U.S. at 441, 90 S.Ct. at 1194.

Since Katz involved a collateral estoppel dismissal of an information filed subsequent to an acquittal for a different offense, it was permissible for this Court to evaluate the basis of the acquittal under the standard of Ashe v. Swenson. That situation is entirely different than the case at bar because the state, as appellant, did not provide a sufficient appellate record to overturn the trial court's finding of collateral estoppel, State v. Yero, 377 So.2d 45 (Fla. 3d DCA 1979), Merrit v. Williams, 295 So.2d 310 (Fla. 1st DCA 1974), Simpson v. Florida, 403 U.S. 384, 91 S.Ct. 1801, 29 L.Ed.2d 549 (1971), nor does the state dispute a double jeopardy bar to reprosecution for the same offense.

Where dismissal of a subsequent indictment is grounded solely on the defendant's prior acquittal for the same offense, the reasons for the acquittal are immaterial; "Where a defendant has been acquitted at trial he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous." Sanabria v. United States, 437 U.S. 54,64 (1978).[2]

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A defendant's acquittal for a single criminal offense stands as a bar in jeopardy to reprosecution for the same offense even if there is no collateral estoppel bar to a prosecution of the defendant for a different offense. Sanabria v. United States, 397 U.S. at 73, footnote 31.

See also Fong Foo v. United States, 369 U.S. 142, 82 S.Ct. 671 (1962). It is without constitutional significance whether a court enters a judgment of acquittal rather than directing a jury to bring a verdict of acquittal or giving it erroneous instructions that result in an acquittal. United States v. Martin Linen Supply Co., 430 U.S. 564,567, footnote 5, 573, 97 S.Ct. 1341, 51 L.Ed.2d 642 (1977); United States v. Sisson, 399 U.S. 267,290, 90 S.Ct. 2117, 26 L.Ed.2d 608 (1970).

A verdict of acquittal on the issue of guilt or innocence is, of course, absolutely final. Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). The Double Jeopardy guarantee protects a man who has been acquitted from having to "run the gantlet" twice. Green v. United States, 355 U.S. 184,190, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). The underlying idea to this fundamental constitutional guarantee is that the "State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continued state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Green v. United States, 355 at 187-188. Those fundamental principles would clearly be violated if the state were given another chance to place the defendant on trial for the murder of Willie Berry, in spite of his acquittal by the jury for that offense.

A general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing. Ball et al. v. United States, 163 U.S. 662, 16 S.Ct. 1192,1194 (1896). Ball v. United States makes it crystal clear that a prosecutor may not claim that his error in drawing the first indictment or some other deficiency in the particulars of the indictment was the ground on which the jury returned a general verdict of not guilty so as to give him a second chance of convicting a prisoner. Id. at 1194. As in Ball v. United States, supra at 1195, the defendant here was discharged by the circuit court by reason of his acquittal by the jury and not by any specific request or motion raising the insufficiency of the proof to meet the bill of particulars as in Bentley or Beamon. Unlike State v. Katz, where the judge's specific order of dismissal for a material variance showed an acquittal of a different offense than the second information, here the defendant was acquitted by a general verdict of not guilty and the reasons for the jury verdict cannot be reviewed without placing the defendant twice in jeopardy for the same offense. Fong Foo v. United States, 369 U.S. 142, 82 S.Ct. 6, 71 L.Ed.2d (1962). United States v. Scott, 437 U.S. 82 (1978).

Although the rule is otherwise in England, Ball v. United States, supra at 1193, under our Constitution a jury's verdict of acquittal in favor of the accused is conclusive. Id. at 1195. Therefore, the state's claim that a "typographical error" was the

reason for the jury's verdict of not guilty does not present a lawful exception to the prohibition of the Fifth Amendment that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. Sanabria v. United States, supra. 437 U.S. at 75. Where the defendant has been acquitted, the state may not retry him for the same offense on an additional theory of liability. Sanabria v. United States. Nor is there any exception to the constitutional rule forbidding successive trials on the same offense once the defendant has been acquitted. Sanabria v. United States, 437 U.S. 75.

Here, the state's "gratuitously" limiting its proof by filing a statement of particulars without a defense request (SSR-49) is similar to the erroneous ruling limiting the government's evidence in Sanabria v. United States. When, in each case, an acquittal on the entire count as charged in the indictment was entered without specifying it was limited to one theory of liability, the acquittal on the entire count bars reprosecution. Clearly, the Constitution does not permit this Court, the Fourth District Court of Appeal or the trial court to assume or assign any specific reason for a general verdict of not guilty so as to permit reprosecution for the same offense on a different theory of liability.

Although the state claims it is not seeking to have this Court review the trial court's denial of its motion to amend the statement of particulars during the trial of case 83-650 (Petitioner's Brief-9), that is precisely what the state is attempting

to get this Court to do. The logic advanced by the state is that it is the court's erroneous ruling on that state's motion which allows it to reprosecute the defendant for the same offense (Petitioner's Brief-9-10). The correctness of the trial court's ruling on that issue in case 83-650 is not subject to the review of this Court or any court on any appeal. Fong Foo v. United States.

Accordingly, the decision of the District Court of Appeal, Fourth District, affirming the defendant's order of discharge should be upheld. The Fifth and Fourteenth Amendments to the United States Constitution prohibit the extension of the rule in State v. Beamon to allow reprosecution of Mr. Mars for the same criminal offense of murder of Willie Berry for which he has been finally and absolutely acquitted by a jury's general verdict of not guilty. The certified question should be answered in the negative.

CONCLUSION

Based on the foregoing, the decision of the District Court of Appeal, Fourth District, should be affirmed and the certified question should be answered in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to SARAH B. MAYER, Assistant Attorney General, Counsel for Petitioner, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, FL 33401, this 25th day of July, 1985.

Margaret Good

MARGARET GOOD
Assistant Public Defender