IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,921

4th DCA CASE NO. 87-0409

EDWARD ADAM FRIDOVICH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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ANSWER BRIEF OF RESPONDENT

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On Review from the District Court
of Appeal of Florida, Fourth District

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PRELIMINARY STATEMENT

Respondent was the Appellee in the District Court of Appeal and was the prosecution in the trial court. Petitioner was the Appellant in the appeal proceedings and the defendant at the trial.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as presented on pages one (1) through eight (8) of Initial Brief of Petitioner with the following additions and/or corrections:

Petitioner was given the opportunity to give the Court a curative instruction regarding a prosecution question as to intent. (R. 166-67). Petitioner failed to supply a proper curative instruction, and therefore, the jury was not given one. (R. 167). The "refiled" information was not barred by the statute of limitations.

SUMMARY OF THE ARGUMENT

POINTS I & II

The instant charging document was timely filed in that it related back to the original charging document. Due to the reversal and remand from his first trial, Petitioner was on notice of the instant prosecution. Petitioner's actions waived his defense.

POINT III

The testimony objected to as violative of double jeopardy prohibitions was proper proof of manslaughter. Petitioner was charged with manslaughter by act, procurement or culpable negligence, thereby necessitating some evidence of intent. There was no premeditation testimony. Petitioner mischaracterizes as "intent" evidence the testimony as to the distance of gun muzzle to target.

POINT IV

The trial court exercised its discretion in denying Petitioner's Motion for Mistrial. The Petitioner received a fair trial. There was no contradiction between the denial of a mistrial motion and the granting of Petitioner's Motions in Limine.

ARGUMENT

POINTS I & II

THE INFORMATION UNDERLYING THE INSTANT PROSECUTION AND CONVICTION IS NOT BARRED BY THE STATUTE OF LIMITATIONS; THE ORIGINAL PROSECUTION TOLLED THE STATUTE OF LIMITATIONS.

The re-filed information leading to the second trial, does not constitute a violation of double jeopardy prohibitions.[1]

> [R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

Burks v. Untied States, 437 U.S. 1, 16 (1978); Greene v. Massey, 437 U.S. 19, 25-26 (1978). Concomitantly, speedy trial guarantees have not been violated either.

Petitioner's claim that the instant prosecution was barred by the statute of limitations is based on the lack of

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[1] A new trial was ordered "because the trial court refused to allow an expert witness to testify for Fridovich that the shooting was accidental". Fridovich v. State, 537 So.2d 648 (Fla. 4th DCA 1989).

language connecting the second information to the earlier prosecution and that the information charges an entirely different offense. In addressing, and subsequently denying Petitioner's direct appeal based on the statute of limitations, the Fourth District Court of Appeal rejected the time/bar allegations. Fridovich v. State, 537 So.2d 648 (Fla. 4th DCA 1989) (Appendix A).

That the instant information provides a sufficient relation back to the first charging document has been recognized, by analogy, by this Court. "[T]he victim was properly identified in the information under which Rubin was tried and convicted. ..." Rubin v. State, 390 So.2d 321, 325 (Fla. 1980), (R. 588),

> A subsequently filed information, which contains language indicating that is a continuation of the same prosecution, timely commenced will not be considered an abandonment of the first information and therefore will not be barred by the statute of limitations. Mead v. State, 101 So.2d 373 (Fla. 1958).

Id. at 324. Furthermore, although the Petitioner now contests the running of the statute of limitations without a proper tolling; his assertions, notwithstanding his waiver of this defense, are invalid as the form and substance of his defense is invalid. "When the state seeks to prosecute after the statute of limitations has expired, the proper method to prevent the prosecution is by [Writ of] Prohibition." Carcaise v. Durden, 382 So.2d 1236, 1237 (Fla. 5th DCA 1980) (emphasis added). Sub judice, Petitioner's defense was not properly preserved. He

requested jury instructions and moved for a Judgment of Acquittal and Motioned for a New Trial. (R. **672, 676),** but he did not seek a Petition for a Writ of Prohibition. See also, State v. Bryson, **380** So.2d **468** (Fla. 2nd DCA **1980):**

> A petition for a writ of prohibition is a proper method of seeking to prevent prosecution where the limitations period has [allegedly] run. See Reino v. State, **352** So.2d **853** (Fla. 1977).

Id. at **468.**

Notwithstanding Respondent's position that the Re-filed Information (R. **588)** was a proper relation back to the first information:

> The defendant was put on notice within the statutory time period as to the criminal activity with which he was charged, and the superceding information did not make any substantive charges which would unreasonably prejudice the preparation of his defense.[2]

State v. Garofalo, **453** So.2d **905, 906-07** (Fla. 4th DCA **1984).** Respondent additionally maintains that the course of conduct pursued by the Petitioner served to waive the defense he now utilizes.

> If the state does not allege the tolling of the statute in an otherwise sufficient information or indictment, a defendant may by his actions waive his defense.

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[2] Petitioner was aware of the second prosecution in that his first manslaughter conviction of March **3, 1984** was reversed and remanded for **a** new trial on August **4, 1386.** (R. **710).**

Sturdivan v. State, 419 So.2d 300, 302 (Fla. 1982) (emphasis added). Petitioner in responding to the information without raising this defense waived it. Furthermore, Petitioner does not allege prejudice due to what he claims to be an untimely prosecution, and therefore, as in Sturdivan, a finding of no prejudice is necessitated. Id. at 303.

The trial court's order denying Petitioner's Motion for Judgment of Acquittal (R. 710-713) is instructive in its recitation of applicable case law. (Appendix B). As to the waiver issue, in addition to Sturdivan, supra, the court notes the opinion in Tucker v. State, 417 So.2d 1006 (Fla. 3rd DCA 1982), wherein the Court stated that "[a] defendant who believes that a criminal statute of limitations no longer works to his advantage, should be permitted to waive that statute. . . ." Id. at 1013.

Cases referenced by Petitioner, in the hopes of persuading this Court of the bar to a manslaughter prosecution due to the alleged running of the statute of limitations, are singularly inappropriate in that they are procedurally deviant from the instant case. Petitioner chooses not to emphasize the major variance that demands affirmance of the lower court's opinion: the original prosecution, the subsequent reversal and remand for a new trial without violating double jeopardy prohibitions. Petitioner's guaranteed right to a direct appeal does not auger to his benefit to the extent that a remand for retrial could be barred by statute leaving the prosecution in a

legal "Catch 22." The Petitioner's direct appeal inherently negates the question of a statute of limitations bar.

> The sole purpose of a statute of limitations in a criminal context is to prevent the state from hampering defense preparation by delaying prosecution until a point in time when its evidence is stale and defense witnesses have died, disappeared or otherwise become unavailable . . . . Since one who has been squarely put on notice of criminal activities with which he is charged is in a position to begin preparation of a defense on those charges, courts have traditionally held that a valid indictment tolls the statute of limitations, and that return of a superceding indictment prior to dismissal of the original indictment does not violate the statute of limitations if the superceding indictment does not substantially alter the charge.

Garofalo at 906 (emphasis added) (citation omitted). Respondent notes that Petitioner was on notice of this second prosecution, as of the remand of his first conviction. Accordingly, Respondent respectfully requests this Court's affirmance of the Petitioner's conviction, and the District Court's ruling and to answer the certified question in the affirmation -- the prosecution of the second information is a continuation of the original prosecution so that the statute of limitations remains tolled throughout the prosecution.

POINT III

THE TRIAL COURT PROPERLY ADMITTED ALL TRIAL TESTIMONY AND EVIDENCE AS THE MATERIAL ADMITTED WAS PERTINENT TO PETITIONER'S MANSLAUGHTER CONVICTION AND WAS NOT A DOUBLE JEOPARDY VIOLATION.

Petitioner was on trial for, and was convicted of, manslaughter in violation of § 782.07, Fla. Stat. Petitioner appeals this conviction based on a double jeopardy claim -- Petitioner's prior acquittal for first degree murder should allegedly have precluded testimony, in his manslaughter trial, regarding "intent" to kill. Respondent posits that Petitioner was not charged with first degree murder, that the charging document presented the crime of manslaughter by act, procurement or culpable negligence; culpable negligence evidences a crime committed "equivalent to an intentional violation of the rights of others []" Dominique v. State, 435 So.2d 974 (Fla. 3rd DCA 1983), and therefore no violation of double jeopardy prohibitions occurred. Further, testimony underlying the alleged "intent" evidence was based on establishing the distance of the gun muzzle to the victim. The Petitioner opened the door to this line of testimony (R. 104), and nonetheless, it did not evidence intent.

The proof requisite to a conviction for manslaughter by act, procurement or culpable ***negligence*** was sufficiently presented to the jury for the conviction to be valid and supportable. The evidence presented did not duplicate the first trial, nor did it place Petitioner in double jeopardy, as proof

of manslaughter was required even though an overlap in the context of the evidence may have resulted.

> The Double Jeopardy Clause protects a person against successive prosecutions for the same crime, not against successive prosecutions for two different crimes that happen to include the same underlying act.

United States v. Ruggiero, 754 F.2d 927, 934 (11th Cir. 1985). (emphasis supplied).

> The test is whether the defendant has been twice in jeopardy, for the same identical crime, not whether he has been tried before upon the same acts, circumstances or situation the facts of which may sustain a conviction for a separate crime. . . . [I]f the facts which will convict on a second prosecution would not necessarily have sustained a conviction on the former prosecution for the crime there charged, then the first prosecution will not stand as a bar to the second, although the offenses charged may have been committed in the same transaction.

State v. Bowden, 18 So.2d 478, 480 (Fla. 1944). The Appellant's double jeopardy claim does not fit the circumstances, sub judice. The charging documents of each case alleged different crimes that require different findings by the jury in order to convict. Contrary to Petitioner's argument that the Prosecutor improved his case by eliminating family witnesses, who may have since recanted their version of events, the state presented only evidence of manslaughter, and consequently did not have to bring in family members whose prior testimony had gone to prove intent to commit premeditated murder. Nonetheless, proof of manslaughter by culpable negligence includes more than proof of an involuntary act.

> Florida courts have given a special definition to "culpable negligence." Instead of construing it to emphasize involuntary and unintentional behavior, they have construed it to emphasize culpability which rest on intentional, or quasi-intentional, behavior . . . .

Carlton v. Wainwright, 588 F.2d 162, 164 (5th Cir. 1979); accord Taylor v. State, 444 So.2d 931, 933 (Fla. 1983). The information sub judice charged Petitioner with manslaughter in the disjunctive, and therefore did not limit the conviction to culpable negligence which the Taylor court determined cannot, under certain circumstances, be a crime of intent as can manslaughter by the act or procurement, Id. at 934, at least when the charge is attempted manslaughter. The trial court agreed with the Taylor characterizations. (R. 600).

Clearly the alleged "intent" testimony was necessary as proof of an implied element of the charged offense. Double jeopardy prohibitions have not been violated herein as both first and second degree murder require findings different than those requisite to a manslaughter conviction. United States v. Caporale, 806 F.2d 1487, 1517 (11th Cir. 1986). See State v. Baker, 456 So.2d 419 (Fla. 1984), Carawan v. State, 515 So.2d 161 (Fla. 1987). Petitioner's factual reliance on Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed.2d 469 (1970) is misplaced; Ashe having supplied an alibi as to one robbery, was factually precluded from committing the second robbery, and therefore that allegation violated double jeopardy prohibitions. In the case at bar, the Petitioner, having been acquitted of premeditated

murder, still had to answer for the manslaughter -- the killing was never denied, and the jury, being instructed on excusable homicide, chose to convict Petitioner of manslaughter.

Petitioner claims the Prosecutor pushed the defense witness, Dr. Tate, into saying under certain specified circumstances that the crime would be homicide. The Court requested Petitioner to suggest a curative instruction.

> THE COURT: I deny your motion for mistrial. What kind of curative do you want me to give?
>
> MR. BROCK [defense counsel]: I would ask for a curative instruction and a mistrial.
>
> THE COURT: What curative do you want?
>
> MR. BROCK: I would ask you to instruct the jury to disregard the question. That question is inappropriate. And then once that's done I would suggest to the Court any instruction you can use except mistrial.
>
> THE COURT: No point in a curative then.

(R. 166-67). Petitioner has not demonstrated any prejudice resulting from the alleged "intent" testimony. The Petitioner was not charged with murder, the jury was not instructed as to murder. The testimony was elicited to demonstrate distance of muzzle to target; and, in fact, Petitioner opened the door to the subject matter.

> Q. Were you trying to determine the distance from which the shot was fired?
>
> A. Yes.

> Q. Why were you trying to determine points of entry and angle and distance?
>
> A. Well, for several reasons. That's important in any gunshot wound. There are three types of gunshot wounds. Basically, they are: Contact or near contact gunshot wounds: the second type is intermediate range gunshot wounds; and the third type is indeterminate.

(R. 104). Petitioner speculation as to what the jury's interpretation of this testimony might be is an improper basis upon which to base legal argument. Rowell v. State, 382 So.2d 886 (Fla. 1st DCA 1980); Sullivan v. State, 303 So.2d 632 (Fla. 1974).

In requesting this Court's affirmance of Petitioner's conviction for manslaughter, Respondent notes that "[a] single transaction however, can give rise to distinct offenses under separate statutes without violating the double jeopardy clause of the fifth amendment." Arnold v. State, 514 So.2d 419, 421 (Fla. 1987). Sub judice, the single action of a gun firing while in Petitioner's control gave rise to proper prosecutions for both the first degree murder charge and the subsequent, refiled, manslaughter conviction. Accordingly, the trial court properly admitted evidence and Petitioner's conviction must be affirmed.

POINT IV

THE TRIAL COURT PROPERLY DENIED PETITIONER'S MOTION FOR MISTRIAL.

Petitioner alleges reversible error occurred due to the trial court's denial of his Motion for Mistrial which was based on admission of evidence which was contrary to defense's assumption that no defense witness would be necessary to rebut the blood spatter testimony. In addition to the omission of allegations of prejudice resulting from his "undue surprise,''the Petitioner fails to legally substantiate his position. Petitioner's Motions in Limine (R. 590, 604) seek to preclude the admission of evidence going to prove first and second degree murder, crimes for which Petitioner was acquitted. However, the admission of the contested evidence by the prosecution went to prove manslaughter and not first or second degree murder.

> But here, underlying conduct constituting Manslaughter by "act or procurement" requires proof of intent, Taylor, supra, and all evidence as to the Defendant's intent is relevant to show that the Defendant's act or procurement resulting in the death of Martin Fridovich was intentional.

(R. 593, STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE). Neither The Motions in Limine (R. 590, 604), nor the court's Order (R. 599), specifically seeks to, nor does, preclude blood spatter evidence.

> The State will only be permitted to offer that testimony and/or evidence which is offered for the purpose of proving an "act" as heretofore defined in this Order,

> and/or culpable negligence. Such testimony will be found to be relevant and constitutionally not proscribed.

(R. 601). The state offered testimony to prove an "act" sufficient to convict Petitioner of manslaughter. The Motion for Mistrial was properly denied.

> Determinations of whether substantial justice requires a mistrial and related questions involving juror conduct are both lodged within the sound discretion of the trial court. Doyle v. State, 460 So.2d 353 (Fla. 1984).

DuFour v. State, 495 So.2d 154, 163 (Fla. 1986). Additionally, a mistrial is to be "granted only when it is necessary to ensure that the defendant receives a fair trial." Marek v. State, 492 So.2d 1055, 1057 (Fla. 1986). The Petitioner received a fair trial, he had notice of the state's witnesses prior to trial and opportunity, therefore, to depose and cross examine them, as well as to call his own witnesses. The court's denial of Petitioner's Motions for Mistrial does not conflict with the granting of his Motions in Limine. Testimony as to the crime of manslaughter was properly admitted into evidence, notwithstanding a potential overlap with evidence of murder. (See Point 111, supra).

Accordingly, Respondent respectfully requests this Court's affirmance of the District Court's Opinion and Petitioner's Conviction for manslaughter.

CONCLUSION

Pursuant to the referenced case law and argument by Respondent, Respondent respectfully requests this Court to affirmatively answer the certified question and to affirm the lower courts *sub judice*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Respondent has been furnished by United States mail to GLEN L. BROCK, Post Office Box 5004, Lakeland, Florida 33807 this 28th day of August, 1989.

Of Counsel