IN THE SUPREME COURT OF THE STATE OF FLORIDA

EDWARD ADAM FRIDOVICH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 73,921

ON REVIEW OF A CERTIFIED QUESTION FROM THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

INITIAL BRIEF OF PETITIONER

GLEN L. BROCK
Post Office Box 5004
Lakeland, Florida 33807
(813) 644-0488
Counsel for Petitioner

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PRELIMINARY STATEMENT

Petitioner Edward Adam Fridovich was the Defendant/Appellant below. Respondent State of Florida was the Plaintiff/Appellee below.

References to the record on appeal in the district court below will be shown as (R. page no.).

STATEMENT OF THE CASE AND OF THE FACTS

This Court has accepted jurisdiction of this case upon certification by the Fourth District Court of Appeal of the State of Florida of the following question of great public importance:

> WHERE A PERSON CHARGED WITH FIRST DEGREE MURDER IS CONVICTED OF MANSLAUGHTER, WHICH CONVICTION IS REVERSED FOR A NEW TRIAL DUE TO TRIAL ERRORS, AND UPON REMAND A NEW INFORMATION CHARGING MANSLAUGHTER IS FILED AND TIMELY PROSECUTED AND ALL PARTIES ARE FULLY AWARE THAT THE SAME CRIMINAL EPISODE IS INVOLVED, IS THE PROSECUTION OF THE SECOND INFORMATION A CONTINUATION OF THE ORIGINAL PROSECUTION SO THAT THE STATUTE OF LIMITATIONS REMAINS TOLLED THROUGHOUT THE PROSECUTION?

Fridovich v. State, So.2d , 14 F.L.W. 100 (Fla. 4th DCA, Jan. 4, 1989).

Upon *so* acquiring jurisdiction, this Court may dispose of all issues raised before the district court of appeal. See, Hillsborough Ass'n for Retarded

Citizens v. City of Temple Terrace, 332 So.2d 610 (Fla. 1976); Kennedy v. Kennedy, 303 So.2d 629 (Fla. 1974).

Petitioner Edward Adam Fridovich was originally charged with first-degree murder arising from the December 4, 1981, death of his father. A jury verdict of manslaughter was appealed to the Fourth District Court of Appeal and reversed because the trial court had refused to allow the Broward County Medical Examiner to testify for Petitioner that the shooting was accidental. The case was remanded for a new trial or further proceedings by mandate issued August 1, 1986. Thereafter, on September 18, 1986, the State filed an information styled "Re-file Information for Manslaughter," in which it was alleged that Petitioner, through his own act, procurement or culpable negligence did kill . . . Martin Fridovich [his father], by shooting him with a firearm . . . contrary to F.S. 782.07" (manslaughter). (R. 588-589).

Prior to trial, Petitioner moved in limine to restrict the trial evidence to that probative of manslaughter and to exclude evidence of any higher offense on the ground of double jeopardy. (R. 590-591). That motion was granted. (R. 599-601).

Petitioner filed a second motion in limine stating that it had become apparent during discovery that the

State still intended to attempt to call witnesses at trial who would testify to offenses other than manslaughter, specifically murder, for which Petitioner was not on trial. (R. 604-605). The trial court addressed that second motion prior to jury selection on the morning of the first day of trial:

> (The Court)
>
> > The only way to avoid such a situation is that the court has to limit the state strictly to the offense of manslaughter. Specifically, to prohibit the state from making any reference to events for which the defendant is not on trial. That seems legitimate.
> >
> > I totally agree.
> >
> > Again, I'm not going to pretry the case. I grant your Motion in Limine.

[Note: this portion of the trial transcript was erroneously omitted by the court reporter at the time the transcript was prepared. It has subsequently been transcribed and should be part of the record. The relevant page was additionally included as an appendix to Petitioner's brief before the district court of appeal. 1

Following the death of Petitioner's father, investigating officers and the Broward County Medical Examiner concluded that the shooting was an accident caused by the discharge of Petitioner's shotgun as he

was removing it from a case in preparation for cleaning it. Petitioner had told investigators he was seated on a sofa some six feet from his father when the gun somehow discharged. The only testimony provided by the State at the first trial was from members of Petitioner's family, who testified that he had told them that he planned the murder of his father. (R. 602-605, 606-607). None of these witnesses were called at the second trial. Instead, the State relied almost exclusively on the testimony of a blood-spatter expert, Rod Englert, who testified that based on his examination of photographs of the decedent and tests conducted by firing shotgun shells into various objects with characteristics similar to the human head, he felt the shot that killed the decedent had to have been a "contact" wound fired from a distance of one inch or less. (R. 288-298).

Prior to this testimony being presented at trial, Petitioner objected to its use on several grounds. First, Petitioner argued that should a witness testify that someone had placed a gun less than an inch from someone's head and pulled the trigger, the only logical inference for the jury to draw would be that the person with the gun intended to effect the death of the person against whose head the gun was pressed. He also prof-

fered the testimony of Capt. Hoffner, the investigator who led the investigation of the death. At deposition Capt. Hoffner had been asked what crime he would charge a person with if he had evidence of the nature Mr. Englert was offering. Capt. Hoffner's response was that he would charge such person with murder. (R. 284). Petitioner argued that the blood-spatter expert's testimony was clearly "murder" testimony, and to allow it would be in violation of the order granting the motion in limine. That argument was rejected and the testimony allowed. (R. 71-79, 286-287).

Petitioner next moved for a mistrial on the ground that Petitioner had reasonably assumed the court would never allow the blood-spatter testimony in evidence and thus had not obtained a similar expert to refute said testimony. Under such circumstances, Petitioner suggested that a mistrial should be granted and that Petitioner should have an opportunity to prepare a defense for such unexpected testimony. (R. 82-86). That motion was denied. R. 86, 286-287).

Petitioner testified, as he had at the first trial, that he and his father had been watching television after their evening meal. Petitioner brought his shotgun and cleaning kit into the room in anticipation of a pending hunting trip. As he began to

remove the gun from its case while seated on a sofa some six feet from his father, the weapon somehow discharged and struck his father. (R. 417-424).

Petitioner called Dr. Larry Tate as a witness. Dr. Tate, an assistant medical examiner, conducted an investigation into the deceased's death and determined it to have been accidental. On cross-examination, the State asked: even if Petitioner did indeed fire the shotgun four to six feet from his father, how could Dr. Tate be certain Petitioner did not intentionally shoot his father from that distance? (R. 164). Petitioner's immediate motions for a curative jury instruction and mistrial were denied. (R. 165-167).

At the trial's conclusion, the jury returned a verdict of guilty of manslaughter. (R. 688).

Following the verdict, Petitioner moved for a judgment of acquittal on the basis that the Information, which was filed more than four and one-half years after the alleged offense, was fatally flawed in that on its face it was barred by the statute of limitations. Section 775.15, Florida Statutes (1981), provides that prosecution for a first-degree felony must be commenced within four years, and prosecution for any lesser felony must be commenced within three years. Petitioner argued that since the

"Re-File Information" on its face was filed outside the applicable statute of limitations and contained no appropriate language linking it to an earlier, timely commenced prosecution, the prosecution was barred. (R. 569-570, 672-673). That motion was denied (R. 710-7131, as was a motion for new trial. (R. 676).

Petitioner raised three issues on the ensuing appeal: (1) the bar of the statute of limitations; (2) error in allowing "murder" evidence in the manslaughter trial; and (3) failure of the trial court to grant a mistrial upon announcing during trial that "murder" evidence would be admissible.

The Fourth District Court of Appeal affirmed Petitioner's judgment of conviction and stated that only the first of the points on appeal merited consideration. That court concluded:

> The record in this case contains no suggestion that the appellant was hampered in the slightest in the preparation of his defense. He was always on notice of the criminal activity with which he was charged, i.e., the unlawful demise of his father at his hands. The original information charging first degree murder progressed expeditiously resulting in the first manslaughter verdict. Due to errors in the trial this court reversed that conviction for a new trial. Six weeks after our mandate issued, a new information was filed as appears appropriate. Jeopardy had surely attached as to all degrees of homicide greater than manslaughter, thus preclud-

ing use of the original information charging murder in the first degree. The new information, styled "Re-file Information for Manslaughter" charged the same defendant with committing the same crime of which he had been originally convicted. The parties, the subject matter, the dates involved -- everything involved was the same; except the crime charged was a substantially lesser degree of the crime charged in the first information. The first tactic taken by appellant in the second phase of the case after the new information was filed was his successful move to preclude the adduction of any evidence by the state supporting premeditated first degree murder.

It thus appears to us that the prosecution under the second information was mandated by the reversal of the original conviction by this court and that it was clear to all involved a continuation of the original prosecution, which in no way prejudiced appellant. We, therefore, hold that the statute of limitations was tolled by the filing of the original information and continued to be tolled throughout the prosecutions under the second information.

Because there are cases containing language that might appear to conflict with our holding here, such as ~~Mead v.~~ State, 101 So.2d 373 (Fla. 1958), and Rubin v. State, 390 So.2d 322 (Fla. 1980), and because we believe this is a question of great public importance, we certify the following question to the Supreme Court of Florida. . . .

Fridovich v. State, supra 14 F.L.W. at 100.

SUMMARY OF THE ARGUMENT

In its manslaughter prosecution of Petitioner, the State failed to plead or prove an offense committed within the statute of limitations.

On its face, the "Re-file Information" sets out a time-barred offense. Although events may toll the running of the statute of limitations, those events must be set out in the charging instrument. If the tolling event is a prior prosecution, the "amended" information must establish a "linkage" to that prosecution by referring to it by number or in some other manner to facially demonstrate the continuation of a former prosecution. In no case in which the subsequent instrument charges a different crime than that in the instrument which is ostensibly the subject of continuation has a defendant been held to answer absent such linkage.

Petitioner had no obligation to raise this issue prior to trial. It is well established that the issue may be raised at trial, post-trial, or for the first time on appeal. Petitioner raised the issue at the jury charge conference. The State had the opportunity to seek amendment of this information, but failed to do so. It is thereby bound by it and by the statute of limitations.

Even if this Court were to recede from precedent and find this information to be sufficient to support a conviction, Petitioner is nevertheless entitled to discharge because the evidence adduced at trial proved the bar of the statute of limitations. When the State relies on "tolling" events, it is required to prove such events at trial.

The jurisdiction of this Court extends to all issues in this case, not just the limitations question upon which review has been granted. Two other errors of the trial court require reversal of Petitioner's conviction, although not his discharge.

The first such error is the use of expert testimony by the State to establish premeditation and intent on the part of Petitioner -- proof of first-degree murder in a manslaughter case. This issue and all issues of intent, other than that underlying manslaughter, were decided in Petitioner's favor in the first trial. The collateral estoppel aspect of double jeopardy precluded the use of murder evidence in the manslaughter trial.

The second error is closely related. The "murder" evidence which was impermissibly permitted at trial had previously been excluded by the granting of a motion in limine. This surprise recession of the trial court from

its own order left Petitioner without adequate opportunity to respond to the "murder" evidence, and his timely motion for mistrial should have been granted. If Petitioner is not entitled to discharge, he is at least entitled to an opportunity for a fair trial free of surprise.

ARGUMENT

I. THE CONVICTION OF PETITIONER WAS BASED UPON AN INFORMATION THAT FACIALLY ESTABLISHED THE BAR OF THE STATUTE OF LIMITATIONS AND SET OUT NO FACTS TO ESTABLISH LEGALLY SUFFICIENT "LINKAGE" TO ANY PRIOR CHARGING INSTRUMENT.

The manslaughter information styled "Re-file Information" was filed on September 18, 1986, and alleged an offense on December 4, 1981. On its face, therefore, the "Re-file" was outside the three-year statute of limitations for manslaughter. § 775.15, Fla. Stat. (1981).

The Fourth District Court of Appeal stated that it was "clear" that the "Re-file" was a continuation of the original prosecution, even though prior decisions of this Court reach a contrary conclusion. As stated most recently in Rubin v. State, 390 So.2d 322 (Fla. 1980):

> A subsequently filed information, which contains language indicating that it 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); State v. Adjmi, 170 So.2d 340 (Fla. 3d DCA 1965).
>
> The question then is whether the second information is a continuation of the prosecution timely commenced on June 1, 1977. The answer turns on whether the language, "Refile of Case No. 77-4257," contained on the second information is sufficient to link it to the first information so as to evidence a continuation of the same prosecution. Mead v. State; State v. Adjmi.

390 So.2d at 324.

This Court has reached differing conclusions on such "linkage," dependent upon the particular wording of the subsequent or "amended" charging instrument.

In Mead v. State, 101 So.2d 373 (Fla. 1958), prosecution was commenced by an information setting out two counts of theft of copper wire, with weights of the wire and dates of the offenses designated in each count. A second information was then filed, entitled "Amended Information," which apparently combined the poundage of the wire into a single grand larceny count and changed the dates. A third information, entitled "Second Amended Information for Grand Larceny," was then filed which replicated all the allegations of the first count of the original information. This third

instrument, upon which the defendant was convicted, was filed after the running of the statute of limitations. This Court reversed that appellant's conviction on the basis that other than the use of the word "amended," "there was nothing to link it [the Second Amended Information] to the first one so we held that the first one had been abandoned." Rubin v. State, supra 390 So.2d at 324 (explaining Mead v. State, supra).

In DiStefano v. Langston, 274 So.2d 533 (Fla. 1973), this Court found what it termed to be "magic linkage language," 274 So.2d at 535, where an information was amended "to add factual data regarding dates of the initial indictments and service of arrest warrants upon the defendants at earlier dates within the two-year statute. . . ." Id. Further, the same conspiracy offense was alleged in both instruments.

Sufficient "linkage" was likewise found in Rubin v. State, supra, where the "amended" information charged the same crime and changed only a slight inaccuracy in the name of the corporate victim. 390 So.2d at 324. See also, State v. Garofalo, 453 So.2d 905 (Fla. 4th DCA 1984) (linkage found where new information stated "refile case number 78-3887 CF," charged same crime and alleged same facts with exception of name of victim); Domberg v. State ex rel.

Peach, 443 So.2d 119 (Fla. 1st DCA 1983), review denied, 449 So.2d 264 (Fla. 1984) (linkage found for "amended indictment" charging same crime in verbatim language); State v. Adjmi, 170 So.2d 340, 342 n.4 (Fla. 3d DCA 1964) (linkage established by recitation in subsequent information of history of proceeding).

The common thread through these cases is that linkage is established by alleging the same offense and/or by making reference to the existence of the prior charge by case number or date. None of these elements are present here.

The "Re-file Information for Manslaughter" in the case sub judice charges a different crime than the indictment returned on January 14, 1983, which charged that Petitioner effected the death of his father "from a premeditated design" and committed murder in the first degree. § 782.04, Fla. Stat. (1981). Nothing in the "Re-file" links this charging instrument to the prior charging instrument other than that some (but not all) of the facts alleged are the same. This case therefore is governed by Mead v. State, supra, and is outside all of the various "linkage" exceptions discussed above.

This "Re-file" information, which on its face shows the running of the statute of limitations, is not merely "technically" flawed. It is substantially

defective because it fails to allege an offense to which the accused can legally be held to answer. The district court of appeal, however, was of the opinion that the statute of limitations is a mere "notice" provision, and that Petitioner was required to show some "prejudice" from the substantially defective information.

The statute of limitations is to be "liberally construed" in favor of criminal defendants who have no responsibility to plead it as a bar to their prosecution. Mead v. State, supra 101 So.2d at 375. Accord, State v. King, 282 So.2d 162, 165 (Fla. 1973). As more recently stated by this Court:

> [T]he state must show in the information or indictment that the prosecution "for the offense charged" has begun within the statute of limitations. Horton v. Mayo, 153 Fla. 611, 15 So.2d 327 (1943); Rouse v. State, 44 Fla. 148, 32 So. 784 (1902). The charging document may meet this requirement by showing on its face the date of the crime and the date the document issued. If, however, it appears from the date shown on the charging document that the statute of limitations may have run, the statue must allege facts necessary to show the statute was tolled for the offense charged before prosecution commenced.

Sturdivan v. State, 419 So.2d 300, 301-02 (Fla. 1982).

In the case sub judice, Petitioner raised the fact that the offense as charged was barred by the statute

of limitations by specifically objecting to the trial court's intention not to give a statute-of-limitations jury instruction. (R. 554-555). Petitioner also moved for a directed verdict on the ground that the charged offense was barred by the statute of limitations (R. 569-570, 672-673) and moved for a new trial on that ground. (R. 676). The issue therefore was timely raised and preserved. The defendant has no burden of raising the issue of the statute of limitations prior to or during the trial. A defendant may raise it for the first time on a motion for new trial. Mead v. State, supra 101 So.2d at 375. A defendant may even raise it for the first time on appeal. Maguire v. State, 453 So.2d 438, 440 (Fla. 2d DCA 1984).

The State was on notice that the statute of limitations was in issue prior to submission of the case to the jury. The State chose to stand on the "Re-file Information" rather than seeking amendment and attempting linkage. The State clearly had this right and the opportunity to exercise it, but it elected not to do so. See, Budd v. State, 477 So.2d 52 (Fla. 2d DCA 1985); Holland v. State, 359 So.2d 28 (Fla. 3d DCA 1978).

The "Re-file Information" stood alone and predicated jurisdiction over Appellant on an offense

which on its face was time-barred. It set out an entirely new offense and an entirely different scienter than that in the indictment. No linkage whatsoever was set out to establish a "continuation" of prosecution. The decision below must therefore be reversed and Petitioner ordered to be discharged.

11. THE STATE PROVED AT TRIAL THAT THE STATUTE OF LIMITATIONS HAD RUN AND INTRODUCED NO EVIDENCE THAT THE STATUTE HAD BEEN TOLLED.

Petitioner's brief before the Fourth District Court of Appeal repeatedly emphasized that the State must not only allege compliance with the statute of limitations but also that the State must prove such compliance as a matter of fact. The opinion below wholly fails to address this issue.

In the case sub judice the evidence of the State proved only an offense barred by the statute of limitations, and no evidence was presented that the statute of limitations may have been tolled in any manner.

This Court has consistently held that the burden of proof is on the prosecution to prove at trial that the offense was committed within the statutory period of limitation. Lowe v. State, 154 Fla. 730, 19 So.2d 106, 107-08 (1944). "[N]ot only should the information

show or allege, but the State must prove, the institution of prosecution for the offense charged within [the limitations period]." Horton v. Mayo, 153 Fla. 611, 15 So.2d 327, 328 (1943). See also, State v. King, 282 So.2d 162, 164-65 (Fla. 1973); Mead v. State, supra 101 So.2d at 375.

In State v. Akers, 370 So.2d 81 (Fla. 1st DCA 1979), the State filed an information on December 7, 1977, which charged an armed robbery on July 28, 1973. The defendant moved to dismiss on the ground of the statute of limitations. At a hearing on this motion, the State adduced evidence that the statute of limitations had been tolled by the issuance of an arrest warrant. The defendant was convicted at trial, but the district court of appeal reversed on the ground that the defendant's motion for judgment of acquittal should have been granted because the State had failed to prove at trial that the statute of limitations had been tolled. See also, Bongiorno v. State, 523 So.2d 644, 645 (Fla. 2d DCA 1988) (State cannot rely on defendant's absence from state as tolling statute when State did not prove such absence).

This Court has likewise recognized that the issue of tolling must be proven to the trier of fact. See,

Horton v. Mayo, supra 15 So.2d at 329. Cf., Sturdivan v. State, supra 419 So.2d at 302.

No evidence was introduced at the trial of Petitioner to show that the statute of limitations was tolled in any manner. Petitioner must therefore be ordered to be discharged.

III. THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF MURDER TESTIMONY IN A MANSLAUGHTER TRIAL.

Petitioner was previously indicted and tried for first-degree murder. The jury's verdict of manslaughter necessarily meant the jury acquitted Petitioner of the offenses of first and second-degree murder. Section 782.07, Florida Statutes (1983) defines manslaughter in part as follows:

> The killing of a human being by the act, procurement or culpable negligence of another, without lawful justification according to the provisions of Chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, shall be deemed manslaughter.

(Emphasis added.) Clearly, manslaughter is the taking of another's life without the intent to commit first or second-degree murder. Thus, any evidence as to another, higher degree of crime would be irrelevant and prejudicial at trial and should be prohibited. Indeed,

even if such evidence should somehow be found relevant, it should be excluded because of the obvious prejudice and confusion of issues which would be the inevitable consequence of a jury being told Petitioner was on trial for a death not involving murder, followed by the State presenting testimony and argument to the effect that Petitioner committed a murder. Section 90.403, Florida Statutes (1983) confronts such a situation squarely:

> Relevant evidence is inadmissible if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

Thus, only testimony directly relevant to the offense of manslaughter should be admissible at trial.

There is yet another reason why the trial court should have limited the State to presentation of testimony which addressed the elements of manslaughter. The Fifth Amendment's prohibition against double jeopardy embodies the concept of collateral estoppel, prohibiting the State from requiring a defendant to "run the gauntlet" by again having to defend himself against factual issues which have previously been decided in his favor. A brief review of case law

demonstrates the history and continued vitality of this concept.

On July 10, 1960, six men engaged in a Missouri poker game were confronted by three or four masked and armed men who robbed them. Bob Fred Ashe was arrested and charged with robbing one of the victims. Following a trial at which Ashe presented an alibi defense, a jury found him not guilty. Six weeks later he was tried again for the robbery of another participant in the poker game. Ashe's motion to dismiss on double jeopardy grounds was denied and he was convicted and imprisoned.

Ashe's case eventually found its way to the United States Supreme Court. In a landmark decision his conviction was reversed on the basis that, once the issue of whether Ashe was one of the robbers had been resolved in his favor, the State was precluded from requiring him to relitigate the fact. Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). The Court in Ashe went on to state:

> [C]ollateral estoppel is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit.

25 L. Ed. 2d at 475. The Ashe decision has served as the cornerstone for a line of cases, both state and federal, which have not only followed its mandate but have expanded it. For example, in Blackburn v. Cress, 510 F.2d 1014 (5th Cir. 1975), the defendant was tried and acquitted on a charge of breaking into a woman's home and sexually assaulting her. He was subsequently prosecuted for a sexual assault on another woman, and at that trial the victim of the offense for which he had been acquitted testified to the alleged assault on her as evidence of a similar offense tending to establish the identity of the assailant. On appeal, the State argued that Ashe applied only to ultimate facts, not evidentiary facts. Rejecting this argument, the appellate court noted:

> Ashe does not merely bar a subsequent state prosecution, the maintenance of which depends upon a successful relitigation of a fact issue which had previously been settled adversely to the state by an earlier acquittal. Rather, the double jeopardy clause, which includes the doctrine of collateral estoppel under Ashe, prohibits the State from relitigating, for any purpose, an issue which was determined in a prior prosecution of the same party. Hence, there is no difference between relitigating an ultimate fact, or an evidentiary fact; relitigation of either is prohibited.

510 F.2d at 1017. See also, United States v. Nelson, 599 F.2d 714 (5th Cir. 1979); United States v. Mock,

604 F.2d 341 (5th Cir. 1979); United States v. Larkin, 605 F.2d 1360 (5th Cir. 1979); and United States v. Griggs, 651 F.2d 396 (5th Cir. 1981).

The courts of this state have not been hesitant in applying the teachings of, and indeed expanding, the Ashe doctrine. A 1983 review of state and federal decisions since Ashe noted:

> Although earlier Florida cases had taken varying approaches in determining the admissibility of evidence of an uncharged offense of which the defendant had previously been acquitted, the Florida Supreme Court, in State v. Perkins (1977, Fla.) 349 So.2d 161, after noting initially that it had not previously been squarely presented with the issue as to whether evidence of a crime for which a defendant has been tried and acquitted may be admitted at a subsequent trial, purported to adopt the Fifth Circuit collateral estoppel rule, set forth in Wingate v. Wainwright, (1972, CA5 Fla.) 464 F.2d 209, infra § 6, but in fact appeared to adopt a more absolute rule than that stated by the Wingate court, which, being based on the constitutional doctrine of collateral estoppel, had barred only such evidence as related to issues necessarily decided favorably to the defendant at the prior trial. The Court appeared to go beyond the collateral estoppel principle, stating that it is fundamentally unfair to a defendant to admit evidence of acquitted crimes, and holding flatly

> that evidence of such crimes is not admissible in a subsequent trial.

Annotation, Admissibility of Evidence as to Other Offense as Affected by Defendant's Acquittal of That Offense, 25 A.L.R.4th 934, 941-42 (1983).

The case which set the tone for this expansion of the Ashe doctrine was State v. Perkins, 349 So.2d 161 (Fla. 1977). In Perkins, the defendant had been prosecuted for a sexual offense against a young girl. The defendant was acquitted, but was subsequently prosecuted for an unrelated attempted rape, and the alleged victim of the offense for which he had been acquitted was again allowed to testify against him. The defendant was convicted. The appellate court reversed the conviction, holding that evidence of crimes for which a defendant has been acquitted should always be barred from admission into evidence. This Court traced the history of collateral estoppel cases since Ashe, and in affirming the district court of appeal, noted:

> 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.

349 So.2d at 163.

In Gragg v. State, 429 So.2d 1204 (Fla. 1983), the defendant was charged with aggravated battery with a

firearm, aggravated assault with a firearm and possession of a firearm by a convicted felon. He obtained a severance of the possession-of-firearm-by-a-convicted-felon charge and went to trial on the other two counts. The jury found him guilty of the lesser offenses of battery and assault. The trial court then granted a defense motion to dismiss the possession-of-a-firearm-by-a-convicted-felon charge on the basis that the jury had found the defendant not guilty of possessing a gun and the State was collaterally estopped from requiring the defendant to relitigate that issue. The appellate court agreed that collateral estoppel applied, but reversed on the theory that the defendant was estopped from raising the defense because he had moved for the severance. In reversing and reinstating the trial judge's order of dismissal, this Court noted that the defendant could not be required to waive the constitutional safeguards of collateral estoppel in order to insure his constitutional right to a fair trial.

In Davis v. State, 459 So.2d 1120 (Fla. 3d DCA 1984), the defendant was tried for second-degree murder and displaying a firearm during the commission of a felony. The jury acquitted him on the offense of second-degree murder but found him guilty of displaying

a firearm during the commission of a felony. The trial court granted a new trial on that offense. He was prosecuted on a new information charging him with unlawfully displaying a firearm while committing or attempting to commit a murder. During the new trial, the prosecution also made reference to the murder in closing argument. The defendant was found guilty. In reversing the conviction, the district court of appeal held that the state was collaterally estopped from requiring the defendant to again defend himself against facts previously litigated in his favor and went on to say:

> Moreover, at this new trial, the State's proof and argument should be restricted to the crime for which the defendant is on trial and should not include references to the crime for which the defendant has been acquitted.

459 So.2d at 1124.

What conclusion could the jury in this cause possibly have arrived at based on Mr. Englert's blood-spatter testimony other than the conclusion that Petitioner murdered his father? Indeed, Petitioner proffered to the court the testimony of homicide investigator Hoffner on this point:

> (By Mr. Brock)
>
> Detective Hoffner, suppose you had a house under surveillance for a drug

> bust. You were watching the house with a set of binoculars . . . you observed a person sitting inside that you assume was asleep. A second person walks up to him and places the gun right against his head, and you arrest that person, what would you charge him with?
>
> (By Det. Hoffner)
>
> I would charge him with murder.

(R. 284-285).

The parallels between Ashe and the instant case are remarkable. In Ashe the defendant was charged with robbing a group of poker players. He was acquitted as a result of an extremely weak State case. The State then charged Ashe with the robbery of yet another of the poker players and used an entirely new theory of proof with new witnesses to obtain a conviction. In reversing the conviction and finding it constituted a violation of the collateral estoppel doctrine, the Supreme Court noted that after losing the first time the prosecutor did what any good aetorney would, namely he improved his case. The Court held that a defendant cannot be required to "run the gauntlet" until the State finally settles on a workable theory of prosecution. Ashe, supra.

In the instant case it has been noted that at the first trial the State depended entirely on the

testimony of family members who testified that Petitioner told them he sat on a sofa six feet from his father and intentionally aimed the gun at him and pulled the trigger.

Not only did the jury in the first trial largely reject this testimony by finding Petitioner guilty of manslaughter, but just prior to the second trial the major witness for the State, Erica Fridovich, gave a sworn deposition recanting her earlier testimony and stating that the family had conspired against Petitioner to gain control of their father's estate. **(R. 608-661).**

Thus, the State's entire theory of prosecution for the second trial was forcibly altered, and, as in the Ashe case, the prosecutor did what any good lawyer would do -- he improved his case. Rather than calling family members who had an obvious bias, whose testimony had been largely rejected in the first trial and who now had recanted their testimony, he relied on experts. In *so* doing, he not only forced Petitioner to "run the gauntlet" a second time under a new theory of prosecution, he also clearly presented to the jury a theory of guilt of the very offense Petitioner had been acquitted of -- murder. The issue of whether Petitioner murdered his father had been resolved in his favor in the first

trial, and the State was clearly precluded from raising that issue by any theory during the second trial. The court's ruling that said testimony was admissible, especially in light of the order granting Petitioner's motion in limine, was in error and cannot stand.

It must additionally be noted that the State was not content with merely presenting the new murder theory by use of blood-spatter testimony.

Petitioner called as a witness Dr. Larry Tate, associate medical examiner for Broward County. Dr. Tate had been called to the scene of the shooting death shortly after it occurred. He examined the decedent at the scene and supervised the investigating officers in their securing the scene, taking photographs and gathering evidence. Dr. Tate supervised the test firing of the shotgun which killed the decedent, performed the autopsy, reconstructed the head wound, reviewed all police reports, including Petitioner's statements, and consulted with two prominent experts on shotgun wounds. (R. 99-115).

Dr. Tate testified that his investigation led him to conclude that the shotgun accidentally discharged as Petitioner was seating himself on a sofa near his seated father. The muzzle of the gun was determined by a series of tests and other factors to have been

approximately four feet from the decedent's head at the time of discharge. Dr. Tate also testified that there was a slight upward angulation to the wound, consistent with Petitioner laying the gun on a coffee table while removing it from the case. (R. 115-117).

On cross-examination of Dr. Tate, the following line of questioning was presented by the State:

> Q. Now, you've testified in front of this jury that this incident, in your opinion, is an accident; is that correct?
>
> A. That is correct.
>
> Q. Is that to say your're telling this jury that this was not an intentional act?
>
> A. That's correct.
>
> Q. So you're telling this jury this is not an intentional act. Now I would ask, would you rule out someone taking a weapon and thoughtfully getting it in the position where you believe it was fired and pulling the triqger? Would you rule that out?

(Emphasis added.) (R. 164).

Counsel for Petitioner immediately objected, pointing out that the questioning clearly suggested that even if the jury concluded the fatal shot was fired from a distance of four feet rather than from less than one inch, Petitioner could still have intentionally shot his father from that distance and

"created" the upward angulation. Petitioner pointed out to the court that not only was this clearly "murder" testimony, but it was a blatant attempt to require Petitioner to "run the gauntlet" against not only the State's new blood-spatter theory, but also a resumption of the precise theory the State had advanced in the first trial. (R. 165). The court denied Petitioner's motion for a mistrial and declined to give a curative jury instruction, instead merely asking the State to "leave that line of questioning." (R. 165-167).

The State's line of questioning immediately after this exchange is equally revealing:

> Q. Do you understand my question?
>
> A. Homicide, I believe --

(R. 167).

Clearly, the witness realized the previous question was an attempt to show that Petitioner murdered his father and made it look like an accident. It can hardly be suggested that six jurors could have interpreted the question in a different fashion. The court's ruling that said questioning was proper was error and cannot stand.

IV. THE TRIAL COURT ERRED IN REFUSING TO GRANT PETITIONER'S MOTION FOR MISTRIAL UPON ANNOUNCING DURING TRIAL THAT "MURDER" TESTIMONY WOULD BE ALLOWED.

When the trial court granted Petitioner's two motions in ~~limine~~ regarding testimony of any offense other than manslaughter, Petitioner was justified in assuming that no defense witnesses would be necessary to rebut the blood-spatter testimony. Immediately upon learning during trial that the court was indeed going to allow such testimony, counsel for Petitioner moved for a mistrial due to undue surprise. (R. **82-86).** The motion was denied. (R. **86, 286-287).** Clearly, the court's ruling was in such total conflict with the granting of the motions ~~in~~ limine that the motion for a mistrial should have been granted in order for Petitioner to prepare a defense for such wholly unexpected testimony. The court's refusal to grant said motion constitutes reversible error.

CONCLUSION

On the basis of the foregoing, the decision of the Fourth District Court of Appeal should be reversed and, if reversed on Points I or II, Petitioner should be ordered discharged, or, if reversed upon Points III or IV, the cause should be remanded for further proceedings.

Respectfully submitted,

GLEN L. BROCK, Esquire
Post Office Box 5004
Lakeland, Florida 33807-5004
(813) 644-0488
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioner has been mailed to DEBORAH GULLER, Esquire, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, on this 22 day of June, 1989.

GLEN L. BROCK