IN THE SUPREME CURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. **CASE NO. SCO8-1204**

FREDDRICK HINES,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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I. PRELIMINARY STATEMENT

Mr. Hines was the defendant in the trial court, the appellant in the case before the First District and the respondent in this case. He will be referred to in this brief by his proper name.

References to the Record on Appeal will be by the volume number in followed by the appropriate page number, all in parentheses.

Any reference to the State's Initial Brief will be by (IB), followed by the page number of that brief.

II. STATEMENT OF THE CASE

(1) Nature of the case. This case is before this Court on a certified question from the District Court of Appeal, First District. Hines v. State, 983 So.2d 721 (Fla. 1st DCA 2008) This Court has accepted jurisdiction of the case. State v. Hines, 990 So.2d 1060 (Fla. 2008)

(2) Course of proceedings. Mr. Hines was tried and convicted of robbery with a firearm. (R1-17) (R2-303) (R6-596) The robbery was alleged to have occurred on March 13, 2002. (R1-17) On direct appeal, the First District reversed the conviction and remanded for a new trial. Hines v. State, 983 So.2d 721 (Fla. 1st DCA 2008) The State belatedly attempted to stay the mandate from issuing but this request was denied by the First District.

After the trial in this case, the State tried Mr. Hines for the possession of the firearm by a convicted felon. The firearm was the same one found by the police on March 21, 2002 and introduced at Mr. Hines trial in this case. In that case, (2002-1613-CFA), a jury found Mr. Hines not guilty of the possession of the gun. That case was resolved while the appeal in the First District was pending. Hines v. State, 983 So.2d at 723. As the First District noted, "Because [Mr. Hines] had stipulated to the fact that he was a convicted felon on March 21, 2002, the jury's

verdict was necessarily based on the conclusion that [Mr.Hines] had not possessed the revolver on March 21st."

(3) Disposition in the lower tribunal. In addition to reversing Mr. Hines' conviction and resulting sentence, the First District certified a question of great public importance.

> IS REVERSAL OF A PRIOR CRIMINAL CONVICTION REQUIRED BECAUSE AN ISSUE OF ULTIMATE FACT NECESSARY TO THE OUTCOME OF THE TRIAL OF THE PRIOR CASE IS DETERMINED DIFFERENTLY IN A SUBSEQUENT PROSECUTION?

This is the issue before this Court.

STATEMENT OF THE FACTS

Terrence Johnson had walked to a library on the University of Florida campus to study for a test. (R3-92-93) Staying only briefly, Mr. Johnson walked home. (R3-95) Standing in front of his door with his keys in hand, he heard footsteps behind him. (R3-107) Mr. Johnson turned around; a black man with short hair told him to give him money. (R3-107) The man was holding a gun. (R3-108) Mr. Johnson told the man he did not have any money. (R3-107) He also a saw a second man standing on the street; the man was taller and had a different hairstyle, dreadlocks. (R3-107-108) The man with the gun got Mr. Johnson to give him his cell phone and backpack. Inside the backpack were a calculator and some books. (R3-113) Both of the men then left. (R3-113) Mr. Johnson then called the police. (R3-114)

The police showed Mr. Johnson a Wal-Mart surveillance photograph to see if he could identify the robbers. (R3-115) Mr. Johnson could not do so. (R13-966) Mr. Hines photograph was in this group. Five days later, the police showed Mr. Johnson a second set of photographs. (R4-223) From this array, Mr. Johnson picked out Mr. Hines as the man with the gun who had stolen his backpack and cell phone. (R3-123-124) Mr. Johnson made an in-court identification of Mr. Hines. (R3-109)

Mr. Johnson was shown a picture of a gun (State's Exhibit "H") at trial and said the barrel of the gun "looks like the same type" he saw in the robber's hand. (R3-127)

Three days later, on March 21, 2002, a police officer saw Mr. Hines driving a Pontiac convertible. (R4-238-239) The police officer chased Mr. Hines, whose car ended up in a crash. (R4247-248) Mr. Hines then got out of the car and fled on foot. (R4-247-248) The police then got a dog tracker and located Mr. Hines at the Tuscan Bend Apartments. (R4-282) The apartment complex was where Gwendolyn Faulkner lived. She was his girlfriend at the time and he would occasionally spend the night at her apartment. (R4-290-291) Mr. Hines was arrested by the police in her apartment on March 21st. (R4-282)

Ms. Faulkner consented to a search by the police of her apartment. The police found a bullet in her apartment. (R4-292) The police also found a firearm in a barbeque grill right outside her apartment. (R4-302) This was State's Exhibit "H". A search of the Pontiac car driven by Mr. Hines turned up a firearm case, speed loaders, and a black wig. (R5-332-333) The police said that the bullet found in the apartment and the speed loaders found in the Pontiac were compatible for use with the firearm found in the barbeque grill. (R4-225-226)

In his defense, Mr. Hines presented evidence that because of the conditions at the time Mr. Johnson saw the robber, that there were concerns about the accuracy of any identification. (R5-414-428) This was especially true when a victim describes a person in two different ways. (R5-445) Another person had entered a guilty plea in association with the robbery. This was Bernard Thomas. (R6-484) Mr. Thomas could not remember how he gained possession of Mr. Johnson's cell phone nor what calls he might have made on it. (R6-483)

A jail cellmate of Mr. Thomas said that Mr. Thomas had told him about a robbery and a stolen cell phone. This cellmate, Thedrice Lewis, said that Mr. Thomas told him that he had used the stolen cell phone to call Mr. Hines. (R6-488) This helped explain why Mr. Hines phone number appeared on Mr. Johnson's cell phone after it was stolen. (R6-488)

III. SUMMARY OF THE ARGUMENT

This case represents one of a trio involving Mr. Hines that were decided by the First District. The other two cases involved much the same fact scenarios – Hines v. State, 982 So.2d 22 (Fla. 1st DCA 2008) and Hines v. State, 982 So.2d 1276 (Fla. 1st DCA 2008) In neither case has the State sought review in this Court. The only difference between those two cases and this case is that the trial which resulted in the jury finding of not guilty as to possession of the firearm in question is that this case was tried **before** that trial while the other two were tried subsequent to the not guilty finding. The First District decided there was NO meaningful distinction. That conclusion is correct.

IV. ARGUMENT

ISSUE PRESENTED

REVERSAL OF A PRIOR CRIMINAL CONVICTION IS REQUIRED BECAUSE AN ISSUE OF ULTIMATE FACT NECESSARY TO THE OUTCOME OF THE TRIAL OF THE PRIOR CASE IS DETERMINED DIFFERENTLY IN A SUBSEQUENT PROSECUTION

STANDARD OF REVIEW

Mr. Hines would agree that this Court will review the certified question as a question of law. The facts are not in dispute for this portion of the appeal. The review standard is *de novo.*

THE MERITS

The State says that the "starting point for analysis is the decision of the United States Supreme Court in Ashe v. Swenson, 397 U.S. 436 (1970) Mr. Hines disagrees. The analysis must be first informed by the two applicable decisions by this Court, State v. Perkins, 349 So.2d 161 (Fla. 1977) and Burr v. State, 576 So.2d 278 (Fla. 1991).

The State has not made any argument that Perkins does not control the other two cases of the Hines triad. In those cases, which were tried after Mr. Hines was acquitted of possessing the firearm, the State agrees that the evidence related to the gun was inadmissble because of Perkins In addition, the First District's finding that all the State's arguments trying to

distinguish Burr v. State, 576 So.2d 278 (Fla. 1991) as "not controlling" are "unpersuasive." Hines, 983 So.2d at 724.

The State is left with the proposition that Burr v. State, was wrongly decided. But the State misreads the import of Burr, founded as it is on the bedrock of Perkins. Perkins was tried and convicted of attempted sexual battery on a six year old child. The conviction was based on the testimony of the child and her brother. In addition, the State called as a witness a collateral crimes witness. This girl testified that when she was fourteen years, Perkins entered her room late at night and grabbed her. Perkins had previously been charged with this crime but a jury found him not guilty.

On appeal, the Fourth District reversed Perkins convictions. It decided that the Fifth Amendment's prohibition against double jeopardy precluded evidence of crimes to be introduced in another trial when the person had been acquitted of that charged crime. Lawson v. State, 304 So.2d 522 (Fla. 3rd DCA 1974) had been decided to the contrary. Lawson was charged with murder. As part of its case, the State presented evidence of a collateral crime for which Lawton had been found not guilty. The State argued that the evidence was admissible to show entire context of the murder. The prior crime was an attempt to cash stolen securites.

In essence, the State retried the entire prior crime to prove Lawton's motive for the murder. The Third District found that the record contained ample other evidence to establish motive without reference to the acquitted crime material. Ultimately, the Third District reversed the conviction because it believed the much of the evidence of the collateral crime was irrelevant. In its opinion, the Third District found that "an acquittal in a previous criminal proceeding does not automatically preclude referring to the crime as evidence in a subsequent criminal case where the relevance of the prior crime is justified under the Williams rule."In doing so, the Third District relied on a line of Florida cases. The Third District recognized contrary federal authority. Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972); McDonald v. Wainwright, 493 F.2d 204 (5th Cir. 1974)

This Court in Perkins resolved the conflict between the Fourth and Third Districts. In doing so, this Court surveyed the myriad of positions taken by federal courts. "Federal courts generally permit the admission of evidence of collateral crimes resulting in acquittals when relevant. (Footnote omitted) Contrary to the general trend, the Fifth Circuit (now the Eleventh) does not permit admission of such evidence. (Citations omitted)" This Court also recognized a "split over the issue in

state jurisdictions. (Footnote omitted) And, too, there is disagreement within our state's District Courts of Appeal, as shown by the decision in this case when compared with other decisions." Perkins, 349 So.2d at 163.

To resolve these varying perspectives, this Court adopted the following position.

> It is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer that a defendant committed a specific crime which a jury has concluded he did not commit. Otherwise a person could never remove himself from the blight and suspicious aura which surround an accusation that he is guilty of a specific crime. Wingate was charged with robbing Hellman and Angel and as result of those charges he endured the perils of trial. He was acquitted of those very charges and that should end the matter.

Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972)

This Court agreed with this sentiment and made it the law of Florida.

> We agree with Wingate that is fundamentally unfair to a defendant to admit evidence of acquitted crimes. To the extent that evidence of the acquitted crime tends to prove that it was indeed committed, the defendant is forced to reestablish a defense against it. Practically, he must do so because of the prejudicial effect the evidence of the acquitted crime will have in the minds of the jury in deciding whether he committed the crime being tried. It is inconsistent with the notions of fair trial for the state to force a defendant to

> resurrect a prior defense against a crime for which he is not on trial. **Therefore, we hold that evidence of crimes for which a defendant is not admissible in a subsequent trial.**

Perkins, 349 So.2d at 163-164 (Emphasis supplied)

As already noted, the only distinction between the other two Hines' cases and this one is Mr. Hines was tried in this case before he was found not guilty in the possession of the firearm case. The State wants this Court to adopt a different rule because of a timing anomaly. A constitutional rule of evidence admissibility and its effect should not hang on so narrow a thread. This Court has already decided it should not. Burr v. State, 576 So.2d 278 (Fla. 1991) As the State rightfully says, this Court found that the rule in Perkins is a rule based on the State Constitution, Article I, Section 9.

The State then says that Burr was wrongly decided. "Applying collaleral estoppel to retroactively exclude evidence in a prior proceeding turns the entire doctrine on its head." (IB – age 15) To this end, the State posits the policy reason that "There can be no question that collateral estoppel cannot apply in this manner, as the very basis for the doctrine is to protect the finality of judgments and to prevent relitigation of issues already decided. Leaving convictions open indefinitely on the chance that some fact used by the prosecution could serve as the basis of an acquittal at some unknown future point defeats

the very purpose of the collateral estoppel doctrine. As such, retroactively excluding evidence based upon a subsequent acquittal is absolutely not required by application of the collateral estoppel component of the Double Jeopardy Clause." (IB – pages 15-16)

Yet the State ignores that the Perkins rationale as explained in Burr was based on this Court's notion of fundamental fairness and fair trial. This is the rule of law found in the language. The State would have the courts of this state treat similarly situated defendants only based on timing. It is important to note the practical effects of this position. Any defendant who is charged in separate cases by the State can face multiple trials. The order of those trials is in large measure determined by the State. It is a fact of trial life that prosecutors will pick their best case to try first. The law enshrines this ability to choose.

Based on the record in this case, the prosecution had multiple cases to decide to try. For whatever reason, the State chose the robbery in this case to try first. At the time, there were at least two other robbery cases that could have been tried. Instead, the State next chose to try Mr. Hines for possession of firearm by a convicted felon and aggravated fleeing or eluding. The State lost those cases. The State then decided to try the

other two cases, using the evidence for which Mr. Hines had explicitly been found not guilty. The State should not receive any benefit because it chose the order to try the cases.

In addition, the appeal in this case had all the information available to it to decide this issue. As the First District noted, the State's position on direct appeal in this case was that Mr. Hines should be forced to raise the issue in a motion for post-conviction relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure. The First District found that "While it is true that the issue was raised in a postconviction proceeding in Burr, we can find nothing in the opinion that mandates such an approach. All of the relevant portions of the record in the trial resulting in [Mr. Hine's] acquittal were made a part of the record in this appeal, and we can perceive no good reason not to address the issue now." As the First District noted, this is exactly the posture of the case of Perez v. State, 801 So.2d 276 (Fla. 4th DCA 2001). In fact, Mr. Hines sought to supplement the record in this case with the additional information and the State raised no objection to doing this. The State says that "Perez fairly applies" the constitutional rule of law in Burr v. State, above. In almost the same breath, the State says that "Perkins should not apply to subsequent acquittals, for the reasons set forth in this brief." (IB – page 24)

In Perez v. State, above, Perez was convicted of battery on a law enforcement officer. During the trial, the State had introduced evidence that ten days after the charged crime occurred, Perez had threaten to kill the victim and her children. The State then charged and tried Perez for corruption by threat and tampering with a witness. A jury found Perez not guilty of those crimes.

On appeal, the defense "brought to our attention in a motion to supplement the record, which was not opposed by the state. The state does not deny that [Perez] was acquitted of the collateral crimes, not is it argued that we should not consider this fact, which is technically outside the record, on this direct appeal." The Fourth District considered the evidence and relying on Perkins and Burr, reversed Perez' conviction and remanded for a new trial. As noted in Perez, the Perkins rule "was based on Article 1, section 9 of the Florida Constitution (due process, double jeopardy).

The State cites to two cases in support of its position. First, Lane v. State, 324 So.2d 124 (Fla. 2nd DCA 1975) was overruled in Perkins v. State, 349 So.2d 161 (Fla. 1977) , footnote 6. This Court mentioned that there was a split of authority in Florida courts about the result. This Court came down on the side that Lane did not represent. The State then

cites a federal decision, Smith v. Wainwright, 568 F.2d 362 (5th Cir. 1978) However, it is clear that at least since 1991, this is not a federal question for the State of Florida. This rule is one of state constitutional principles.

Ultimately, the State has to contend with Burr v. State, 576 So.2d 278 (Fla. 1991) It provides a detailed history of the procession that led to the final decision by this Court. Yet this history is irrelevant in this discussion. This is because in the final analysis, this Court determined the evidence question to be one of state constitutional import. The State says that this Court "confused the two remand issues in Burr IV when it held that Perkins "dictates that the admission of collateral crimes evidence was improper in this case." (IB – page 23) That is simply not the case. This Court set forth a state constitutional proscription against the admission of evidence when the person had been found not guilty of that evidence. It has consistently applied this rule, regardless of when the event occurs.

In essence, the State's position exalts form over substance. In the end, the State says that the remedy for Mr. Hines was to file a motion for post-conviction relief and raise the information as newly discovered. First, it is late in the day for the State to be asking for this remedy. During the appellate

process before the First District, Mr. Hines asked for and was given permission to supplement the record with the information pertaining to the not guilty verdict. The State never opposed this request and argues it was inappropriate for the First District to consider this information.

The First District recognized this. This is a case where the information was not in dispute; the record made it clear, without the need for any explanation, the Mr. Hines had been found not guilty of possession the firearm on March 21, 2002. Till this day, the State has conceded this information is accurate. In addition, the State's rule would result in judicial inefficiency for no reason other than some unclear policy considerations. This was a case, as was Perez, where all the germane information was brought to the attention of the appellate court. Why not have the appellate court rule on it given the state of the record.

A defendant who does not have the benefit of having a pending appeal can always bring a motion for post-conviction relief, based on newly discovered evidence. Although the State seems to think there is a two-year time limit to this, that position is not correct. Newly discovered evidence can be argued any time the evidence is truly newly discovered. If the State decided to try a defendant more than two years after the

conviction became final and the defendant was found not guilty relating to some evidence of the final conviction, the defendant could surely raise this point in a motion for post-conviction relief.

The two appellate decisions that have considered this issue have come away with the right result, given that the appeal was pending at the time the new information came to light. The State has offered no reason for this Court to overrule Burr v. State, above. There is a more important consideration in the criminal justice arena than finality; it is called justice. In this case, justice was done by the First District. That court, in all three of Mr. Hines' cases, recognized that the admission of the weapon was harmful error in determining whether he was guilty or not guilty. The State makes no argument that it was not. The First District was careful to understand that the legal issue involved "an ultimate fact necessary to the outcome of the trial of the prior case . . ." This being so, that court has been faithful to the rule of law pronounced by this Court in Perkins and Burr.

V. CONCLUSION

Based on the arguments contained in Mr. Hines' Answer Brief, he requests this Court to answer the certified question in the affirmative and affirm the decision of the First District, found at Hines v. State, 983 So.2d 721 (Fla. 1st DCA 2008).

CERTIFICATES OF SERVICE AND COMPLIANCE

I hereby certify that a copy of the foregoing has been furnished by United States Mail to Mr. Thomas D. Winokur, Assistant Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050; and Mr. Freddrick Hines, I03303, Graceville C.F, 5168 Ezell Rd., Graceville, FL 32440, on this ____ day of December, 2008. I hereby certify that this brief has been prepared using Times New Roman 14 point font in compliance with the Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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