

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

FREDDRICK HINES,

Respondent.

CASE NO. SC08-1204

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, FREDDRICK HINES, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent.

The record on appeal consists of thirty-three volumes, which will be referenced according to the respective Roman numeral designated in the Index to the Record on Appeal, followed by any appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

a. Procedural history of the instant case

Respondent was accused of committing a series of robberies with a firearm in early March 2002. The victims included Tiffany Snyder, Jennifer McQueen, Nicholas Bornhoft, Katherine Miller, Robert Sesna (I 21-22). In the case at bar, Respondent was charged with robbery with a firearm allegedly occurring on March 13, 2002, of victim Terrence Johnson (I 17).

During trial on this charge, the State presented evidence regarding Appellant's apprehension on March 21, 2002. Detective Campos of the Gainesville Police Department proceeded to Tuscan Bend Apartments on information that Respondent was staying there and was driving a gold Pontiac (IV 238-240). Gwendolyn Faulkner lived at

this complex, and was Respondent's girlfriend at the time (IV 290-91). Respondent fled in the vehicle when approached by police (IV 243-48). Respondent crashed the vehicle into another car and fled on foot (IV 248, 265-68). A police dog ultimately tracked Respondent to back to Ms. Faulkner's apartment (IV 280-82).

Respondent was inside Ms. Faulkner's apartment and was arrested (IV 297). Faulkner consented to a search of the apartment. Id. Officers located and recovered a .357 revolver in a barbecue grill located next to the rear sliding glass door of the apartment (IV 309-317, V 350). The victim, Mr. Johnson, was shown a photograph of the handgun and indicated that it appeared to be the same type of weapon used to rob him (V 350-51). Johnson testified that the gun had a barrel similar to that used by appellant to rob him (III 126-27). As the District Court of Appeal ("DCA") put it in the opinion below, "[i]t is apparent from the record that the state offered the testimony regarding the .357 revolver in the hope that the jury would conclude that appellant had possession of the revolver on March 21st (the day it was found) and that, therefore, it was reasonable to infer that appellant had also possessed that revolver on March 13th (the date of the alleged robbery in this case)." Hines v. State, 983 So.2d 721, 722 (Fla. 1st DCA 2008).

On December 15, 2004, the jury found Respondent guilty as charged, including that he carried a firearm in the course of committing the robbery (I 303, VI 596). On January 10, 2005, the court adjudged him guilty in accordance with the verdict and sentenced him to life imprisonment as a prison releasee reoffender (II 306-312).

Respondent appealed the judgment and sentence (II 314). While the appeal was pending, Respondent went to trial on the charges arising from his March 21, 2002 apprehension.

b. Trial on the March 21, 2002 offenses

In Case No. 02-1045, Respondent was charged with four offenses arising from the March 21 incident: grand theft of a motor vehicle, possession of a short-barreled shotgun (found in the vehicle), possession of a firearm by a convicted felon, and fleeing or attempting to elude a law enforcement officer (XXXI 466-467). On April 12, 2005 (approximately three months after the conviction in the instant case) Respondent proceeded to a bifurcated trial, where the possession of firearm by felon charge would be considered by the jury after disposition of the other charges. The court granted Respondent's motion for judgment of acquittal on the fleeing charge on the ground that the State produced no evidence that the officer was in a marked vehicle (XXIX 443, XXXIII 232-241). The jury found Respondent guilty as charged on the grand theft of a motor vehicle and possession of short-barreled shotgun counts (XXXIII 309-310).

The case then proceeded on the possession of firearm by felon count. The court instructed the jury that it could consider only whether Respondent possessed the revolver found in the grill rather than the shotgun in the stolen car, because the jury had specifically found that Respondent only "constructively" possessed the shotgun (XXXIII 312). Respondent argued that the evidence was insufficient to show that he had actual, rather than constructive, possession of the revolver; the State argued that the evidence the evidence was

sufficient to show that he had actual, rather than constructive, possession of the revolver (XXXIII 312-313). The jury found Respondent not guilty of this offense (XXIX 444, XXXIII 324).

c. Other robbery trials¹

Respondent also proceeded to trial on two of the other robbery cases following his acquittal on the possession charge noted above. Respondent filed a motion in limine to preclude the State from introducing the .357 found in the grill into evidence, pursuant to State v. Perkins, 349 So.2d 161 (Fla. 1977), on the ground that the prior acquittal prohibited the State's use of such evidence. Hines v. State, 982 So.2d 22, 23 (Fla. 1st DCA 2008) ("Hines I"); Hines v. State, 982 So.2d 1276 (Fla. 1st DCA 2008) ("Hines II").² The trial court denied the motion in both cases. Id. The district court in Hines I ruled that the denial of the motion in limine was error:

Appellant argues that evidence of his possession of the .357 shotgun on March 21 was impermissible because he had previously been acquitted of the charge. In *Perkins*, the supreme court held that evidence of collateral crimes for which a defendant has been acquitted is not admissible in a subsequent trial. 349 So.2d at 163-64. The *Perkins* rule, however, precludes evidence of an acquitted collateral crime only when the prior verdict clearly decided in the defendant's favor the issue for which admission of the collateral crime is sought. *Diaz v. State*, 609 So.2d 1337, 1341 (Fla. 3d DCA 1992). When making this

¹In the DCA, this case was consolidated with the appeal of one of the other robbery cases, trial court case number 02-1031. Unless this Court orders otherwise, the State will rely on the DCA opinions for relevant facts involving that and the third robbery trial rather than supplement the record with the record of those cases.

²Although the trial in the instant case preceded the trials in Hines I and Hines II, the State has designated those case "I" and "II" because the appeals in those cases preceded the appeal in this one.

determination, a trial court should consider the record of the prior proceeding and conclude whether that jury could have grounded its verdict upon an issue other than that which the defendant now seeks to foreclose from consideration. *Wingate v. Wainwright*, 464 F.2d 209, 212 (5th Cir. 1972).

The State argues that the jury in Appellant's first trial did not decide the issue for which admission of the collateral crime was sought, as it only introduced the .357 found in the grill to corroborate the victim's identification that he had been robbed by a man wielding a .357. By showing that Appellant might have placed the gun in the grill on March 21, the State argued that Appellant had access to it near the time of the March 3 robbery. We see little difference between access to a gun on March 21 and possession of it on March 21, especially in light of the evidence and testimony presented at both trials.

Considering the entire record of the proceedings in Appellant's first trial, as we must in order to determine whether the jury determined the ultimate issue for which admission of the gun was sought in the second trial, we conclude that the jury decided the ultimate issue in the first trial. In both trials the State presented evidence that on March 21, Appellant ran past the grill to enter his girlfriend's apartment, depositing the .357 in the grill; no other evidence was presented to show that he did this at some time other than March 21. The jury found that Appellant did not possess a weapon on March 21. *Cf. State v. Wade*, 435 So.2d 898, 899-900 (Fla. 1st DCA 1983) (reasoning that the jury in the appellant's first trial could have concluded that the appellant armed himself while outside the dwelling in convicting him only for burglary of a dwelling, rather than armed burglary; therefore, the gun could be admitted at a second trial on the felon in possession charge). Accordingly, the trial court abused its discretion in admitting the .357 into evidence.

Hines I at 23-24. The court also ruled that the error was not harmless, and reversed for new trial. Id. at 24.

The trial in Hines II also occurred after the acquittal on possession charge. As in Hines I, Respondent claimed in Hines II that the trial court abused its discretion in admitting evidence of collateral crimes of which he had previously been acquitted. Hines II. The court, noting that the issue was precisely the same as presented in Hines I, ruled that Hines I controlled, and reversed for new trial. Id.

However, in the instant case (which the DCA decided after Hines I and Hines II), the DCA ruled that the decision in Hines I and Hines II did not control, because unlike the trials in those cases, the trial in this case *preceded* the acquittal on the possession charge. Hines v. State, 983 So.2d 721, 723 (Fla. 1st DCA 2008)(hereinafter "Hines III"):

However, our decisions in those two appeals are not directly controlling here because, in those two cases, appellant had been acquitted of the charge alleging possession of a firearm by a convicted felon on March 21, 2002, before his trials; whereas, here, the acquittal did not occur until after the trial. Moreover, in the two other cases, appellant timely objected to the evidence; whereas, here he did not because he could not (as the acquittal had not yet occurred at the time of the trial).

The court in Hines III ruled that this Court's decision in Burr v. State, 576 So.2d 278 (Fla. 1991), controlled, and reversed on its authority. Hines III at 725. However, the court indicated that it was "troubled by the apparent illogic of such a result," upon the following reasons:

As previously discussed, *Burr II* relied exclusively on *Perkins*, and *Perkins*, in turn, relied on the decision of the United States Supreme Court in *Ashe v. Swenson*, 397 U.S. 436,

90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), which held that the doctrine of collateral estoppel was a requirement of due process of law embodied in the Fifth Amendment's guarantee against double jeopardy. However, as the Court pointed out in *Ashe*, "[c]ollateral estoppel' ... means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties *in any future lawsuit*." *Id.* at 443, 90 S.Ct. 1189 (emphasis added). The doctrine of collateral estoppel does not require reversal of a *prior* lawsuit because an issue of ultimate fact necessary to the outcome of that lawsuit was determined differently in a *subsequent* lawsuit. Such being the case, it does not appear to us that the authority relied on in *Burr II* for the result reached provides any support for that result. While policy arguments might be made both for and against the result in *Burr II*, it seems to us that, ultimately, the result must rest on a choice from among the countervailing policy considerations, rather than on constitutional considerations. One such important policy consideration, it seems to us, is the need for finality in judgments.

Id. Based upon these considerations, the DCA certified to this Court the following question, which it believed to be 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?

SUMMARY OF ARGUMENT

ISSUE I.

State v. Perkins, 349 So.2d 161 (Fla. 1977), is based upon the same double-jeopardy principles underlying the collateral-estoppel component of the Fifth Amendment's Double Jeopardy clause. Applying collateral estoppel to retroactively exclude evidence in a *prior* proceeding turns this doctrine on its head. 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.

Even if Perkins were not an application of the collateral-estoppel component of the Double Jeopardy Clause, the same policy considerations apply. A defendant who is acquitted of a collateral crime after it has been admitted in another trial is not forced to "reestablish" a defense or "resurrect" a prior defense. Thus, even if Perkins were not decided upon collateral-estoppel grounds, it still does not support the notion that collateral-crime evidence should be retroactively excluded if the defendant is later acquitted of the collateral crime.

While Burr v. State, 576 So.2d 278, 280 (Fla. 1991), appears to support the contention that Perkins requires retroactive exclusion of collateral-crime evidence, the State respectfully suggests that this holding confused the two remand issues from the Supreme Court. The first remand issue, addressed in the 1989 Burr decision, dealt solely with the Eighth Amendment effect of the subsequent acquittal of a crime that had been used as an aggravating factor supporting a death sentence. Any reasonable reading of Johnson v. Mississippi shows that it is based on the special considerations attending capital sentencing. Nothing about Johnson suggests that it was meant to create a constitutional rule of evidentiary law in non-capital cases, requiring reversal of a conviction when the defendant is subsequently acquitted of an act introduced as collateral-crime evidence in the earlier trial. However, even though this Court chose to reject Dowling v. United States as a matter of state law and allow the Perkins rule to remain, Perkins did **not** in fact require the exclusion of the collateral-crime evidence at the guilt phase of Burr's trial. Nothing about Perkins, either its language or the constitutional bases for it, suggests that it should require retroactive exclusion of evidence based upon a subsequent acquittal, for the reasons stated above. Such a rule of law erodes the finality of criminal judgments by subjecting them to future attack due to acquittals for some act that might have constituted criminal conduct that had been admitted at trial. Whatever policy reasons underlie Florida's strict "prior-acquitted conduct" rule, the State asserts that they do not

outweigh the countervailing policy considerations attending application of such a rule to subsequent acquittals.

ARGUMENT

ISSUE

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?

Standard of review

As this issues involves a pure question of law, review is *de novo*. State v. Glatzmayer, 789 So.2d 297, 301 n.7 (Fla. 2001).

Merits

a. Ashe v. Swenson

The starting point for analysis is the decision of the United States Supreme Court in Ashe v. Swenson, 397 U.S. 436 (1970). In that case, a group of masked men had robbed six men playing poker in the basement of a home. Ashe at 437. The State unsuccessfully prosecuted Ashe for robbing one of the men. Id. at 438. Six weeks later, however, the defendant was convicted for the robbery of one of the other players. Id. at 439. Applying the doctrine of collateral estoppel which it found implicit in the Double Jeopardy Clause, the Court reversed Ashe's conviction, holding that his acquittal in the first trial precluded the State from charging him for the second offense. Id. at 445-446. The Court defined the collateral-estoppel doctrine as providing that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Id. at 443. As such, Ashe's acquittal in the first trial foreclosed the second trial because, in the circumstances of that case, the acquittal

verdict could only have meant that the jury was unable to conclude beyond a reasonable doubt that the defendant was one of the robbers:

Straightforward application of the federal rule to the present case can lead to but one conclusion. For the record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that Knight had not been a victim of that robbery. The single rationally conceivable issue in dispute before the jury was whether the Respondent had been one of the robbers. And the jury by its verdict found that he had not. The federal rule of law, therefore, would make a second prosecution for the robbery of Roberts wholly impermissible.

Id. at 445. A second prosecution was impermissible because, to have convicted the defendant in the second trial, the second jury had to have reached a directly contrary conclusion. Id.

The Court provided the following test to determine whether collateral estoppel barred a subsequent prosecution: "Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach 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. at 444. In other words, collateral estoppel applies only where the fact sought to be introduced was "necessarily decided" in the earlier prosecution. See Davis v. State, 645 So.2d 66 (Fla. 4th DCA 1994).

b. State v. Perkins

One of this Court's first cases to address Ashe directly was State v. Perkins, 349 So.2d 161 (Fla. 1977). Perkins had been tried and convicted of the attempted rape of a child. Id. at 162. At trial, the State was permitted to introduce evidence from a witness who claimed that Perkins had engaged in similar conduct as to her. Id. However, Perkins had been tried and acquitted of charges arising from that collateral incident. Id. On appeal, the Fourth District Court of Appeal reversed, holding that Ashe absolutely prohibited admission of evidence of crimes for which a defendant has been acquitted. Perkins v. State, 332 So.2d 649 (Fla. 4th DCA 1976). The District Court relied upon Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972), to support its conclusion. Wingate held that Ashe required the exclusion of collateral crime evidence for which the defendant had previously been acquitted.

This Court determined that the District Court decision in Perkins conflicted with Lawson v. State, 304 So.2d 522 (Fla. 3d DCA 1974). Perkins at 162. In Lawson, the defendant was tried for murder of his accomplice in a stolen securities scheme. Although Lawson was acquitted of the securities crime, the State introduced evidence relating to it in order to establish Lawson's motive for the murder. Lawson at 523. The court held that Wingate (and by extension Ashe) did not necessarily require exclusion of the evidence: "In the present case, we are inclined to accept the state's contention that some reference to the earlier stolen securities scheme was essential to

establish a motive for killing Eaton and to enable the state to intelligently present its case." Lawson at 524.³

This Court in Perkins held that "the District Court in this case misapplied the *Ashe* rule, while in terms of the Fifth Amendment, Lawson was correctly decided." Perkins at 163. "Thus, the *Ashe* rule forbids the admission in a subsequent trial of evidence of an acquitted collateral crime only when the prior verdict clearly decided in the defendant's favor the issue for which admission is sought. Id. "From *Ashe* we know the double jeopardy clause of the Fifth Amendment to the U.S. Constitution does not forbid the admission of all evidence of acquitted collateral crimes, but only that evidence which the state is collaterally estopped from introducing." Id.

Although this Court found that the Federal Constitution did not require the exclusion of all evidence for which the defendant had been acquitted, it did not end the inquiry there. Citing Wingate, this Court determined that the State should not be permitted to introduce evidence of prior crimes of which the defendant had been acquitted:

We agree with *Wingate* that it 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

³Although the Lawson court held that some reference to the stolen securities scheme was permissible in spite of the prior acquittal, it further held that the State presented irrelevant details of the scheme and reversed for new trial. Id.

prior defense against a crime for which he is not on trial. Therefore, we hold that evidence of crimes for which a defendant has been acquitted is not admissible in a subsequent trial. Nothing we say here forbids admission under the "Williams Rule" of relevant evidence of collateral crimes for which acquittals have not been obtained.

Perkins at 163-64.

This Court narrowed the applicability of Perkins in Amoros v. State, 531 So.2d 1256 (Fla. 1988), where it approved State's introduction of evidence that the defendant used the same gun used to kill the victim in an earlier murder for which he was acquitted. The Court distinguished Perkins because "in that case the focus was on a similar pattern of criminal conduct rather than the linking of a defendant to a critical piece of evidence." Amoros at 1260.

In Burr v. State, 576 So.2d 278, 280 (Fla. 1991), this Court clarified that Perkins rests upon the Florida Constitution, in particular the Double Jeopardy Clause contained in Article I, section 9.

In short, this Court in Perkins held that while the collateral-estoppel component of the Double Jeopardy Clause of the United States Constitution does not necessarily bar similar-fact collateral-crime evidence for which the defendant had previously been acquitted, the Double Jeopardy Clause of the Florida Constitution does necessarily bar such evidence. However, while the Florida Double Jeopardy Clause prohibits use of a broader range of evidence, Perkins is still based on the same collateral-estoppel principles as Ashe v. Swenson, and Florida courts employ collateral-estoppel

analysis in determining whether Perkins prohibits the use of collateral-crime evidence of which the defendant was acquitted, or whether Amoros permits its use. See e.g., Hilaire v. State, 799 So.2d 403 (Fla. 4th DCA 2001); Diaz v. State, 609 So.2d 1337 (Fla. 3d DCA 1992).

c. Retroactive application of collateral estoppel

"Collateral estoppel is a judicial doctrine which in general terms prevents identical parties from relitigating the same issues that have already been decided." Department of Health & Rehabilitative Services v. B.J.M., 656 So.2d 906, 910 (Fla. 1995). "Collateral estoppel precludes relitigation of issues actually litigated in a prior proceeding." Id. The intent of collateral estoppel is "to prevent parties from rearguing the same issues that have been decided between them." State v. McBride, 848 So.2d 287, 291 (Fla. 2003).

Applying collateral estoppel to retroactively exclude evidence in a *prior* proceeding turns the entire doctrine on its head. 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.

To demonstrate this point, the State presents the following variation of Ashe v. Swenson. Rather than a jury acquittal in the first trial, suppose that the State had secured a robbery conviction of the first poker-game victim. The State then secured a conviction for the second victim, the third victim, the fourth victim, and then the fifth victim. However, Ashe was acquitted in the trial involving the final victim. Under the "retroactive collateral estoppel" doctrine, Ashe would be entitled to have the five convictions overturned as a result of the subsequent acquittal in the sixth trial. The State submits that such a result is not required by the Double Jeopardy Clause, to say the least.

d. Considerations other than collateral estoppel

Even if Perkins were not an application of the collateral-estoppel component of the Double Jeopardy Clause, the State would still argue that the same policy considerations apply. First, the basis for Perkins was the Double Jeopardy Clause of the Florida Constitution. Burr, supra. Like the collateral estoppel component specifically, the Double Jeopardy Clause protects against *subsequent* prosecutions:

The Fifth Amendment guarantee against double jeopardy consists of three separate constitutional protections: 'It protects against a **second** prosecution for the same offense **after** acquittal. It protects against a **second** prosecution for the same offense **after** conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

State v. Paul, 934 So.2d 1167 (Fla. 2006)(emphasis added).

Even the language of Perkins itself does not support retroactive application:

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. 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 has been acquitted is not admissible in a **subsequent** trial.

Perkins at 163-64 (emphasis added). A defendant who is acquitted of a collateral crime *after* it has been admitted in another trial is not forced to "reestablish" a defense or "resurrect" a prior defense. Thus, even if Perkins were not decided upon the collateral-estoppel doctrine, it still does not support the notion that collateral-crime evidence should be retroactively excluded if the defendant is later acquitted of the collateral crime.

e. Other cases

As the DCA noted, few cases have addressed this issue directly. The State notes two cases from Florida that reject the application of collateral estoppel to retroactively exclude evidence following a subsequent acquittal of collateral-crime evidence, one state case and one federal case. In Lane v. State, 324 So.2d 124 (Fla. 2d DCA 1975), the State introduced evidence in a sexual battery prosecution that the appellant had perpetrated a similar offense upon another woman nine days before. The week following appellant's conviction, he was tried and acquitted of the collateral crime, and sought a new trial for the earlier conviction based upon the acquittal, under the

rationale of Wingate v. Wainwright, supra. The court held that Wingate did not apply:

The question before us, which appears to be one of first impression, is whether the rationale of *Wingate* should be extended to a situation where the acquittal of the 'similar crime' occurs After the trial in which evidence of the similar crime was introduced. We think not. In applying the *Ashe* doctrine, *Wingate* was predicated upon collateral estoppel. This is a doctrine which precludes the relitigation of an issue which has been determined in a prior proceeding between the same parties. *Seaboard Coast Line Railroad Company v. Industrial Contracting Company*, Fla.App.4th, 1972, 260 So.2d 860. In the instant case when the similar crime evidence was introduced, the issue of whether appellant had actually committed that crime had never been litigated before. Hence, the doctrine of collateral estoppel could not have applied.

Lane at 125-26.

The Fifth Circuit also refused to extend the holding of Wingate to subsequent acquittals in Smith v. Wainwright, 568 F.2d 362 (5th Cir. 1978). Smith was charged in a Florida prosecution with breaking and entering a dormitory room with the intent to rape its occupant, and at trial the State introduced testimony regarding another alleged rape committed by Smith the same morning in the same dormitory, as evidence of Smith's identity, motive and intent. Smith at 363. After Smith was convicted, the State tried him on the other rape charge, of which he was acquitted. Id. After exhausting state remedies, Smith sought federal habeas relief, arguing that Wingate required reversal of his conviction. The court disagreed. The court refused to "accord to the acquittal some special power retroactively to render inadmissible evidence formerly offered and properly admitted." Id.

at 364. “[N]either the considerations of finality and economy which underlie res adjudicata nor those of restraint and discharge which forbid double jeopardy come into play here in Smith’s favor.” Id. at 365. “Contrary to his contention, it is precisely the fact that the trial at which he was convicted preceded his rape acquittal which prevents their having application.” Id.

Thus, the very court that decided Wingate, the primary case on which this Court relied in Perkins, specifically ruled that the Wingate rule did not apply to subsequent acquittals.

f. Burr v. State

Based on the foregoing, the State contends that neither the Double Jeopardy Clause of the United States or Florida Constitutions, nor any other ground upon which Perkins v. State may have been based, require retroactive exclusion of collateral-crime evidence when the defendant is subsequently acquitted of the collateral crime. The State further contends that the opinions in Burr v. State, upon which the DCA relied to reverse Respondent’s conviction, do not create a general principle requiring such retroactive exclusion. A detailed procedural history of Burr is required to place its holdings into context.

Burr was convicted of first-degree murder of a store clerk during a robbery. Burr v. State, 466 So.2d 1051, 1052 (Fla. 1985) (“Burr I”).⁴ The state presented evidence of collateral crimes in the form of three

⁴The DCA referred only to the last two of this Court’s opinions in the Burr case and labeled them “Burr I” and “Burr II.” Because the State will be referring to all four Burr decisions, its use of Roman numerals to differentiate them will not match the DCA’s use.

store clerks who testified that Burr robbed and shot them in separate incidents around the time of the murder. Id. This Court ruled in Burr's direct appeal that the evidence was relevant and properly admitted. Id. at 1053.

The trial court also used the collateral crimes in the penalty phase, finding that "the pattern of shooting store clerks during the commission of robberies exhibited an intent to eliminate witnesses," which supported the aggravating factors of murder committed for the purpose of avoiding a lawful arrest, and cold, calculated and premeditated manner. Id. at 1054. This Court affirmed these findings. Id.

At some point after the trial, Burr was acquitted of one of the collateral crimes, and in his motion for postconviction relief, Burr argued that the acquittal required a new murder trial. This Court disagreed:

As to the subsequent acquittal, clearly, at the time the *Williams* rule evidence was admitted, it was not error to do so. This much had been settled on direct appeal. There is no reason to suggest that the subsequent acquittal changes that admissibility subsequent to the trial. This Court will not render evidence retroactively inadmissible.

Burr v. State, 518 So.2d 903, 905 (Fla. 1987) ("Burr II").

Upon petition for writ of certiorari, the United State Supreme Court vacated the judgment and remanded for further consideration in light of Johnson v. Mississippi, 486 U.S. 578 (1988). Burr v. Florida, 487 U.S. 1201 (1988).

The defendant in Johnson was sentenced to death in 1982 for a 1981 murder, and one of the aggravating circumstances supporting the death sentence was that Johnson had been convicted of a felony in New York in 1963. Johnson at 580. In 1987, the New York Court of Appeals reversed the 1963 conviction, on the ground that the trial court had never held a hearing on the voluntariness of his confession and that the State had frustrated his right to appeal. Id. at 582. Johnson then sought relief in Mississippi from his death sentence on the ground that the New York conviction was invalid and could not be used as an aggravating circumstance. Id. at 583. The Mississippi court denied relief. Id. Upon review, the Supreme Court first noted the following:

The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "'need for reliability in the determination that death is the appropriate punishment'" in any capital case. Although we have acknowledged that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death,'" we have also made it clear that such decisions cannot be predicated on mere "caprice" or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." The question in this case is whether allowing petitioner's death sentence to stand although based in part on a reversed conviction violates this principle.

Johnson at 584-85 (footnote and internal citations omitted). Applying these principles, the Supreme Court found that the state's use of the New York conviction as an aggravated factor in this circumstance violated the Eighth Amendment prohibition against cruel and unusual punishment.

Upon remand from Burr v. Florida, this Court first noted that the case "involves similar issues with significantly dissimilar facts" from Johnson. Burr v. State, 550 So.2d 444 (Fla. 1989) ("Burr III"). This Court ruled that "the evidence of the collateral act for which Burr received an acquittal is inadmissible under *Johnson*, but found its admission harmless beyond a reasonable doubt. Id. at 446. However, this Court noted that the collateral act for which Burr was acquitted supported two of the three aggravating circumstances supporting the death sentence, and that use of the aggravators in such circumstances violated Johnson and was not harmless beyond a reasonable doubt. Id. This Court vacated the death sentence and remanded for a new sentencing determination. Id.

Upon petition for writ of certiorari, the United State Supreme Court again vacated the judgment and remanded for further consideration, this time in light of Dowling v. United States, 493 U.S. 342 (1990). Florida v. Burr, 496 U.S. 914 (1990).

In Dowling, the Supreme Court ruled that neither the Double Jeopardy Clause nor the Due Process Clause required the exclusion of collateral-crime evidence for which the defendant had been previously acquitted. In other words, the Supreme Court came to a different conclusion that this Court reached in Perkins. The Supreme Court apparently wished to provide this Court an opportunity to reconsider Perkins, perhaps due to the fact that the primary case upon which this Court relied in Perkins, Wingate v. Wainwright, supra, was effectively overruled by Dowling.

On remand, in light of Dowling, this Court receded from Burr III "solely to the extent it suggested that *Johnson*, as a matter of *federal* law, always prohibits the introduction of unconvicted collateral crimes evidence during the guilt phase of a trial." Burr v. State, 576 So.2d 278, 280 (Fla. 1991) ("Burr IV") (emphasis in original). This Court further noted that Perkins was based solely upon the Florida Constitution, so the ruling in Dowling had no effect on Perkins. Id. This Court concluded, "[o]bviously, the holding of *Perkins* dictates that the admission of collateral crimes evidence was improper in this case." Id. This Court then reiterated its remaining rulings in Burr III, and again remanded for a new sentencing hearing. Id. at 280-81.

The State respectfully suggests 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." The first remand issue, addressed in Burr III, dealt solely with the Eighth Amendment effect of the subsequent acquittal of a crime that had been used as an aggravating factor supporting a death sentence. Any reasonable reading of Johnson shows that it is based on the special requirements attached to capital sentencing. Nothing about Johnson suggests that it was meant to create a constitutional rule of evidentiary law in non-capital cases, requiring reversal of a conviction when the defendant is subsequently acquitted of an act introduced as collateral-crime evidence in the earlier trial. This Court correctly receded from its ruling in Burr III suggesting otherwise.

However, even though this Court chose in Burr IV to reject Dowling as a matter of state law and allow the Perkins rule to remain, Perkins did **not** in fact require the exclusion of the collateral-crime evidence at the guilt phase in Burr's trial. The **only** reason that the retroactive exclusion of this evidence was even addressed in Burr III was the effect of Johnson, which this Court correctly ruled in Burr IV did not apply to the guilt-phase evidence. Nothing about Perkins, either its language or the constitutional bases for it, suggests that it should require retroactive exclusion of evidence based upon a subsequent acquittal, for the reasons stated in sections b, c, and d above. The State contends that this Court's ruling in Burr II, that it "will not render evidence retroactively inadmissible," Burr II at 905, remains good law and is not inconsistent with Perkins or any other decision of this Court.

The State recognizes the Fourth District Court of Appeal in Perez v. State, 801 So.2d 276 (Fla. 4th DCA 2001), applied Burr IV to retroactively exclude collateral-crime evidence that had been introduced at trial, based upon a later acquittal of the collateral crime. The State acknowledges that Perez fairly applies Burr IV, but nonetheless argues that Perkins should not be apply to subsequent acquittals, for the reasons set forth in this brief.

g. Proper remedy

While the State asserts that Perkins should never apply retroactively, the State also notes that such claims should only be raised by motion for postconviction relief rather than for the first time on direct appeal because this is a newly-discovered evidence

claim. See Pomeranz v. State, 703 So.2d 465 (Fla. 1997). Pomeranz raised a similar claim, and the Court noted "it would appear that this point would more properly be raised in a postconviction motion." Pomeranz at 469 n. 5. This Court agreed to address it "because the relevant facts are not disputed and the State makes no claim that it cannot be raised on direct appeal."⁵

The State does claim here that such a claim should not be raised for the first time on direct appeal. This claim is nothing more than a newly-discovered evidence claim, cognizable by Florida Rules of Criminal Procedure 3.850. The State sees no compelling reason to dispense with the basic preservation requirement when a trial-court remedy is available to the defendant.

The fact that this is a newly-discovered evidence claim highlights one of the fundamental problems with the suggestion that an acquittal retroactively excludes evidence. The only time limit rule 3.850 imposes upon claims is that they be made within two years after the claim could have been discovered through the exercise of due diligence. Fla. R. Crim. P. 3.850(b)(1); Bolender v. State, 658 So.2d 82, 85 (Fla. 1995). Such a rule of law erodes the finality of criminal judgments by subjecting them to attack due to acquittals for some act that might have constituted criminal conduct that had been admitted at trial. Whatever policy reasons underlie Florida's strict "prior-acquitted conduct" rule (a rule not required under the

⁵This Court did not actually consider the effect of a subsequent acquittal in Pomeranz, as it found that he was not in fact acquitted. Id.

Federal Constitution), the State asserts that they do not outweigh the countervailing policy considerations attending application of such a rule to subsequent acquittals.

For these reasons, the State asserts that Burr IV should be clarified to reflect that Perkins does not apply to subsequent acquittals. The State respectfully requests this Court to answer the certified question in the negative and to quash the District Court's decision reversing Respondent's conviction.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the decision of the District Court of Appeal reported at 983 So.2d 721 should be disapproved, and the conviction entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Steven L. Seliger, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on November 24, 2008.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements
of Fla. R. App. P. 9.210.

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