OA 8-31-83

IN THE SUPREME COURT OF FLORIDA

CASE NO. 62,683

MELVEE TUCKER,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

* *

BRIEF OF RESPONDENT ON THE MERITS

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* *

INTRODUCTION

Petitioner, Melvee Tucker, was the appellant in the District Court of Appeal, and the defendant in the trial court. Respondent, the State of Florida, was the appellee in the District Court of Appeal, and the prosecution in the trial court. In this brief, the parties will be referred to as Petitioner and the State. The symbol "R" will be used to refer to the record on appeal in the district court. The symbol "TR"

will be used to refer to the transcript of testimony in the district court. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's Statement of the Case and Facts as being a substantially true and correct account of the proceedings below.

POINTS ON APPEAL

I

WHETHER THE TRIAL COURT WAS CORRECT IN REFUSING TO INSTRUCT THE JURY ON TIME BARRED LESSER INCLUDED OFFENSES, WHERE THERE WAS NO EXPRESS WAIVER OF THE STATUTE OF LIMITATIONS?

A

WHETHER A DEFENDANT CAN WAIVE THE STATUTE OF LIMITATION AND BE PROSECUTED AND CONVICTED FOR OTHERWISE TIME BARRED OFFENSES?

B

WHETHER A MERE REQUEST FOR JURY INSTRUCTIONS ON LIMITATIONS-BARRED LESSER-INCLUDED OFFENSES, WHICH REQUEST WAS MADE BY COUNSEL, IS A WAIVER OF THE STATUTE OF LIMITATIONS, THEREBY CAUSING THE LESSER INCLUDED OFFENSES TO BECOME VIABLE CHARGES PERMITTING CONVICTION AND SENTENCING AND ENTITLING A DEFENDANT TO INSTRUCTIONS ON SUCH OFFENSES?

ARGUMENT

I

THE TRIAL COURT WAS CORRECT IN REFUSING TO INSTRUCT THE JURY ON THE TIME BARRED LESSER-INCLUDED OFFENSES, WHERE THERE WAS NO EXPRESS WAIVER OF THE STATUTE OF LIMITATIONS.

A

A DEFENDANT CAN WAIVE THE STATUTE OF LIMITATIONS AND BE PROSECUTED AND CONVICTED FOR OTHERWISE TIME BARRED OFFENSES.

A dual approach has been established in those jurisdictions that have addressed the issue of waiver of the statute of limitations. One line of reasoning has held that the statute is a "jurisdictional" bar to prosecution, while on the other hand the statute has been found to be an affirmative defense waiveable by the defendant.

The majority opinion in Tucker v. State, 417 So.2d 1006 (Fla. 3d DCA 1982), recognized this dichotomy:

> Generally courts which have found the statute a "jurisdictional" bar to waiver have done so in terms of waiver by the State, not the defendant, and have done so only in the sense that a criminal statute of limitations goes not to the remedy of an action,but creates a sub-

> stantive right which prevents prosecution and conviction of an individual after the statute has run. In this sense "jurisdictional" refers to the legality of the actions of the state in prosecuting an individual for an offense determined legislatively to a stale. A court may not convict a defendant of a crime for which the State has no statutory right to prosecute. . .
>
> 417 So.2d at 1012.

See Lane v. State, 337 So.2d 976 (Fla. 1976); State ex rel. Mauncy v. Wadsworth, 293 So.2d 345 (Fla. 1974); State v. King, 282 So.2d 162 (Fla. 1973); Mead v. State, 101 So.2d 373 (Fla. 1958); Mitchell v. State, 157 Fla. 121, 25 So.2d 73 (1946); Nelson v. State, 17 Fla. 195 (1879).

The court in Tucker v. State, supra, recognized that a difference exists between the legality of prosecution for an offense barred by the limiting statute and the ability of the defendant to waive the statute of limitation for purposes of jury instruction and possible conviction of lesser concluded offenses. The court then stated:

> A defendant who believes that a criminal statute of limitations no longer works to his advantage should be permitted to waive that statute either before the trial or before the jury retires. (Citations omitted).
>
> 417 So.2d at 1013.

This position is consistent with those other jurisdictions that have been confronted with this issue. See United States v. Williams, 684 F.2d 296 (4th Cir. 1982); United States v. Levine, 658 F.2d 113 (3rd Cir. 1981); United States v. Akmakjian, 647 F.2d 12 (9th Cir. 1981), cert. denied, 454 U.S. 964, 102 S.Ct. 505, 70 L.Ed.2d 380 (1981); United States v. Wild, 551 F.2d 418 (D.C. Cir. 1977), cert. denied, 431 U.S. 916, 97 S.Ct. 2178, 53 L.Ed.2d 226 (1977); United States v. Doyle, 348 F.2d 715 (2d Cir. 1965), cert. denied, 382 U.S. 843, 86 S.Ct. 89, 16 L.Ed.2d 84 (1965); United States v. Parrino, 212 F.2d 919 (2nd Cir. 1953), cert. denied, 348 U.S. 840, 75 S.Ct. 46, 99 L.Ed. 663 (1954); Commonwealth v. Darush, 279 Pa.Super. 140, 420 A.2d 1071 (1980); People v. Lohnes, 76 Misc.2d 507, 351 NYS 2d 279 (Sup.Ct. 1973); See also 1 C. Wright, Federal Practice and Procedure: Criminal §193, at 707-08 (2d Ed. 1981); 8 J. Moore, oore's Federal Practice -- Criminal Rules §12.03[1], at 12-17, 18 (2d Ed. 1975); Comment, Waiver of the Statute of Limitations in Criminal Prosecutions; United States v. Wild, 90 Harv.L.Rev. 1550 (1977).

This Court has also recognized that a defendant may, under appropriate circumstance waive the statute of limitations. In Sturdivan v. State, 419 So.2d 300 (Fla. 1982), this Court restated its holding in Spaziano v. State, 393 So.2d 1119 (Fla. 1981):

> In Spaziano, we concluded that where the State charges a defendant with a capital offense, and where it unquestionably appears that the statute of limitations has run on the necessary lesser included offenses, either the defendant must waive the statute of limitations defense, and thus subject himself to possible conviction and sentence for one of them, or the trial court will instruct only for the capital offense.
>
> 419 So.2d at 302.

Threfore, the State submits that the statute of limitations is a "jurisdictional" bar to waiver by the State and an affirmative defense which can be waived, under the appropriate circumstances, by the defendant.

B

A MERE REQUEST FOR JURY INSTRUCTIONS ON LIMITATIONS BARRED LESSER-INCLUDED OFFENSES, WHICH REQUEST IS MADE BY COUNSEL, IS NOT A WAIVER OF THE STATUTE OF LIMITATION, THEREBY CAUSING THE LESSER INCLUDED OFFENSES TO BECOME VIABLE CHARGE PERMITTING CONVICTION AND SENTENCING AND ENTITLING A DEFENDANT TO INSTRUCTIONS ON SUCH OFFENSE.

The issue now before this Court in the case sub judice is the delineation of the type of conduct that a defendant must pursue to effectuate a waiver of the statute of limitations where the defendant was charged with a capital felony and where the statute of limitations unquestionably has run on the necessary lesser included offenses.

In Tucker v. State, supra, the Third District found that a defendant should be permitted to waive the statute of limitations either before trial or before the jury retires. However, the Third District had divergent views as to how to effectuate the waiver. The majority opinion, after finding that the right not to be convicted of an offense for which prosecution is barred by statute of limitations is substantive and fundamental, held:

> Waiver of that right must meet the same strict standards which courts have ap-

> plied in determining whether there has been an effective waiver as to other fundamental rights (footnote omitted). Waiver of any fundamental right must be express and certain, not implied or equivocal. With respect to wiaver of the statute of limitations there should be a waiver in writing made part of the record or at least an express oral waiver of the statute preventing prosecution and conviction made in open court on the record by the defendant personally or by his counsel in his presence. See, e.g., United States v. Wild, supra (written waiver after full consultation with attorney effective; United States v. Sindona, 473 F. Supp. 764 (S.D. N.Y. 1979) (same).
>
> 417 So.2d at 1013.

In accordance therewith the court held that a defendants:

> . . .mere request for an instruction on the lesser-included offense is not an express waiver of the right not to be prosecuted and convicted for an offense for which the statute of limitation has run.
>
> 471 So.2d at 1013.

Therefore, the court found no error occurred, absent the effective waiver, in refusing to instruct on the lesser included offenses of first-degre murder. See, Holloway v. State, 362 So.2d 333 (Fla. 3d DCA 1978), cert. denied 379 So.2d 953 (Fla. 1980), cert. denied 449 U.S. 905 101 S.Ct. 231, 66 L.Ed.2d 137 (1980).

The specially concurring opinion, agreed that a defendant may waive the statute of limitations. However, the position espoused if not bound by precedent, was that the statute of limitations could be waived by the simple failure of a defendant to claim its benefit.

It is the State's position that, in accordance with the majority opinion in Tucker v. State, supra, the protection afforded to the defendant by the statute of limitations is a fundamental right, requiring a knowing and voluntary express waiver by the defendant. Therefore, the trial court was correct in refusing to instruct the jury on the lesser-degree offenses of first degree murder, where the trial court was presented with only a mere request by Petitioner's counsel, without any indication of knowledge or consent by the Petitioner, for an instruction on the lesser included offenses.

Fundamental rights requiring a knowing and intelligent waiver have been defined by the United States Supreme Court in Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

> . . .the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial. (footnote omitted).
>
> 412 U.S. at 237.

The court then elucidated those rights which involved the integrity of the trial process itself, thereby being fundamental and requiring a waiver of that right to be knowing, voluntary and expressly made. See Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.1461 (1938) (Waiver of the right to counsel); Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968) (Waiver of Sixth Amendment right to confrontation and cross-examination); Brookhart v. Janis, 382 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d (1966) (Same); Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942). (Waiver of trial by jury); Barker v. Wingo, 407 U.S. 514 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) (Waiver of the right to a speedy trial); Green v. United States, 385 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). (Waiver of right to claim double jeopardy).

The aforecited authorities stand for the proposition that knowing waivers of rights are required where the rights involved invoke the integrity of the trial process itself. The State submits that since a waiver of the statute of limitations is integrally related to the trial process via authorizing the State to initiate an otherwise jurisdictionally time barred prosecution, it is clear that a waiver of the limiting statute should be made knowingly. Further, in order to ensure the defendant's understanding of the consequences of his waiver, said waiver should be explicit and written. A written waiver

also provides reliable evidence that a specific waiver was in fact executed. See, United States v. Wild, 551 F.2d 418 (D.C. Cir. 1974), cert denied 431 U.S. 916, 97 S.Ct. 2175, 53 L.Ed.2d 266 (1977).

As previously delineated, the statute of limitations is both a "jurisdictional" bar to waiver by the State and an affirmative defense waivable, under appropriate circumstances, by the defendant. This jurisdictional bar/waiver dichotomy is further evidence that the right not to be convicted of an offense for which prosecution is barred by the statute of limitations is a fundamental right.

In Johnson v. Zerbst, supra, the Court, when confronted with the issue of waiver of right to counsel is criminal proceedings stated:

> Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of Counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a Federal court's authority to deprive an accused of life or liberty.
>
> When this right is properly waived, the assistance of Counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence. If the accused, however, is not represented by Counsel and has not competently and intelligently waived

> his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of trial may be lost "in the course of the proceedings" due to failure to complete the court-as the Sixth Amendment requires-by providing Counsel for an accused who is unable to obtain Counsel, who has not intelligently waived his constitutional guaranty, and whose life or liberty is at stake. (Footnote omitted). If this requirement of the Sixth Amendment is not complied with the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void...
>
> 304 U.S. at 467-68.

The court then held that a defendant may waive the right to counsel. However, the duty was put on the trial judge to determine whether there was an intelligent and competent waiver by the defendant and in the course of said determination the same should be evident in the record.

The jurisdictional bar of Johnson v. Zerbst, supra, is equivalent to the State's jurisdictional bar to prosecute time barred offenses. In both instances, a valid conviction cannot be rendered absence affirmative conduct of the defendant . A defendant's conviction is void if he proceeded to trial without counsel, if there is not a knowing and intelligent waiver of the

right to counsel, Johnson v. Zerbst, supra. Likewise, a defendant's conviction is void, if he was tried and convicted for time barred offense. See, Lane v. State, supra; State ex rel. Manucy v. Wadsworth, supra; State v. King, supra; Mead v. State, supra; Mitchell v. State, supra; Nelson v. State, supra. However, the defendant must waive the statute of limitations, thereby allowing a conviction of a time barred offense to be legal. See, Sturdivan v. State, supra.

In Tucker v. State, supra, the majority opinion cited Groomes v. State, 401 So.2d 1139 (Fla. 3d DCA 1981) (Waiver of right to trial by twelve jurors in a capital case) and Sessums v. State, 404 So.2d 1014 (Fla. 3d DCA 1981) (Waiver of right to trial by jury), in support of the proposition that fundamental rights must be knowingly, intelligently, and voluntarily waived. The rights in Groomes and Sessums were fundamental thereby requiring an express waiver of them inasmuch as rights waived dealt with the manner in which the defendants were to be tried. Absent an express waiver by the defendant of his right to trial by twelve jurors in a capital case, a trial by less than twelve jurors would render any conviction therefrom void. The same situation would occur if the defendant did not waive trial by jury, and he was given a bench trial. The same jurisidctional bar/waiver dichotomy is once again present. Therefore, the State submits that this dichotomy is a crucial deterimining factor in deciding whether

a right, be it constitutional or statutory, is fundamental.

The petitioner has taken the position that since the statute of limitations is a statutory right , it does not share the statute of the constitutional rights involved in Groomes v. State, supra and Sessums v. State, supra, The State submits that it is a distinction without a difference. It does not matter where the right emanates from but rather what the right seeks to protect. Constitutional rights deemed fundamental concern the ability of the defendant to obtain a fair trial. Schneckloth v. Bustamonte, supra. The statute of limitations directly and unequivocally deals with the ability of the defendant to obtain a fair trial , inasmuch as he can either claim its benefit and avoid prosecution and conviction of time barred offenses or he can waive it in order to avoid an all or nothing verdict. See, Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); Kennan v. State, 379 So.2d 147 (Fla. 4th DCA 1980); Hayes v. State, 368 So.2d 374 (Fla. 5th DCA 1979).

The Petitioner next asserts that the statute of limitations is akin to the rights established by the speedy trial rule, Rule 3.191, Florida Rules of Criminal Procedure, inasmuch as both set boundaries on the State's right to try certain presons. The State submits that, even though similarites exist between the statute of limitations and the speedy trial rule, there are two

distinctions between them that makes the statute of limitations a fundamental right.

The first distinction, the jurisdictional bar, is that in order for the defendant to claim the protection of the statute of limitations and prevent prosecution for time barred offense, the defendant need do nothing. The burden is on the State to prove that the defendant perpetrated the crime within the limitations period. Mead v. State, supra; Mitchell v. State, supra. Whereas, in order for the defendant to claim the protection of the speedy trial rule he must raise the same in the trial court or it is waived. Schulkin v. State, 287 So.2d 137 (Fla. 3d DCA 1973).

The second distinction, based on the waiver part of the dichotomy, is that waiver of the statute of limitations can benefit the defendant. See e.g., United v. Wild, supra. (Waiver of statute of limitations enabled defendant to engage in plea bargaining prior to indictment being filed); United States v. Williams, 684 F.2d 296 (4th Cir. 1982) (Waiver of statute of limitations at trial as to lesser included offense allowed defendant to be convicted of the lesser included offenses). Whereas, the defendant has absolutely nothing to gain by waiving the speedy trial rule, inasmuch as violation of the rule requires complete discharge of the defendant. See Rule 3.191, Florida Rules of Criminal Procedure. The jurisdictional bar/waiver

dictotomy is present in statute of limitations. But it clearly does not apply to the speedy trial rule. Therefore, the State submits that petitioner's analogy of statute of limitations with the speedy trial rule is without merit and that in fact the statute of limitations is a fundamental right.

The Petitioner next asserts that the statute of limitations is also analogous to the double jeopardy clause and the immunity statute, Florida Statute Section 914.04 (1981). Inasmuch as these rights are also waived if not raised at trial. Drake v. State, 400 So.2d 487 (Fla. 5th DCA 1981) (Double Jeopardy); McKnown v. State, 54 So.2d 54 (Fla. 1951) (Immunity). The State submits that the same reasoning applicable to the Petitioner's speedy trial contention is applicable to his Double Jeopardy and Immunity contention.

The concurring opinion in Tucker v. State, supra, reservedly agreed with the majority opinion's holding.

> My reservation is this. Were I free to do so, I would cast my lot with the authorities which hold that the statute of limitations is waived by the simple failure of a defendant to claim its benefits. See, e.g., United States v. Doyle, 348 F.2d 715 (2d Cir.) (waiver by plea of guilty), cert. denied, 382 U.S. 843, 86 S.Ct. 89, 15 L.Ed.2d 84 (1965); United States v. Parrino, 212 S.2d 919 (2d Cir. 1953)

(waiver by plea of guilty), cert. denied, 348 U.S. 840, 75 S.Ct. 46, 99 L.Ed. 663 (1954); People v. Williams, 79 Ill.App.3d 806, 35 IllDec. 63, 398 N.E.2d 1013 (App.Ct. 1979) (waiver by failure to raise in trial court); People v. Lohnes, 76 Misc.2d 507, 351 N.Y.S.2d 279 (Sup.Ct. 1973) (waiver by failure to object to instruction on limitations-barred offense) See also 1 C. Wright, Federa; Practice and Procedure: Criminal § 193, at 409-10 (2d ed. 1969) (the more sensible rule is that the statute of limitations is waived if not raised at or before trial); 8 J. Moore, Moore's Federal Practice-Criminal Rules ¶12.03[1], at 12-17, -18 (2d ed. 1975) (same). Under these authorities Tucker's request for instructions on limitations-barred offense would, a fortiori, waive the statute of limitations. I am obliged, however, to follow the quite different views that the statute of limitations is not waived by the defendant's nonassertion of it, State v. King, 282 So.2d 162 (Fla. 1973); Mead v. State, 101 So.2d 373 (Fla. 1958); Mitchell v. State, 157 Fla. 121, 25 So.2d 73 (1946); Horton v. Mayo, 153 Fla. 611, 15 So.2d 327 (1943); Nelson v. State, 17 Fla. 195 (1879), and that even the affirmative act of requesting jury instructions on limitations-barred offenses does not constitute a waiver of the statute. Perry v. State, 103 Fla. 580, 137 So. 798 (1931); Blackmon v. State, 88 Fla. 188, 101 So. 319 (1924); Keenan v. State, 379 So. 2d 147 (Fla. 4th DCA 1980); Holloway v. State, 362 So.2d 333 (Fla. 3d DCA 1978), cert. denied, 379 So.2d 953 (Fla.), cert. denied, 449 U.S. 904, 101 S.Ct. 281, 66 L.Ed.2d 137 (1980). Thus, because Tucker merely requested instructions on the limitations-barred offenses, I must agree that the trial court did not err in failing to give the instructions, and we are foreclosed from affording Tucker relief.

417 So.2d at 1014
(Footnote omitted)

The cases relied on by the concurring opinion, upon closer scrutiny, do not stand for the general proposition that the statute of limitations is waived by the simple failure of a defendant to claim its benefit.

In United States v. Doyle, supra, the court found that defendant's waiver of the statute of limitations was contained within his plea of guilty, where the record reflected that the defendant, pursuant to advice of counsel, waived the statutes of limitations defense. Likewise in United States v. Parrino, supra, the court found that the record showed that the waiver of the statute of limitations by the defendant was deliberately and intentionally made, with the advice of counsel, as part of the guilty plea. See also, Padie v. Alaska, 594 F.2d 50 (Alaska 1979) (as part of the plea agreement the defendant expressly waived his right to assert the statute of limitations as a defense to his conviction); Oliver v. State, 379 So.2d 143 (Fla. 3d DCA 1980) (defendant is estopped from asserting a statute of limitations where he pled nolo contendere on ground that defendant cannot initiate error and then seek reversal based on the error).

People v. Williams, supra, was a prosecution for armed robbery, which offense has a three (3) year statute of limitations. The indictment was filed after the statute had run,

however, it failed to allege tolling of the statute. The court found defendant waived the defense of statute of limitations by failing to raise it. Accord, Sturdivan v. State supra.

In People v. Lohnos, supra, the court held the defendant waived, by failing to assert, his statute of limitations defense. However, the court's holding was based on the State's Criminal Procedure Law which states that any error respecting submission of lesser included offense instruction is waived unless objection is made before the jury retired.

The Petitioner contends that the authorities cited in the concurring opinion does not preclude this Court from holding that the statute of limitations is waived by the defendant's non-assertion of it and does not preclude this Court from holding that the affirmative act of requesting jury instructions on limitations-barred offenses constitutes a waiver of the statute. Upon further analysis, said authorities do indeed stand for the proposition that the statute of limitations is waived only by the defendant express waiver of it.

The law places the burden on proof upon the State to show that the prosecution for the offense charged commenced within the statute of limitations. Lowe v. State, 154 Fla. 730, 19 So.2d 106 (1944). Horton v. Mayo, 153 Fla. 611, 15 So.2d 106 (1943).

> . . . 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 state must allege facts necessary to show the statute was tolled for the offense charged before prosecution commenced. The issuing of a warrant and its delivery for execution constitute circumstances which do toll the statute. If the state does not allege the tolling of the statute in an othewise sufficient information or indictment, a defendant may by his actions waive this defense.
>
> Sturdivan v. State, supra at 302.

Sturdivan, was concerned with tolling of the statute of limitations for the offense charged and not with the statute of limitations for lesser included offenses. The State submits that the statement that "a defendant may by his actions waive this defense" is applicable only to tolling situations.

In Sturdivan, the victim's body was discovered in April, 1971. In May, 1971, while the defendant was in custody in Missouri, he confessed to the Florida killing. Thereafter, in 1971, an arrest warrant was issued and the State filed a detainer with Missouri. An indictment was filed in Florida

eight (8) years later. At trial the defendant requested instructions on the necessary lesser included degrees of first degree murder on the ground that the statute of limitations was tolled in 1971 by the issuance of the arrest warrant. The trial court refused to give the instructions and the defendant was convicted of first degree murder.

This Court held that the failure to give the requested instructions required a new trial inasmuch as the statute of limitations was tolled with the issuance of the arrest warrant. Failure of the state to allege tolling, was found to be a defense waivable by actions of the defendant, especially where the defendant's actions caused the statute to be tolled. See Horton v. Mayo, supra, (Defendant did not challenge information at trial as being outside limitations period, inasmuch as defendant knew arrest warrant was issued thereby tolling the limitations period and therefore he waived the defense that the State failed to allege that information was filed within the limitations period).

This Court in Sturdivan specifically limited its holding to cases involving the tolling of the statute of limitation for the offense charge. This Court also specifically stated that Spaziano v. State, supra, is not controlling.

> That decision concerned instructions to the jury on lesser included offenses for which both sides conceded that the statute of limitations had run. Our ruling was based on our belief that the trial court would perpetrate an absolute fraud on the jury if it were to instruct on lesser included offenses for which the defendant could neither be convicted nor sentenced. In Spaziano, we concluded that where the state charges a defendant with a capital offense and where it unquestionably appears that the statute of limitations has run on the necessary lesser included offenses, either the defendant must waive the statute of limitations defense, and thus subject himself to possible conviction and sentence for one of them, or the trial court will instruct only the capital offense. We distinguish Spaziano because in the instant case the issuance of the warrant and its eventual delivery to the Missouri state prison system clearly tolled the statute of limitations for appellant's lesser included offense. As a result, appellant was entitled to have the jury instructed on the lesser included offenses for first-degree premeditated murder.
>
> Sturdivan v. State, supra at 302.

Since the issue in Sturdivan concerned only the tolling of the statute of limitations, and not with the waiver of the statute of limitations, it was not incumbent on the court to restate either of its prior pronouncements that "the time

within which an offense is commited is a jurisdictional fact in all cases subject to limitation," see King, supra and Mitchell, supra, and "the statute must be construed liberally in favor of defendants and need not be pleaded in bar," see, King, supra; Mead, supra; Mitchell, supra, and Nelson, supra.

Inasmuch as this Court's decision in Sturdivan is expressly limited to tolling situtation, it is inapplicable to the case sub judice. Therefore, the question of how a defendant may waive the statute of limitations in the instant situation has still never been addressed by this Court.

Although Florida has never addressed the issue as to how a defendant may waive the statute of limitations, other jurisdiction have so had the opportunity. The defendant cit. United States v. Williams, supra, for the proposition that a defendant waives the defense of statute of limitations by requesting instruction on time barred lesser included offenses. The State suggests that underlying rationale of the Williams' decisions is estoppal and not waiver. Not only did the defendant request the charge given, but:

> . . . At the time this charge was requested defense counsel did not mention the limitation found in 18 U.S.C. 3282 or that a guilty verdict on the lesser

included offense might be timed barred.

United States v. Williams, supra, at 299.

To allow the defendant to contest this conviction of a time barred offense, which he did not inform the court of, would allow the defendant to induce error and then benefit from it. Therefore, the defendant was estopped to raise the defense of statute of limitation. Accord Oliver v. State, supra.

The defendant also cited as analogous authority Ray v. State, 405 So.2d 206 (Fla. 1981). The State submits that Ray also dealt with estopped and induced error, rather the waiver.

Therefore, since the statute of limitations establishes rights both for a defendant and the State, which rights are integrally related to the trial process, it is a fundamental right. Accordingly, waiver of the statute must be knowing, intelligently, and voluntarily expressly made. This Court should established that a defendant's effective waiver of the statute of limitations can be made after determining that:

1. The waiver was knowing, intelligently and voluntarily made.

2. The waiver was made for defendant's benefit and after consultation with counsel.

3. The waiver does not handicap his defense or contravene any of the public policy reasons motivating the enactment of the statute.

See Note: The Statute of Limitations in a Criminal Case can be waived? 18 William and Mary Law Review 823, (1977).

In accordance therewith, Petitioner's mere request for lesser included offense instructions was not a sufficient waiver of the statute of limitations. Therefore the trial court was correct in refusing to instruct on time barred lesser included offenses and the judgment and sentence shall be affirmed.

CONCLUSION

Based on the foregoing reasons and citations of authority, the State respectfully requests this Court to affirm the decision of the Third District Court of Appeal thereby affirming the Petitioner's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was furnished by mail to HOWARD K. BLUMBERG, Assistant Public Defender, 1351 NW 12th Street, Miami, Florida 33125, on this 17th day of May, 1983.

MICHAEL J. NEIMAND, Esquire
Assistant Attorney General

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