DA 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 PETITIONER 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 petitioner was indicted on December 14, 1977 for the first-degree murder of an individual killed more than three years earlier on June 11, 1974 (R. 1-1A). At trial, defense counsel's request for jury instructions on lesser-included offenses was denied because the statute of limitations had run as to those lesser-included offenses (TR. 647,655). The petitioner was subsequently found guilty of first-degree murder and sentenced to life imprisonment with a minimum mandatory term of twenty-five years without parole (R. 229-230).

On appeal to the District Court of Appeal, Third District, the trial court's refusal of the request for jury instructions on lesser-included offenses was upheld, and the petitioner's judgment of conviction and sentence were affirmed by a majority [1] of the Court. Tucker v. State, 427 So.2d 1006 (Fla. 3d DCA 1982). The District Court cited its prior decision in 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. 281,

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[1] Judge Jorgenson dissented based on the fact that the indictment failed to allege venue. 417 So.2d at 1020. The Court certified the following question to this Court as being of great public interest:

> Is the error in the failure of an indictment to specify the place where the crime allegedly occurred so fundamental that it may be urged on appeal though not properly presented at the trial court, where the defendant is not hindered in the preparation or presentation of his defense and the situs of the crime is proved at trial?

417 So.2d at 1013, 1020. Petitioner's notice of invocation of this Court's discretionary jurisdiction sought review based on this certification, and briefs on the merits addressing this certified question have already been filed in this case.

66 L.Ed.2d 137 (1980), which held it was not error to refuse to instruct on lesser degrees of homicide when such offenses were barred by the statute of limitations. The District Court found that the decision of the United States Supreme court in Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d (1980) did not necessitate a re-examination of the holding in Holloway v. State, supra, and also found that the decision in Holloway foreclosed any claim of a denial of equal protection in failing to give instructions on lesser-included offenses barred by the statute of limitations.

The District Court did find, however, that its prior opinion in Holloway had not resolved the issue of whether by requesting an instruction on the lesser-included offenses, a defendant could waive the statute of limitations thereby causing the lesser-included offense to become a viable charge permitting conviction and sentencing and entitling the defendant to an instruction on that offense. The District Court then squarely addressed the waiver issue in the decision under review, and held that while a defendant could waive the protections of the statute of limitations, a mere request to have the jury instructed on the limitations-barred offenses was not a sufficient waiver so as to entitle him to have the instructions given. Finding no effective waiver in the instant case, the District Court found no error in refusing to instruct on the lesser-included offenses, and affirmed the defendant's conviction.

Notice of invocation of this Court's discretionary jurisdiction to review the decision of the District Court of

Appeal was filed September 24, 1982. Review was sought based on the grounds that the decision expressly and directly conflicted with a decision of this Court on the same question of law, as well as the question certified to be of great public interest.[2] On April 6, 1983 this Court accepted jurisdiction of the case.

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2 See fn. 1, supra.

ARGUMENT

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON LESSER-INCLUDED OFFENSES WHERE DEFENSE COUNSEL EXPRESSLY REQUESTED SUCH INSTRUCTIONS, THEREBY WAIVING ANY DEFENSE BASED ON THE STATUTE OF LIMITATIONS AND CAUSING THE LESSER INCLUDED OFFENSES TO BECOME VIABLE CHARGES PERMITTING CONVICTION AND SENTENCING.

In 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. 281, 66 L.Ed.137 (1980), the Third District Court of Appeal held that it was not error to refuse to instruct on lesser degrees of homicide when such offenses were barred by the statute of limitations. In its decision in the instant case, the Third District Court of Appeal noted that the Holloway decision had not resolved the issue of whether by requesting an instruction on lesser-included offenses a defendant could waive the statute of limitations, thereby causing the lesser-included offenses to become viable charges permitting conviction and sentencing and entitling the defendant to an instruction on those offenses.

The District Court squarely addressed this waiver issue in the decision under review, and concluded that while a defendant could waive the protections of the statute of limitations, a mere request to have the jury instructed on the limitations-barred offenses was not a sufficient waiver so as to entitle him to have the instructions given. Petitioner submits that the District Court correctly held that the statute of limitations could be waived by a defendant, but erred in holding that petitioner's express request for instructions on lesser-included offenses did

not constitute such a waiver.

A.

THE RIGHT NOT TO BE PROSECUTED FOR AN OFFENSE AFTER THE RUNNING OF THE STATUTE OF LIMITATIONS CAN BE WAIVED BY A DEFENDANT.

There is a split of authority in other jurisdictions which have decided the issue of whether the statute of limitations may be waived, with the majority of jurisdictions holding that the statute of limitations is not a jurisdictional bar to prosecution but rather a waivable defense. 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 (2d 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. Williams, 79 Ill.App.3d 806, 35 Ill. Dec. 63, 398 N.E.2d 1013 (1979); Padie v. State, 594 P.2d 50 (Alaska 1979); 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, Moore'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); contra, Waters v. United States, 328

F.2d 739 (10th Cir. 1964); Benes v. United States, 276 F.2d 99 (6th Cir. 1960); People v. Zamora, 18 Cal. 3d 538, 134 Cal.Rptr. 784, 557 P.2d 75 (1976); State v. Civella, 364 SW 2d 624 (Mo.App. 1963); State v. Stillwell, 175 N.J. Super. 244, 418 A.2d 267 (N.J.App. 1980); City of Cleveland v. Hirsch, 26 Ohio App.2d 6, 268 NE 2d 600 (Ohio App. 1971.

The reasoning behind the decisions holding the statute of limitations to be a waivable defense is typified by the following statement in United States v. Wild, supra:

> "[I]f a defendant may waive certain constitutional rights, he should certainly be capable in this instance of waiving a statutory right such as the statute of limitations."

551 F.2d 424. The court then proceeded to note that the major purposes behind the statute of limitations involve protecting the defendant, and that accordingly the defendant should be able to forego such protection where he decides that to do so would be in his own best interest. 551 F.2d at 423-24. These sentiments were echoed by Judge Daniel S. Pearson in his specially concurring opinion in the decision under review:

> "It is sometimes said that 'the time within which an offense is committed is a jurisdictional fact,'. . .[I]f 'jurisdictional fact' is said to mean that a court is powerless to convict a defendant of a limitations-barred offense and the term is thus woodenly applied to preclude a limitations-barred conviction which the defendant is willing to accept, then the statute of limitations, designed to shield only the defendant, is turned on him as a sword."

Tucker v. State, 417 So.2d 1006, 1014-15 (citations omitted).

In Florida, this Court has stated that application of the

statute of limitations is a substantive matter, see, e.g. Lane v. State, 337 So.2d 976 (1976) and State ex rel. Manucy v. Wadsworth, 293 So.2d 345 (Fla. 1974), and that the time within which an offense was committed is a jurisdictional fact which must be proved by the state, see e.g. State v. King, 282 So.2d 162 (Fla. 1973); Mitchell v. State, 101 So.2d 373 (Fla. 1958). Despite the use of the term "jurisdictional fact", however, two recent decisions of this Court make it clear that a defendant can in fact waive the statute of limitations.

In Sturdivan v. State, 419 So.2d 200 (Fla. 1982), this Court reversed a first-degree murder conviction and sentence of death based on the trial court's refusal to instruct the jury as to any lesser included offenses. This holding was based on a finding that the issuance of an arrest warrant and its delivery to the appropriate authorities had tolled the statute of limitations for the lesser offenses. In the course of restating the principles governing the state's burden to plead sufficient facts in the information to show that prosecution had begun within the statute of limitations, this Court stated the following:

> "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 issuance 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 otherwise sufficient information or indictment, a defendant may by his actions waive this defense.

419 So.2d at 302.

This Court went on in Sturdivan to distinguish the case from its decision in Spaziano v. State, 393 So.2d 1119 (Fla. 1981) based on the fact that in Sturdivan the statute of limitations had been tolled for the lesser-included offense, whereas in Spaziano all parties conceded that the statute of limitations had run on the lesser-included offenses. This Court then restated its holding in Spaziano as follows:

> "[W]here 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.

This Court's recent decisions in Sturdivan and Spaziano clearly establish that Florida follows the majority of jurisdictions which hold that the statute of limitations is an affirmative defense which can be waived by a defendant.

B.

> A DEFENDANT'S REQUEST FOR JURY INSTRUCTIONS ON LIMITATIONS-BARRED LESSER-INCLUDED OFFENSES CONSTITUTES A WAIVER OF ANY DEFENSE BASED ON 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.

Although the three judge panel of the District Court unanimously [3] held that a request for instructions on lesser-

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3 Judge James Jorgenson's dissenting opinion indicates that it "should not be read as a rejection of the views expressed in the majority opinion on the issue of waiver of lesser included (Cont.)

included offenses is not an effective waiver of the right not to be prosecuted and convicted for an offense for which the statute of limitations has run, two different reasons were given for this ruling. In the majority opinion, Judge Wilkie D. Ferguson, Jr. relied on the nature of the right not to be convicted of an offense for which prosecution is barred by limiting statute. Judge Ferguson described that right as "substantive and fundamental", and therefore determined that:

> "Waiver of that right must meet the same strict standards which courts have applied in determining whether there has been an effective waiver as to other fundamental rights. Waiver of any fundamental right must be express and certain, not implied or equivocal."

417 So.2d at 1013 (footnote omitted).

The right not to be convicted of an offense for which prosecution is barred by limiting statute is simply not the type of fundamental right requiring an express waiver. Significantly, statutes of limitation do not share the constitutional stature of the rights involved in the waiver cases [4] cited in the majority opinion. Furthermore, even constitutional rights can be waived simply by the failure of an individual to assert them in a timely fashion. Ray v. State, 403 So.2d 956 (Fla. 1981). For example, the constitutional protection against double jeopardy has

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offenses or views expressed in my brother Pearson's special concurrence since I, likewise, agree that a defendant who chooses to do so can waive protection of the statute of limitations." Tucker v. State, supra, 417 So.2d at 1020.

[4] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); Groomes v. State, 401 So.2d 1139 (Fla. 3d DCA 1981); Sessums v. State, 404 So.2d 1074 (Fla. 3d DCA 1981).

repeatedly been held to be a personal right which, if not raised at the time of trial, will be regarded as waived. See e.g. United States v. Perez, 565 F.2d 1227 (2d Cir. 1977); United States v. Scott, 150 U.S.App.D.C. 323, 464 F.2d 832 (1972); Grogan v. United States, 394 F.2d 287 (5th Cir. 1967), cert. denied 393 U.S. 830, 89 S.Ct. 97, 21 L.Ed.2d 100 (1968); Drake v. State, 400 So.2d 487 (Fla. 5th DCA 1981); Chapman v. State, 389 So.2d 1065 (Fla. 5th DCA 1980); Johnson v. State, 299 So.2d 155 (Fla. 3d DCA 1974).

Aside from the non-constitutional nature of the statute of limitations, it must also be taken into consideration that unlike the Double Jeopardy Clause, the statute of limitations simply creates time and manner restrictions on, rather than permanent barriers to, prosecution. In this sense, the statute of limitations is closely analogous to the speedy trial rule, Fla.R.Crim.P. 3.191. Both the speedy trial rule and the statute of limitations acknowledge the state's right to try certain persons, but then set boundaries on the exercise of that power. Indeed, in one sense, the speedy trial rule provides greater protections to a defendant than the statute of limitations, for the speedy trial rule applies in all cases, whereas the statute of limitations does not apply to capital or life felonies. See Section 775.15 Florida Statutes (1981).

This Court has recently noted the importance of the right provided by the speedy trial rule:

> "Indisputably, the right to a speedy trial is one of the most sacred and important rights guaranteed by the United States and the Florida Constitutions. It is common knowledge

> that the said right has been flagrantly ignored by many courts in this country, and strict rules like Rule 3.191 represent the enlightened effort of many courts to implement the constitutionally-guaranteed right to a speedy trial."

Sherrod v. Franza, 427 So.2d 161, 163 (Fla. 1983), quoting State ex rel. Reynolds v. Willis, 255 So.2d 287 (Fla. 1st DCA 1971). However, notwithstanding the importance of the right guaranteed by Rule 3.191, subsection (a)(1) of that rule provides for discharge only "upon motion timely filed with the court having jurisdiction," and accordingly the right to a speedy trial under Rule 3.191 is waived if not raised in the trial court by appropriate motion. Schulkin v. State, 287 So.2d 137 (Fla. 3d DCA 1973); Morris v. State, 267 So.2d 99 (Fla. 3d DCA 1972), cert. denied 275 So.2d 251 (Fla. 1973).

The fact that the statute of limitations has been referred to as "jurisdictional" does not establish that the right provided by the statute of limitations is so fundamental that an express waiver is required. The statute of limitations is "jurisdictional" only in the sense that prosecution is barred after the statute has run. In this regard, the protection provided by the statute of limitations is analogous to the protections provided by the Double Jeopardy Clause, the immunity statute, [5] and the speedy trial rule. As this Court recently stated:

> "A court does not have jurisdiction to try a defendant when he is entitled to discharge on the ground of double jeopardy or collateral

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5 Section 914.04 Florida Statutes (1981).

> estoppel, or if he is entitled to a discharge because of a violation of his immunity from prosecution or his right to a speedy trial."

Sherrod v. Franza, supra, 427 So.2d at 163.

Notwithstanding this "jurisdictional" nature of the rights guaranteed by the Double Jeopardy Clause, the immunity statute, and the speedy trial rule, each of these rights is waived if it is not raised at trial by appropriate motion. See United States v. Perez, supra (double jeopardy); United States v. Scott, supra (same); Grogan v. United States, supra (same); Drakes v. State, supra (same), Chapman v. State, supra (same); Johnson v. State, supra (same); McKown v. State, 54 So.2d 54 (Fla. 1951) (immunity); Buchanan v. State ex rel. Husk, 167 So.2d 38 (Fla. 3d DCA 1964), cert. denied 174 So.2d 742 (Fla. 1964), cert denied 382 U.S. 954, 86 S.Ct. 428, 15 L.Ed.2d 359 (1965) (same); Bazarte v. State, 114 So.2d 500 (Fla. 2d DCA 1959), cert denied 117 So.2d 844 (Fla. 1959) (same); Schulkin v. State, supra (speedy trial); Morris v. State, supra (same).

Thus, although certain rights may be substantive as opposed to procedural, and although those rights may provide very important protections to a criminal defendant, and although a violation of those rights might be jurisdictional in the sense that such violation bars prosecution, the fact remains that such rights are not fundamental rights which require an express waiver. Petitioner submits that the right provided by the statute of limitations is just such a right, and accordingly an express waiver is not required.

Whereas the majority opinion in the decision under review

relied on the "fundamental" nature of the right provided by the statute of limitations to support its holding that a request for instructions on lesser-included offenses is not an effective waiver of that right, the specially concurring opinion took a somewhat different approach:

> "[W]hile I wholeheartedly share Judge Ferguson's view that the bar of the statute of limitations can be waived, I agree, albeit reservedly, that Tucker's mere request to have the jury instructed on the limitations-barred lesser offenses was not a sufficient waiver under binding Florida caselaw so as to entitle him to have the instructions given.
>
> 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. [citing, United States v. Doyle, supra; United States v. Parrino, supra; People v. Williams, supra; People v. Lohnes, supra; 1 C. Wright, Federal Practice and Procedure, supra; and 8 J.Moore, Moore's Federal Practice, supra]. Under these authorities Tucker's request for instructions on limitations-barred offenses 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 non-assertion 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. 905 101 S.Ct. 281, 66L.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.

Tucker v. State, supra, (Pearson, J. concurring specially), 417 So.2d at 1014 (footnote omitted).

Petitioner submits that the authorites cited in the specially concurring opinion do not not preclude this Court from holding that the statute of limitations is waived by the defendant's non-assertion of it, and certainly do not preclude this Court from holding that the affirmative act of requesting jury instructions on limitations-barred offenses does constitute a waiver of the statute.

In Nelson v. State, supra, this Court stated:

> "Statutes of limitations in respect to crimes are always construed liberally in favor of defendants, and it is not deemed necessary for a party relying upon them to plead them in bar."

17 Fla. at 197. This Court then held that a conviction for third degree murder could not be had on an indictment for murder where the statute of limitations had run as to that offense. There is no discussion of waiver in this Court's opinion. In Mitchell v. State, supra, this Court restated its holding in Nelson, and also stated that "(t)he time within which an offense is commited is a jurisdictional fact in all cases subject to limitation." 25 So.2d at 74.

In Horton v. Mayo, supra, the defendant had filed a petition for habeas corpus based on the ground that the information filed against him was fatally defective because the face of the information showed that the statute of limitations had run as to the offense charged. The defendant had filed no motion to quash,

which led this Court to remark that a "[m]otion to quash would have been an appropriate remedy" and to cite to the statute in effect at the time providing that a defendant who does not move to quash before he pleads to the indictment or information shall be taken to waive all objections which are grounds for a motion to quash. 15 So.2d at 327-328. This Court went on to deny habeas corpus relief based in part on that statute.

In Mead v. State, supra, this Court held that the defendant's failure to move to quash the information and failure to specifically object to an erroneous instruction concerning the statute of limitations did not preclude him from raising the statute of limitations as an issue on appeal. This Court cited to Nelson and Mitchell, and restated the principle that "the statute must be construed liberally in favor of defendants and need not be pleaded in bar." 101 So.2d at 375.

Finally, in State v. King, supra, this Court cited to Mitchell for the proposition that "[t]he time within which an offense is committed is a jurisdictional fact in all cases subject to limitation," 282 So.2d at 164, and cited to Mead for the proposition that "[t]he appellant was not required to raise the question of the statute of limitations as the statute must be construed liberally in favor of defendants and need not be pleaded in bar." 282 So.2d at 165. Significantly, however, this Court in King also stated that "a most significant burden of proof is placed upon the State in order to proceed once the jurisdiction of the Court is questioned through the raising of the Statute of Limitations." 282 So.2d at 164.

The foregoing cases can hardly be viewed as unquestionably establishing the principle that the statute of limitations is not waived by the defendant's non-assertion of it. Furthermore, two days after the decision of the district court of appeal in the instant case was filed, this Court issued its decision in Sturdivan v. State, supra. In Sturdivan, this Court cited to Horton v. Mayo, supra, and Rouse v. State, 44 Fla. 148, 32 So. 784 (1902) for the principle that "the state must show in the information or indictment that the prosecution 'for the offense charged' has begun within the statute of limitations." 419 So.2d at 301-02. Significantly, however, this Court did not restate either of its prior pronouncements that "the time within which an offense is committed 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. Instead this Court made the following statement:

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

419 So.2d at 302.

Petitioner submits that in light of this latest pronouncement by this Court on the subject of waiver of the statute of limitations, it is possible that the statute of

limitations can be waived by the defendant's non-assertion of the defense. However, this Court need not decide this issue in the instant case, for the petitioner did not merely fail to object to the instructions on lesser-included offenses, he expressly requested such instructions. If, as this Court stated in Sturdivan, "a defendant may by his actions waive" the defense of the statute of limitations, his actions in requesting that the jury be instructed on lesser-included offenses normally barred by the statute of limitations certainly constitute such a waiver.

Several decisions in this state, including three from this Court, have held that a trial court is not required to instruct the jury on lesser-included offenses barred by the statute of limitations. See Spaziano v. State, 393 So.2d 1119 (Fla. 1981); 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. 1980), cert. denied 449 U.S. 905, 101 S.Ct. 281, 66 L.Ed.2d 137 (1980). However, the decisions in Perry, Blackmon, Keenan and Holloway do not in any way address the issue of waiver of the statute of limitations, and in Spaziano the defendant contended that he could not be forced to choose between waiving the statute of limitations and having the jury instructed only as to first degree murder. Furthermore, all of these cases pre-date this Court's decision in Studivan and its pronouncement that a defendant may by his actions waive the defense of the statute of limitations.

Other jurisdictions have expressly held that a defendant waives the defense of statute of limitations by requesting instructions on lesser-included offenses normally barred by the statute. In United States v. Williams, 684 F.2d 296 (4th Cir. 1982), the Fourth Circuit stated:

> In the present case Williams received the charge he requested, and he was convicted of the lesser included offense contained therein. Murder in the first degree is a capital offense for which there is no statute of limitations. If the court had not given the requested lesser included offense charge, Williams would have been in the unenviable position of facing a verdict of guilty or not guilty on a capital offense. The requested charge was certainly in Williams' best interest under the circumstances. He requested the charge, did not object to the charge, was convicted under the charge and, in all probability, benefited from the charge. He cannot now complain of the result and his actions obviously constitute a waiver of the time limitation contained in § 3283.

684 F.2d at 299-300. See also People v. Lohnes, 76 Misc.2d 507, NYS 2d 279 (Sup.Ct. 1973).

This Court has found waiver under facts closely analogous to those in the instant case. In Ray v. State, 403 So.2d 406 (Fla. 1981), this Court addressed the issue of whether a defendant convicted of a crime for which he was not charged, but which was submitted to the jury as a lesser included offense when in fact it was not, may challenge that conviction when he failed to object to the submission of that crime to the jury. This Court began its resolution of that issue by recognizing the fundamental nature of the constitutional right involved:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a

> trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.
>
> . . . . .
>
> It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

403 So.2d at 959, quoting Cole v. Arkansas, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed. 644 (1948).

Based on the importance of the principles of due process involved, this Court in Ray held that the defendant's mere failure to object to an instruction on a crime not charged did not constitute a waiver of the error of convicting him of such a crime. However, notwithstanding the magnitude of the constitutional right involved, this Court went on to hold that the right could be waived by defense counsel's affirmative actions of requesting the improper instruction, and under such circumstances the defendant could indeed be convicted of a crime not charged.

Surely, if a defendant can waive his procedural due process right not be be convicted of a charge never made by requesting a jury instruction on such charge, a defendant can waive the right not to be convicted of an offense for which prosecution is barred by limiting statute by requesting a jury instruction on such an offense. Accordingly, petitioner in the instant case, by expressly requesting jury instructions on limitations-barred lesser-included offenses waived any defense based on the statute of limitations, and was therefore entitled to have those

instructions given. The trial court erred in refusing petitioner's request for the instructions, and this error requires that petitioner be granted a new trial.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to quash the decision of the Third District Court of Appeal, and direct that Court to reverse the petitioner's judgment of conviction and sentence.

Respectfully submitted,

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By: _____
HOWARD K. BLUMBERG
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida, this 26th day of April, 1983.

By: _____
HOWARD K. BLUMBERG
Assistant Public Defender