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IN THE SUPREME COURT OF FLORIDA

JESUS PEREZ,

Petitioner,

vs. CASE NO.: 72,161

STATE OF FLORIDA,

Respondent.

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PETITIONER'S INITIAL BRIEF ON THE MERITS

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## PRELIMINARY STATEMENT

The Petitioner, Jesus Perez, was the defendant in the trial court and will be referred to in this brief as either "defendant", "Petitioner" or "Perez".

The Respondent, State of Florida, will be referred to as "State".

Citations to the record will be designated by the letter "R" followed by the page number.

## STATEMENT OF THE CASE AND FACTS

This is an appeal from the decision of the First District Court of Appeal rendered in State v. Perez, 519 So.2d 669 (Fla. 1 DCA 1988), which reversed the trial court's order dismissing three counts of sexual battery against the Petitioner.

On April 16, 1986, the State charged Perez with three separate counts of sexual battery on children under the age of eleven. On August 9, 1986, the State filed amended informations, alleging that the offenses occurred "between June 1, 1975, and June 1, 1976" (R.1-3). Perez filed motions to dismiss each count, alleging that the crimes were no longer "capital" because the death penalty could not be imposed and, therefore, the prosecution was not brought within the applicable statute of limitations (R.9-14). A hearing was held (R.30-64) after which, the trial court granted defendant's motions to dismiss (R.18-22).

The State timely filed notices of appeal to the First District Court of Appeal (R.23-25). The First District reversed and remanded the case to the trial court. Perez filed motions for rehearing and a request that the district court certify the question to the Florida Supreme

Court, both of which were denied (See Appendix). Perez then petitioned this court to accept jurisdiction which was granted on June 14, 1988. This appeal follows.

## SUMMARY OF ARGUMENT

In 1981, the Florida Supreme Court held, in Buford v. State, that the death penalty could not be imposed in a sexual battery case. The holding in Buford is consistent with the decision of the United States Supreme Court in Coker v. Georgia.

When the United States Supreme Court abolished the death penalty nationwide in 1972 with its decision in Furman v. Georgia, there was no death penalty in Florida during the "hiatus period" between the Furman decision and the legislature's enactment of the current death penalty statute. During that period, the Florida Supreme Court held, in Donaldson v. Sack, that a capital offense was one for which the death penalty could be imposed and that other procedural safeguards attendant to capital cases were inapplicable when the death penalty was no longer possible. In addition, in Reino v. State, the Florida Supreme Court held that all vestiges of capital punishment, procedural and substantive, fall when the death penalty is inapplicable.

Since Buford was decided in 1981, the Florida Supreme Court has considered a number of sexual battery cases, formerly deemed "capital." In each case, the Florida courts have consistently held that, because the death

penalty is not a possible punishment, the offenses are not "capital" in terms of requiring a grand jury indictment, a twelve-person jury and a prohibition of bail on appeal. The only question that the courts of Florida have not considered since Buford is the issue of whether the statute of limitations applies.

Perez is accused of committing sexual batteries between 1975 and 1976 but was not charged until 1986. Perez contends that the statute of limitations does apply and that the ruling of the First District Court of Appeal is contrary to Reino v. State when that case is viewed in light of Buford and the line of cases decided after Buford. Because this court has consistently done away with all other attributes of capital cases in sexual battery cases with the exception of the statute of limitations, it is only logical that the statute of limitations should be applied.

## QUESTION PRESENTED FOR REVIEW

WHETHER THE STATUTE OF LIMITATIONS APPLIES TO A SEXUAL BATTERY CASE THUS BARRING THE PROSECUTION OF PETITIONER WHERE THE DEATH PENALTY CANNOT BE IMPOSED.

Perez is charged with committing three acts of sexual battery "between June 1, 1975, and June 1, 1976" (R.1-3). During that period of time, Florida had two different statutes of limitation for non-capital crimes, providing that prosecutions for non-capital crimes must be commenced within a minimum of two years and a maximum of four years, depending upon the statute involved.[1]

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[1] §932.465, F.S. (1973), in effect until June 30, 1975, provided, in pertinent part:

(1) A prosecution for an offense punishable by death may be commenced at any time.
(2) Prosecution for offenses not punishable by death must be commenced within two years after commission...

During the 1974 legislative session, the statute was amended and transferred by Chapter 74-383, Laws of Florida, thus creating §775.15, F.S. (1975). This new statute of limitations, which took effect on July 1, 1975, provided, in pertinent part:

(1) A prosecution for a capital felony may be commenced at any time.
(2) Except as otherwise provided in this section, prosecutions for other offenses are subject to the following periods of limitation:
(a) A prosecution for a life felony or a felony of the first degree must be commenced within 4 years after it is committed;
(b) A prosecution for any other felony within 3 years after it is committed...

It is clear from the record that the State's prosecution did not commence until 1986, at least eleven years after the alleged acts were committed (R.1-3). The question thus presented is whether or not the statute of limitations applies to this offense at all. If it does, the State is forever barred from prosecuting Perez for these offenses.

There are, basically, five major differences between a "capital" crime and a "non-capital" crime. In capital cases:

1. Death is a possible punishment;

2. The defendant must be charged by grand jury indictment rather than by information. Art. 1, §15, Florida Constitution;

3. A jury of twelve persons is required. Rule 3.270, Fla.R.Crim.P.; §913.10, F.S. (1985);

4. The accused has no right to bail on appeal;

5. There is no statute of limitations.

In Buford v. State, 103 So.2d 943 (Fla. 1981), this court held that a sentence of death was grossly disproportionate and excessive punishment for the crime of sexual assault and was, therefore, forbidden by the Eighth Amendment as cruel and unusual punishment. The death

penalty for rape itself had been declared unconstitutional in Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). Since death is not a possible penalty in the instant case, Perez contends that his alleged offense is no longer "capital" for purposes of the statute of limitations. While Florida courts have considered the other distinctions between "capital" and "non-capital" cases in light of Buford, it appears that the question of whether the statute of limitations applies to this offense is one of first impression in this state.

In State v. Hogan, 451 So.2d 844 (Fla. 1984), this court considered the question of whether a person who was charged with sexual assault could be tried before a jury of six persons rather than twelve. The court defined the term "capital" as a case where death is a possible penalty and stated:

> "Sexual battery of a child, therefore, while still defined as a 'capital' crime by the legislature, is not capital in the sense that a defendant might be put to death. Because the death is no longer possible for crimes charged under subsection 794.011(2), a twelve-person jury is not required...."

451 So.2d 844, 845.

In Snowden v. Donner, 464 So.2d 223 (Fla. 3 DCA 1985), the Third District Court of Appeal held that, since

the death penalty could not be imposed for sexual battery of a child, the offense was not a "capital crime" and did not require a grand jury indictment. The Second District reached the same conclusion, also relying on Hogan, four days earlier in State v. Wells, 466 So.2d 291 (Fla. 2 DCA 1985). See also Cooper v. State, 453 So.2d 67 (Fla. 1 DCA 1984); Carter v. State 483 So.2d 740 (Fla. 5 DCA 1986) (remanded for resentencing, 516 So.2d 1142 [Fla. 1987]).

In Nussdorf v. State, 495 So.2d 819 (Fla. 4 DCA 1986); rev. den., 503 So.2d 328 (Fla. 1987), the defendant, charged with sexual battery, applied for bond pending appeal which is available in non-capital cases. The court again recognized that the death penalty was not applicable, citing Buford, and stated:

> "...Thus, sexual battery is not a capital offense in Florida, notwithstanding that contrary language is found in the statutory section applied in the instant case...."

495 So.2d 819, 820 (emphasis applied).

The State, however, urged the court to, in effect, apply the term "capital" in some instances, such as an appeal bond,

although not in others. The court declined stating:

> "We do not think...that capital means punishable by death for some purposes, but may be something else for other purposes...If the death penalty is no longer available for punishing a crime, that crime is no longer a capital offense."

Id.

It is apparent that no Florida court has considered the applicability of the statute of limitations to former "capital" crimes which were rendered non-capital by Buford. However, a similar climate existed during the so-called "hiatus period" after the United States Supreme Court decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), which abolished the death penalty nationwide. That decision, rendered on July 24, 1972, abolished the death penalty in Florida until the Florida Legislature enacted the current death penalty statute, effective October 1, 1972, thus creating a "hiatus period" when there was no death penalty in Florida. During that time, this court decided Donaldson v. Sack, 265 So.2d 499 (Fla. 1972) and considered the definition of the term "capital offense" in light of the abolition of the death penalty. The court relied upon its previous definition in Adams v. State, 48 So. 219 (1908) and defined "capital

crime" as "one for which the punishment of death is inflicted." Donaldson, supra, at 502. This court held, that since there was no death penalty in Florida at the time, there was, therefore, no such designation as a capital case. See also, State v. Johnston, 144 P. 944 (Wash. 1914). Because there were no "capital crimes" during the "hiatus", the Donaldson court found the other safeguards attendant to such cases, such as twelve-person juries, bifurcated trials and grand jury indictments, were also inapplicable. The statute of limitations was not considered. Donaldson was cited with approval by the court in both Snowden and Hogan supra.

This court did consider the question of the statute of limitations during the "hiatus" in Reino v. State, 352 So.2d 853 (Fla. 1977). In Reino, the defendants committed a first degree murder on September 7, 1972, after the Furman decision but before the new death penalty statute was enacted. They were not indicted until August 5, 1976, over four years later and well beyond the two-year statute of limitations in effect at the time. The State argued that procedural changes, such as those discussed in Donaldson, fall when the death penalty is abrogated, however, substantive changes such as the statute of limitations were not affected. This court rejected that argument and found

that the statute of limitations did apply, thus barring the prosecution of Reino. The court stated:

> "...[H]ence, it is apparent that all incidents of capital crimes, substantive as well as procedural, become inapplicable upon abolition of the death penalty. It would be conceptually inconsistent to conclude that the procedural advantages inuring to a defendant in a capital case fall with abolition of the death penalty and then conclude that the substantive disadvantages (limitation on entitlement to bail and unlimited statute of limitations) remain viable...."

352 So.2d 853 (emphasis supplied).

In United States v. Brown, 422 A.2d 1281 (D.C.C.A. 1980), the District of Columbia Court of Appeals was presented with the question of whether the abolition of the death penalty made the statute of limitations applicable in a rape case. Brown was indicted on April 25, 1979, on a charge of armed rape, a capital offense according to the statute. Brown contended that his prosecution was barred

by the statute of limitations[2] since the death penalty was inapplicable and the offense was no longer "capital." The government urged that the decision of whether an offense is deemed "capital" or not should depend upon the nature of the offense rather than the punishment authorized. The court rejected that argument, holding that, "there is no question that a capital crime is defined as one punishable by death", therefore, the five-year statute of limitations applied and Brown's prosecution was barred. United States v. Brown, supra, at 1284, 1285.

Rule 3.350, Fla.R.Crim.P., allows ten preremptory challenges in a trial if the offense charged is punishable by death or life imprisonment. This would include, in addition to capital cases, many first-degree felonies which carry the maximum penalty of life imprisonment. However, in other jurisdictions where the number of challenges depends upon the capital/non-capital nature of the offense, the

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[2]The pertinent federal statutes of limitation are 18 U.S.C., §§ 3281 & 3282 and read:

§ 3281 Capital offenses
An indictment for any offense punishable by death may be found at any time without limitation except for offenses barred by the provisions of law existing on August 4, 1939.

§ 3282 Offenses not capital
Except as otherwise expressly provided by law, no person shall be prosecuted, tried or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

applicability of the death penalty to the offense has had a profound impact. In People v. Watkins, 308 N.E.2d 180 (Ill. 1974), the defendant, charged with first degree murder, contended that he was entitled to twenty preremptory challenges required in "capital" cases. The court limited him to ten (as permitted in non-capital felony cases) finding that, since the death penalty was not possible, the offense was not "capital." See also, Martin v. State, 314 N.E.2d 60 (Ind. 1974); cert den., 420 U.S. 911, 95 S.Ct. 833, 42 L.Ed.2d 841 (1975); U.S. v. McNally, 485 F.2d 398 (8th Cir. 1973); cert den., 415 U.S. 978, 94 S.Ct. 1566, 39 L.Ed.2d 874 (1974); Jenkins v. State, 509 S.W.2d 240 (Tenn. 1974); State v. Haga, 536 P.2d 648 (Wash.App. 1975).

The State here, and the First District below, rely heavily on State ex rel. Manucy v. Wadsworth, 293 So.2d 345 (Fla. 1974). In Manucy, this court held:

1) That statutes of limitations in criminal cases vest substantive rather than procedural rights;

2) The statute of limitations in force and effect at the time of the incident giving rise to the criminal charges is controlling; and

3) Manucy's prosecution for murder by information, rather than indictment, violated the constitutional indictment requirement.

The court was pursuaded to reverse on the basis that Manucy should have been tried by indictment. Perez contends that Manucy is distinguishable and not controlling here for several reasons. First, Manucy was decided before Coker v. Georgia, Reino and Buford, supra. Reino clearly held that all vestiges of capital punishment, both substantive and procedural, are inapplicable when the death penalty is not involved. Reino v. State, supra, at 858. This includes the statute of limitations. Second, Manucy was charged with first degree murder which this court has recognized as the only remaining capital offense in Florida. Rowe v. State, 417 So.2d 981 (Fla. 1982); Heuring v. State, 513 So.2d 122 (Fla. 1987). As such, Manucy's prosecution by information was improper, however, if Manucy had been charged by information with sexual battery, equally a capital crime in the opinion of the lower court, the prosecution would clearly have been proper. For these reasons, Perez contends that Manucy is no longer the law of Florida insofar as it is inconsistent with Reino, Buford and its progeny. It is not controlling here.

The purpose of a statute of limitations is to limit an individual's exposure to criminal prosecution to a fixed period of time and is designed to protect people from having to defend themselves against charges when the facts,

and memories, have been obscured by the passage of time. Toussie v. United States, 397 U.S. 112, 90 S.Ct. 858, 25 L.Ed.2d (1970); Reino v. State, supra. It is also well-settled law in Florida that criminal statutes are construed strictly in favor of the person against whom a penalty is to be imposed. Reino, supra; State v. Llopis, 215 So.2d 17 (Fla. 1971). Further, statutes of limitation in criminal cases are to be construed liberally in favor of the accused. Reino, supra. This court has consistently held that the term "capital offense" means an offense for which death is a possible penalty and that first degree murder is the only existing capital felony in Florida. Rowe, supra; Heuring, supra. Since Buford, the Florida courts have slowly and consistently done away with distinction after distinction between capital cases and non-capital cases in sexual offenses with the exception of the statute of limitations. It is now time for this court to extend that reasoning to the statute of limitations by holding that sexual battery cases are not "capital" cases for purposes of the statute of limitations. The decision of the First District directly conflicts with Reino, when Reino is viewed in light of Buford and its progeny. To hold otherwise would be inconsistent with the now well-established trend begun by this court in Buford, and

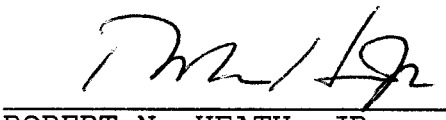
followed in Nussdorf, Heuring, Wells, Snowden and Hogan, supra.

## CONCLUSION

The decision of the First District should be reversed with orders that the trial court's order be affirmed and the Petitioner discharged.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Kurt L. Barch, Esquire, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, by Federal Express Mail, on this 11th day of July, 1988.



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