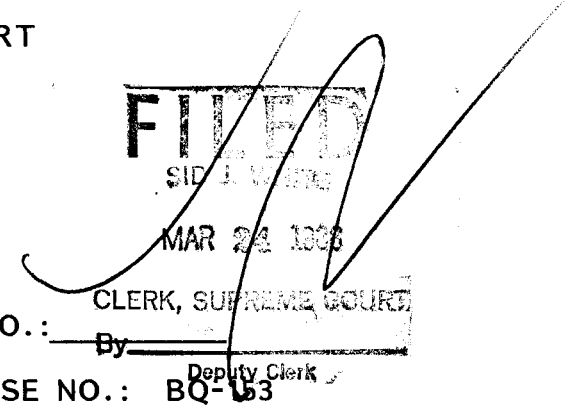
IN THE SUPREME COURT
STATE OF FLORIDA



JESUS PEREZ,

Defendant/Petitioner,

vs.

CASE NO.:

DCA CASE NO.: BQ-153
BQ-154
BQ-155

STATE OF FLORIDA,

Plaintiff/Respondent.

PETITION FOR CONSTITUTIONAL CERTIORARI
AND JURISDICTIONAL BRIEF OF PETITIONER

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INTRODUCTION

This jurisdictional brief is filed on behalf of the Petitioner, JESUS PEREZ, the Defendant in this criminal action.

STATEMENT OF THE CASE AND FACTS

The trial court granted Petitioner, Perez's motions to dismiss three counts of sexual battery on children under the age of eleven years on the basis that the statute of limitations had expired since the offenses were alleged to have been committed between June 1, 1975, and June 1, 1976. Petitioner was not arrested and charged until February, 1986. The State of Florida, Appellant below, appealed the trial court's order to the First District Court of Appeal alleging that, since sexual battery of a child under the age of eleven years is a "capital crime", there is no statute of limitation. The First District reversed and remanded the case.

Petitioner now seeks review in this Court because the First District's opinion is in conflict with this Court's prior ruling in Reino v. State, 352 So.2d 853 (Fla. 1977) when viewed in light of Buford v. State, 403 So.2d 943 (Fla. 1981).

SUMMARY OF ARGUMENT

The decision of the First District Court of Appeal in this case directly and expressly conflicts with the Supreme Court decision in Reino v. State, 352 So.2d 853 (Fla. 1977) when that decision is viewed in light of the later ruling of the Supreme Court in Buford v. State, 403 So.2d 943 (Fla. 1981). Thus, under Article V, Section 3(b)(3) of the Florida Constitution and Rule 9.030(a)(2)(iv), Florida Rules of Appellate Procedure, this Court may exercise jurisdiction to review the present case.

In the opinion below, the First District held that, because death was a possible penalty for these offenses in 1975 and 1976, there is no statute of limitation, relying on State ex rel. Manucy v. Wadsworth, 293 So.2d 345 (Fla. 1974). That holding is inconsistent with Reino v. State, supra, which held that, when the death penalty is no longer applicable, all vestiges of capital offenses, both procedural and substantive, fall. Since death is not a possible penalty for this offense in light of Buford v. State, supra, and since this Court has ruled that the requirements of a grand jury indictment and twelve-person jury are equally inapplicable when the death penalty cannot be imposed, this Court should likewise find that the statute of limitations is applicable here and the

prosecution of Petitioner for these offenses is barred by the passage of time.

JURISDICTIONAL ISSUE

WHETHER THE DECISION BY THE DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH REINO V. STATE, 352 So.2d 853 (Fla. 1977) IN LIGHT OF BUFORD V. STATE, 403 So.2d 943 (Fla. 1981).

JURISDICTIONAL ARGUMENT

In Reino v. State, 352 So.2d 853 (Fla. 1977), this Court considered the applicability of the statute of limitations to a "capital offense" which took place after the United States Supreme Court abolished the death penalty in Furman v. Georgia. This Court ruled that the two-year statute of limitation, in effect at the time, barred prosecution of Reino for first degree murder because death was no longer a possible punishment for the crime. The Court stated:

> "...[i]t is apparent that all incidents of capital crimes, substantive as well as procedural, become inapplicable upon abolition of the death penalty. It would be conceptionally 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."

Reino v. State, 352 So.2d, at 858. The Court further noted its prior decision in Donaldson v. Sack, 265 So.2d 499 (Fla. 1972) which obviated the need for a grand jury indictment and a twelve-person jury in cases where death is not a possible penalty though designated "capital" by the legislature. See also, State v. Hogan, 451 So.2d 844 (Fla. 1984). The Court also noted that statutes of limitation are construed liberally in favor of the accused. Reino v. State, 352 So.2d, at 860.

In Buford v. State, 403 So.2d 943 (Fla. 1981), this Court held that the death penalty was excessive punishment for sexual assault and was, therefore, prohibited by the Eighth Amendment. It is thus clear that, at the time Petitioner was arrested and charged with sexual battery, death was not a possible penalty and it was not necessary for the state to charge him by indictment or assure him of a twelve-person jury. Since that time, this Court has held that a capital felony is one punishable by death, Heuring v. State, 513 So.2d 122 (Fla. 1987) and that the only capital felony in Florida is first degree murder. Id; Rowe v. State, 417 So.2d 981 (Fla. 1982).

The decision of the District Court of Appeal ignores the clear holding of this Court in Reino and Donaldson, supra.

The Court below distinguished those decisions by reasoning that the statute of limitations in effect at the time of the offense controls and, since death was at least a possible penalty in 1975 and 1976, there is no statute of limitation here. The state advanced the same argument in Reino, supra, which was rejected by this Court which ruled that all attributes of capital crimes, procedural or substantive, fall when the death penalty is abolished. Reino v. State, 352 So.2d, at 857. It is thus necessary for this Court to review the case to re-emphasize its previous holding that a capital crime is one for which death is a possible penalty and that, in Florida, murder in the first degree is the only capital crime.

CONCLUSION

The petition for discretionary review should be granted on the basis of the conflict between the instant decision and Reino v. State and Donaldson v. Sack, supra.

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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, Attorney for Plaintiff/Respondent, by regular U.S. Mail, on this 23rd day of March, 1988.

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