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IN THE SUPREME COURT OF FLORIDA

JESUS PEREZ,

Petitioner,

vs. CASE NUMBER: 72,164

STATE OF FLORIDA

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

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PRELIMINARY STATEMENT

The Petitioner, Jesus Perez, was a defendant in the circuit court and the Appellee on appeal. He will be referred to herein as Petitioner.

The State of Florida was the prosecuting authority in the circuit court and the Appellant on appeal and will be referred to herein as Respondent.

Citations to the record will be by the symbol "R" followed by the appropriate page number in parenthesis.

STATEMENT OF THE CASE AND FACTS

The State of Florida charged the Petitioner by information, with three incidents of sexual battery against three different children occurring between June 1, 1975 and June 1, 1976. (Circuit Court case numbers 86-I-82, 86-I-83, 86-I-84).

On June 9, 1986, the Appellee filed Motions to Dismiss in all three cases alleging that the statute of limitations had expired for the offenses charged. On August 8, 1986, the trial court conducted a hearing on Petitioner's motions. On October 10, 1986, the trial court issued its order granting the motions to dismiss. The trial court determined that at all times material to the dates relied upon by the State, the law requires that the prosecution be commenced within four years of the date of the occurrence of the offense on or after July 1, 1975, and within two years if the offense occurred prior to July 1, 1976. (Record 211-212.)

The trial court's order was appealed by the State to the First District Court of Appeals. The trial court was reversed by the First District Court in an opinion filed January 22, 1988. State v. Perez, 519 So.2d 669, (Fla. 1st DCA, 1988) The Defendant then petitioned this court to review the decision of the District Court of Appeal.

SUMMARY OF ARGUMENT

The District Court of Appeal correctly ruled that since the statute of limitations did not apply at the time of the commission of the offense it does not now bar prosecution of the Petitioner.

ARGUMENT

ISSUE

WHETHER THE STATUTE OF LIMITATIONS BARS PROSECUTION OF THE PETITIONER FOR SEXUAL BATTERY

The Petitioner appeals the District Court's reversal of the trial court's dismissal of the sexual battery charges.

The Petitioner was charged under Section 794.011(2), Florida Statutes, which provides that:

> A person 18 years of age or older who commits sexual battery upon or injures the sexual organs of a person 11 years of age or younger in an attempt to commit sexual battery upon said person commits a capital felony punishable as provided in Section 775.082 and Section 921.141. If the offender is under the age of 18, that person shall be guilty of a felony, punishable as provided in Sections 775.082, 775.083, or 775.084.

Section 775.082(1) provides that a person convicted of a capital felony shall be punished by life imprisonment with a minimum mandatory of 25 years unless a proceeding is held under Section 921.1411 as to whether such person shall be punished by death. The statutory time limitation which controlled at the time of the offense was Florida Statute 932.465 which provides that:

> (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...

Effective July 1, 1975, the statute of limitations was designated Florida Statute 775.15 and contained the following relevant provisions:

> (1) A prosecution for a capital felony may be commenced at any time.
>
> (2) ..., prosecutions for other offenses are subject to the following periods of limitations:
>
> > (a) A prosecution for a life felony or a felony of the first degree must be commenced within four years after it is committed....

Following the commission of the offenses, the Florida Supreme Court determined that the death penalty for sexual assault on a child age 11 or younger was an unconstitutional violation of the eighth amendment. Buford v. State, 403 So.2d 943 (Fla, 1981), cert. denied, 454 U.S. 1164, 102 S.Ct. 1039, 71 L.Ed.2d 320 (1982). The Buford decision followed the United States Supreme Court decision in Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) which declared the death penalty for rape of an adult woman unconstitutional.

Following the date of the alleged offense the Florida statute of limitations was again amended and contained the following relevant provision:

> (1) A prosecution for a capital or life felony may be commenced at any time. In the event the death penalty is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, all crimes designated as capital felonies shall be considered life felonies for the purposes of this section, and prosecution for such crimes may be commenced at any time....

Id. Florida Statute 775.15

As pointed out by the District Court, the trial court took the erroneous position that since, at the time the Petitioner was charged, the death penalty was no longer an optional punishment for the crime of sexual battery the unlimited period for prosecution of capital felonies did not apply. The trial court reasoned that the statute of limitations for noncapital felonies applied. The trial court concluded that the prosecution had to be commenced within two years if the offense occurred prior to July 1, 1975 (under Section 932.465, Florida Statutes, 1973) or within four years of the date of the offense if it occurred on or after July 1, 1975 (under Section 775.15, Florida Statutes, 1975).

In State ex rel Manucy v. Wadsworth, 293 So.2d 345 (Fla. 1974), this court addressed the issue of the application of the statute of limitations to crimes that were called "capital crimes" before the death penalty was struck down. In the above cited case murders had been committed before the death penalty was declared unconstitutional in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). One of the Defendants was arrested following the Furman opinion but before the Florida legislature reinstated the death penalty. The codefendant arrested before the death penalty was held unconstitutional, argued that the two year statute of limitations should apply to him since the charges were brought more than two years after the crimes. This court held that the statute of limitations in force and effect at the time of the incident which gave rise to the criminal prosecution is controlling in determining whether

prosecution is barred. This court determined that statutes of limitations are a substantive right that runs from the time of the alleged conduct, thus concluding that neither prosecution was barred by the statute of limitations.

By authority of this court's decision in Manucy the Respondent submits that the limitation period is determined from the date the crime was committed and not from the date prosecution began.

As correctly pointed out by the District Court, the present case is distinguishable from Reino v. State, 352 So.2d 853, (Fla, 1977), wherein this court held that the two year statute of limitations controlled a murder committed during the period between the Furman decision and the Florida legislature's reinstatement of the death penalty. In the Reino case, unlike the present case, death was not a possible penalty at the time of the commission of the offense. The fact that subsequent to the commission of the offense death was held to be impermissible does not affect the period of time in which charges may be brought.

Respondent submits that the fact that there was a statute of limitations in effect during the period between the time of the offense and the time of the prosecution is of no consequence. At the time of the offense there was no statute of limitations and at the time of the prosecution there was no statute of limitations. An interim change under the statute of limitations did not work any onerous application of an ex post facto change in the law, therefore the Appellant's condition was no worse at the time of prosecution than it was at the time he committed the

offenses. Dobbert v. Florida, 432 U.S 282, 53 L.Ed.2d 344, 97 S.Ct. 2290 (1977).

Additional support for the state's position comes from this court's decision in Rusaw v. State, 451 So.2d 469 (Fla. 1984). The Defendant in Rusaw was convicted of sexual battery upon a person 11 years of age or younger and he appealed. The District Court of Appeal affirmed and certified that its opinion was in direct conflict with the decision of another district court. The Respondent contends that this court in Rusaw determined that Section 794.011(2) remained a capital crime even though the death penalty was ruled unconstitutional. In affirming the Defendant's conviction this court stated:

> In 794.011(2), the legislature has denominated certain conduct to be a "capital" crime and has provided alternative penalties for that crime. Buford's striking of one of these penalties has not disturbed the other. See Section 775.082(2), Florida Statute, (1981). We agree with the District Court's conclusion that the legislature intended that the penalty set out in 775.082(1), be fully applied to the extent that they are constitutionally permissible. Death is no longer permissible for the sexual battery described in 794.011(2), but life in prison with a 25 year minimum mandatory is. Rusaw's argument that his crime should be reduced automatically to a life felony ignores the legislature's obvious intent.

In summary the Petitioner contends that by virtue of the statute and the case law, the Petitioner's crime was either a life felony for which prosecution can begin at any time or a capital offense without a statute of limitations. Thus, at no time did the Appellee have the benefit of the statute of

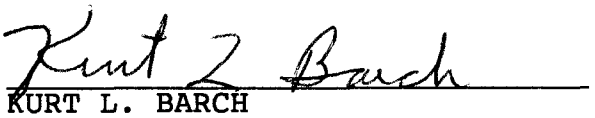
limitations. Either way the state's efforts to bring Mr. Perez to justice cannot be thwarted by the passage of time. This court should affirm the District Court of Appeal.

CONCLUSION

Based upon the foregoing arguments and citation of authority the District Court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been forwarded by United States Mail to Robert N. Heath, Jr., Harrell, Wiltshire, Swearingen, Wilson and Harrell, P.A., 201 East Government Street, Pensacola, Florida 32501, this 1st day of August, 1988.

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