O/A 10-488

IN THE SUPREME COURT OF FLORIDA

JESUS PEREZ,

Petitioner,

vs. CASE NO.: 72,161

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF

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ISSUE

WHETHER THE STATUTE OF LIMITATIONS BARS PETITIONER'S PROSECUTION FOR SEXUAL BATTERY.

ARGUMENT

The State correctly cites the statutory history of the statute of limitations since 1974. As the State points out, the statutes in effect at the time these offenses were committed called for either a two year statute of limitation (if the offense occurred before July 1, 1975), a four year statute of limitation (if the offense occurred after July 1, 1975), or no statute of limitation at all if the offenses remained "capital." The State argues that, subsequent to these offenses, the statute was again changed to allow prosecution for a capital or life felony at any time (Respondent's Brief, page 5). The subsequent change in the statute is irrelevant for purposes of this case, the application of which would clearly be unconstitutional if applied to Perez. Either Perez's prosecution is proper because the alleged offenses are "capital" or it is forever barred.

The State continues to rely on State ex rel Mauncy v. Wadsworth, but fails to appreciate the obvious conflict between Mauncy and Reino v. State in light of Buford v.

State and it progeny. The State fails to address Petitioner's arguments that this Court has consistently ruled since Buford that a capital crime must involve death as a possible penalty and that first degree murder is the only capital crime in Florida. The statement at page seven of its brief that, "the fact that subsequent to the commmission of the offense death was held to be impermissible does not affect the period of time in which the charges may be brought" ignores the holdings in Donaldson v. Sack, Snowden v. Donner and State v. Hogan. Further, the Reino court clearly held that all incidents of capital crimes, both procedural and substantive, are inapplicable without the death penalty, another point omitted from the State's brief.

The State's conclusion that Perez is no worse off now than he was in 1975 because his offense is either a life felony or a capital felony, neither of which has a statute of limitations, is also erroneous. The statutory change excepting life felonies from the statute of limitations did not occur until well after these offenses and would cleary constitute an unconstitutional ex post facto application if applied here. Either the offense is capital or it is not. If it is not captial, then a prosecution at least ten years later is improper.

CONCLUSION

Perez contends that Mauncy is no longer viable in light of Buford, Reino and their offspring. It is clear that sexual battery is not a "capital crime" and that Petitioner's prosecution for that offense is barred by the passage of time. This Court should reverse the holding of the first district.

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 regular U.S. Mail, on this 22nd day of August, 1988.

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