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IN THE SUPREME COURT OF FLORIDA

WILLIAM R. CREWS

Petitioner,

v. CASE NO. SC14-319

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 664261
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8500
glen.gifford@flpd2.com

ATTORNEYS FOR PETITIONER

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PRELIMINARY STATEMENT

Does the statute of limitations for "misconduct in public office" by a public officer or employee in section 775.15(12)(b), Florida Statutes (2006), apply to a public school teacher? If so, how closely connected must the misconduct be to the teacher's duties to justify the use of this provision?

By definition in Florida's Education Code, teachers are neither public officers nor public employees, and are therefore excluded from the operation of section 775.15(12)(b). In the alternative, if applicable to teachers, this provision requires a palpable nexus between the criminal conduct and the teacher's duties, such as commission of the offense on school property or in connection with a school activity.

In this brief, the record on appeal, including the supplemental record, is cited by the letter "R."

STATEMENT OF THE CASE AND FACTS

This case concerns the statute of limitations for the second- and third-degree felonies of lewd molestation, lewd exhibition, and showing obscene material to a minor. None of the offenses occurred later than June 2006, according to the amended information. (R79-81) The state commenced prosecution on these offenses via information first filed March 27, 2012. (R61-63) To escape the already-expired three-year statute of limitations under section 775.15(12)(b), Florida Statutes (2006), the state added an allegation that the crimes constituted "misconduct in public office." Under section 775.15(12)(b), Florida Statutes (2006), this allegation extends the period for commencing a prosecution until two years after the defendant leaves public office or employment. Here, it brought the prosecutions in counts 2-5 and 7-10 within the three-year statute of limitations.

Defense counsel moved to dismiss each of these counts on grounds that Crews' status as a public school teacher did not qualify the offenses, which were not committed on school grounds or in connection with any school activity, as misconduct by a public employee while in public office. (R145-60, 165-83) The state traversed each of the motions. On counts 2-5, the state alleged that Crews sought and obtained the permission of the parent of J.T. to care for and supervise her son at the gym, where some of the alleged acts took place, and at car shows

that preceded visits to the storage unit or shed where other acts occurred. (R488-503) The state also asserted that sex acts which occurred far from school grounds could nonetheless constitute misconduct in office. On counts 7-9, the state averred that Crews routinely solicited J.E. by encouraging him to accompany Crews after school, and that J.E. ultimately submitted to the "constant pressure from his teacher." (R512-23) On count 10, the state asserted that the acts involving J.S. occurred while Crews was his teacher, and that "[o]n some occasions, the Defendant would teach and assist J.S. on school projects and homework while inside the shed." (R524-26)

The trial court denied the motions to dismiss, relying on the ruling in LaMorte v. State, 984 So. 2d 548 (Fla. 2d DCA 2008), that the section 775.15(12)(b) extension applied to a public school teacher. The court also noted that in its traverses, the State averred that while "on campus during school hours," Crews enticed each of the three alleged victims to travel to the off-campus locations where the offenses occurred. (R195)

Crews pled nolo contendere to these and other counts for concurrent sentences of 20 years in prison for the first-degree felonies and shorter sentences for the other offenses. He reserved the right to appeal the denial of his motions to dismiss. (R198-200) The trial court accepted the plea and ultimately imposed the negotiated sanctions. (R259-91, 361-76)

Crews raised two issues on appeal. The First DCA granted relief on the first issue and reversed Crews' conviction of the first-degree felony of sexual activity by a person in custodial authority in count 6. Relying on Hallberg v. State, 649 So. 2d 1355 (Fla. 1994), the court explained:

> As to the question of whether Crews was in custodial authority at the time of the sexual encounter alleged in count six, the defense below argued that no such custodial authority could be said to exist because the encounter occurred away from school grounds and was unconnected with a school activity. As the incident occurred in the summer or early in the ninth grade, Crews was not one of J.E.'s teachers at the time.
>
> …
>
> … [T]he sexual activity between Crews and J.E. as alleged in count six occurred away from school, at a time when Crews was not the victim's classroom teacher, and was unconnected to a school activity. Given the admitted facts regarding the conduct at issue in count six, reversal is required under Hallberg.

Crews v. State, 130 So. 3d 698, 700-01 (Fla. 1st DCA 2013).

The appellate court affirmed on the second issue of whether the extension of the limitations period in section 775.15(12)(b) applies to the convictions in counts 2-5 and 7-10. Like the trial court, the First DCA panel relied on LaMorte:

> In LaMorte, the defendant was a teacher and swim coach at a public high school who engaged in sexual activity with two students. He was convicted of sexual battery by a person in custodial authority, attempted sexual battery by a person in custodial authority, and lewd, lascivious or indecent act upon or in the presence of a child. Like appellant in the instant case, the

> defendant in LaMorte argued that the charges against him were barred by the applicable statute of limitations; the State argued that the time for prosecution was extended by virtue of the "misconduct in public office," section 775.15(3)(b).[1] The trial court agreed as did a majority of the reviewing court. Like the majority in LaMorte, we hold that section 775.15(3)(b) may apply to the type of offenses committed by Crews while he was indisputably a public school teacher.

Crews, 130 So. 3d at 702.

Judge Padovano dissented on this issue, as had Judge Altenbernd in LaMorte:

> As Judge Altenbernd reasoned in his dissent in LaMorte, section 775.15(12)(b), Florida Statutes does not define the phrase "misconduct in office." We do not know whether the legislature meant to use the phrase in a broad sense to refer to any government employee, or in a narrow sense to include only those employees who hold an "office" as defined in the state constitution or the state laws. The narrow construction makes more sense to me as I do not think there is any valid reason to treat public employees differently from private employees.
>
> At the very least, the statute is ambiguous, and I would resolve the ambiguity in favor of the defendant pursuant to the rule of lenity.

Id. at 702 (Padovano, J., concurring part and dissenting in part).

1. The provision was moved from subsection (3)(b) to subsection (12)(b) in 2005. See LaMorte, 984 So. 2d at 550 n. 2.

In an unpublished order, the panel granted Crews' motion to certify as question of great public importance:

> DOES THE STATUTE OF LIMITATIONS FOR "MISCONDUCT IN PUBLIC OFFICE" BY A PUBLIC OFFICER OR EMPLOYEE IN SECTION 775.15(12)(b), FLORIDA STATUTES, APPLY TO A PUBLIC SCHOOL TEACHER?

SUMMARY OF THE ARGUMENT

I. This Court should answer the certified question in the negative and hold that the statute of limitations in section 775.15(12)(b), Florida Statutes, for offenses based upon misconduct in office by a public officer or employee does not apply to public school teachers. Public school teachers are not officers or employees as defined in Florida law, but rather "instructional personnel." The difference is meaningful in that it implicates three principles of construction, all favoring exemption of teachers from section 775.15(12)(b): the rule of lenity, *in pari materia*, and *expressio unius.* In extending the limitations period to public officers and employees and classifying teachers as neither, the Legislature has excluded teachers from the extension.

II. Even if section 775.15(12)(b) encompasses public school teachers, not every crime committed by a teacher qualifies for the extended limitations period. The term "misconduct in office" should be construed strictly, according to its plain meaning, and in connection with a related provision to require a palpable nexus between the teacher's role and the misconduct. Crews' offenses occurred away from school property and were unconnected to any school activity. His crimes therefore fall outside the "misconduct in office" requirement of section 775.15(12)(b).

ARGUMENT

I. THE EXTENDED STATUTE OF LIMITATIONS FOR "OFFENSES BASED UPON MISCONDUCT IN OFFICE BY A PUBLIC OFFICER OR EMPLOYEE" IN SECTION 775.15(12)(B), FLORIDA STATUTES, DOES NOT APPLY TO PUBLIC SCHOOL TEACHERS.

Standard of review: The certified question in this case presents a pure question of statutory interpretation, which is addressed de novo. Tillman v. State, 934 So. 2d 1263, 1269 (Fla. 2006).

Discussion: This Court should answer the certified question in the negative and hold that the statute of limitations for offenses based upon misconduct in office by a public officer or employee does not apply to public school teachers. As Judge Alternbernd recognized in LaMorte v. State, 984 So. 2d 548 (Fla. 2d DCA 2008), Florida's Education Code classifies teachers as "instructional personnel" and uses the term "employees" for other educational personnel. This exempts teachers from section 775.15(12)(b) under three principles of statutory construction: the rule of lenity, *expressio unius*, and *in pari materia*.

In his LaMorte dissent, Judge Altenbernd observed that a public school teacher does not hold any "office" defined by Florida law. Id. at 554 (Altenbernd, J., dissenting). Instead, the "definitions" section of the Education Code, section 1012.01(2)(a), Florida Statutes (2006), classifies classroom teachers as "instructional personnel," distinct from "school officers" as defined in subsection

(1). Section 1012.01 uses the term "employee" descriptively in other subsections, but uses the term definitionally only once, to classify "education support employees" in subsection (6).

The use of the Education Code to discern the scope of section 775.15(12)(b) is construction *in pari materia*, a tool this Court uses to clothe undefined statutory terms. See, e.g., DuFresne v. State, 826 So. 2d 272 (Fla. 2002)(using provision in chapter 39, which concerns proceedings relating to children, to define "mental injury" in child abuse statute, section 827.03). Here, a construction of section 775.15(12)(b) *in pari materia* with section 1012.01, as implicitly suggested by Judge Altenbernd, exempts public school teachers from the extended statute of limitations for misconduct in office by public officers and employees.

The LaMorte majority also performed an ad hoc *in pari materia* construction. The court concluded that the statutory terms "public officer or employee" and "misconduct in office," combined with provisions in the Florida Administrative Code which define "misconduct in office" for instructional personnel, bring teachers within section 775.15(12)(b). 984 So. 2d at 552. Two of the three judges on the First DCA panel in this case agreed with the LaMorte majority. Crews v. State, 130 So. 3d 698, 702 (Fla. 1st DCA 2013).

The prospect that "conduct codes that allow for discipline based on the civilian equivalent of conduct unbecoming an officer" could subject state

employees to the extended statute of limitations in section 775.15(12)(b) justifiably troubled Judge Altenbernd. He concluded that the undefined reference to "misconduct in office" failed to "put[] public employees on notice of the extended statute of limitations applicable to them if they are subject to a 'conduct in office' requirement in the conditions of their employment." LaMorte, 984 So. 2d at 554 (Altenbernd, J., dissenting).

Further, although he recognized that section 775.15(12)(b) was amended to encompass employees and to replace offenses "connected with the duties of their office" with offenses "based on misconduct in office," Judge Altenbernd deemed the changes insignificant in the absence of legislative history explaining their rationale. Consequently, "[a]bsent a definition" of misconduct in office "in the criminal code," he would have limited section 775.15(12)(b) "to persons who commit crimes based upon misconduct in a position that is defined as an 'office' either in the Florida Constitution or in the Florida Statutes." Id. Judge Padovano agreed:

> [S]ection 775.15(12)(b), Florida Statutes does not define the phrase "misconduct in office." We do not know whether the legislature meant to use the phrase in a broad sense to refer to any government employee, or in a narrow sense to include only those employees who hold an "office" as defined in the state constitution or the state laws. The narrow construction makes more sense to me as I do not think there is any valid reason to treat public employees differently from private employees.

> At the very least, the statute is ambiguous, and I would resolve the ambiguity in favor of the defendant pursuant to the rule of lenity.

Crews, 130 So. 3d at 702 (Padovano, J., concurring in part and dissenting in part).

Judges Altenbernd and Padovano have the better reasoned views. In using the term "misconduct in office by a public officer or employee," the Legislature may have wished to exclude public school teachers from the operation of section 775.15(12)(b). The Legislature could have intentionally omitted definitions of these terms from chapter 775, knowing that teachers are defined in the Florida Education Code not as officers or employees but as personnel. Without definitions in chapter 775 or legislative history, there is little or no basis to conclude to the contrary—that teachers were meant to be included in section 775.15(12)(b).

In addition to construction *in pari materia* and the rule of lenity, use of the maxim *expressio unius est exclusio alterius* supports the view that teachers fall outside section 775.15(12)(b). "[W]hen a law expressly describes the particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded." Gay v. Singletary, 700 So.2d 1220, 1221 (Fla.1997). Section 1012.01 defines teachers as "instructional personnel" and classifies others in the public education system as "officers" and "employees." Section 775.15(12)(b) extends the statute of limitations for crimes based on misconduct in office by public officers or

employees, not by public personnel, staff, or volunteers. The specific use of these terms must be presumed intentional. These provisions exclude public school teachers from the operation of section 775.15(12)(b).

For these reasons, this Court should answer the certified question in the negative and quash the portion of the First DCA decision affirming Crews' convictions in counts 2-5 and 7-10.

II. THE EXTENDED STATUTE OF LIMITATIONS FOR AN OFFENSE "BASED UPON MISCONDUCT IN OFFICE," IF APPLICABLE TO PUBLIC SCHOOL TEACHERS, COVERS ONLY THOSE OFFENSES COMMITTED ON SCHOOL PROPERTY OR IN CONNECTION WITH A SCHOOL ACTIVITY.

This issue concerns the scope of section 775.15(12)(b) in relation to public school teachers. The Court need reach this issue only if it rejects the argument in Point 1 that section 775.15(12)(b) is wholly inapplicable to public school teachers.

Standard of review: The trial court's denial of the motions to dismiss under Florida Rule of Criminal Procedure 3.190(c)(4) was reviewable de novo in the district court. Galston v. State, 943 So. 2d 968, 970-71 (Fla. 5th DCA 2006). The underlying issue involves statutory construction, which is also performed de novo. Tillman v. State, 934 So. 2d 1263, 1269 (Fla. 2006).

Discussion: The First DCA asked via certified question whether the extended criminal statute of limitations for "misconduct in office" by a public employee applies to public school teachers. If the answer is yes, it should be qualified: Section 775.15(12)(b) applies to public school teachers only when there is a palpable nexus between the teacher's role and the misconduct, such as occurrence on school property or in connection with a school activity.

Four principles of statutory construction assist this Court in interpreting section 775.15(12)(b): plain meaning, giving effect to all statutory language, construction *in pari materia*, and the rule of lenity.

To determine legislative intent, courts look first to the statute's plain language. Kasischke v. State, 991 So. 2d 803, 807 (Fla. 2008). By its plain and ordinary meaning, an "offense based upon misconduct in office by a public officer or employee" is misconduct linked to the accused's performance of his official or employment duties. The term "misconduct *in office*" can connote little else.

Second, "misconduct in office" must mean something not already conveyed by the rest of the provision. When possible, statutes should be read to give effect to every word and phrase so that nothing is construed as surplusage. Mendenhall v. State, 48 So. 3d 740, 749 (Fla. 2010); Koile v. State, 934 So. 2d 1226, 1231 (Fla. 2006). Section 775.15(12)(b) has three threshold components: (a) "an offense based upon misconduct in office" (b) "by a public officer or employee" (c) "at any time when the defendant is in public office or employment." Had the Legislature intended any misconduct by a public officer or employee while in public office or employment to extend the limitations period, it would not have added "based upon misconduct in office."

Third, construction of section 775.15(12)(b) *in pari materia* with another statute in the criminal code yields a narrow construction. "Misconduct in office" is

not defined by chapter 775. However, section 838.022, Florida Statutes (2006), defines the crime of "official misconduct" to require a direct connection between the misconduct and the offender's performance of the duties of office:

> (1) It is unlawful for a public servant, with corrupt intent to obtain a benefit for any person or to cause harm to another, to:
> (a) Falsify, or cause another person to falsify, any official record or official document;
> (b) Conceal, cover up, destroy, mutilate, or alter any official record or official document or cause another person to perform such an act; or
> (c) Obstruct, delay, or prevent the communication of information relating to the commission of a felony that directly involves or affects the public agency or public entity served by the public servant.

"Public servant" means "[a]ny officer or employee of a state, county, municipal, or special district agency or entity." § 838.014, Fla. Stat. (2006). The "misconduct in office" provision in the statute of limitations long predates section 838.022, which was enacted in 2003. Ch. 2003-158, § 5, Laws of Fla. However, the Legislature moved the provision from subsection (3)(b) to subsection (12)(b) of section 775.15 in 2005, two years after creating the crime of "official misconduct." Ch. 2005-110, § 1, Laws of Fla. The Legislature is presumed to have been aware of its creation of section 838.022 in 2003 when it re-enacted and moved the "misconduct in office" provision in its 2005 revision of section 775.15. See Butler v. State, 838 So. 2d

554, 556 (Fla. 2003) ("It is presumed that statutes are passed with the knowledge of existing statutes.").

Sections 775.15(12)(b) and 838.022 have similar purposes: to deter and punish misconduct by those who hold the public trust. Accordingly, the term "misconduct in office" in section 775.15(12)(b) should be construed *in pari materia* with the elements of the crime of official misconduct in section 838.022 to require that the misconduct have a firm, direct connection to the duties of the public officer or employee. When section 775.15(12)(b) is invoked to expand the period for prosecution of a teacher for misconduct with a student, the term "offense based on misconduct in office" should be construed to require a connection of the misconduct to the school environment or teacher's duties.

A fourth principle, the rule of lenity codified in section 775.021(1), Florida Statutes, also weighs in favor of a narrow or strict construction of "misconduct in office." This is best illustrated through comparison of the facts in LaMorte, several out-of-state opinions discussed in LaMorte, and this case.

In LaMorte, the Second DCA upheld a public school teacher's convictions of lewd molestation. LaMorte taught high school and coached the swim team. One of his alleged victims was a member of his swim team. The informations specified that at the time of the crimes, LaMorte "was in a position of custodial or official authority to coerce each child to submit to him." 984 So. 2d at 550. The

court rejected LaMorte's claim that applying the statute to teachers rendered it unconstitutionally vague. 984 So. 2d at 551-53. LaMorte evidently did not ask the court to decide whether, assuming that teachers are generally covered by section 775.15(12)(b), LaMorte's offenses were specifically "based upon misconduct in office."

In a footnote, the LaMorte majority discussed several Ohio decisions construing a provision similar to section 775.15(12)(b). Id. at 551 n.3 Section 2901.13(C)(1)(a) of the Ohio Revised Code provides that "[f]or an offense involving misconduct in office by a public servant," prosecution may be commenced "at any time while the accused remains a public servant or within two years thereafter." In State v. Hebsh, 620 N.E.2d 859 (Ohio Ct. App. 1992), the appellate court ruled that the provision applied to a public school teacher and tennis coach who admitted having sexual contact with a student member of the tennis team before he drove her home after tennis matches. The court observed that Hebsh "used his position as a school teacher and [the student's] tennis coach to facilitate his sexual contact with [the student]." Id. at 861. This is similar to LaMorte, in which the informations alleged that the misconduct "was related to school activities and/or swim team activities and/or LaMorte's position as a teacher and/or coach at Venice High School." The state alleged that LaMorte had "custodial or official authority to coerce each child to submit." 984 So. 2d at 550.

No similar connection was established by the pleadings or evidence on Crews' motion to dismiss the second- and third-degree felonies in this case. The state did not allege custodial authority on those counts. The undisputed material facts did not establish that Crews had authority over the alleged victims in his capacity as a school teacher at the time of the offenses. None of the crimes occurred on school property or in connection with any school activity.

In another Ohio case discussed in LaMorte, the court construed the term "misconduct in office" narrowly:

> We believe that by employing the term "misconduct in office," the legislature intended that, in order for the statute of limitations to be tolled, either the offense must involve such a palpable nexus between the auspices of the office and the wrongdoing that it constitutes an offense against justice and public administration as codified in R.C. Chapter 2921, or, alternatively, the wrongdoer must have misused his or her public office effectively to conceal the wrongdoing and thus thwart timely prosecution.

State v. Sakr, 655 N.E. 2d 760 (Ohio App. 1995). It did so partly for policy reasons:

> Unless the term "misconduct in office" is so construed, the limitations period for all offenses committed by public servants could be tolled even if a particular offense bore absolutely no relationship to the wrongdoer's official position. We do not believe that the legislature intended for statutes of limitation to be tolled every time any public official, juror, candidate for office, legislator, judge, law enforcement official, or public

> employee commits any statutory crime. Such a reading would be too drastically in conflict with the public policy behind statutes of limitations, which is to discourage dilatory law enforcement, ensure that criminal prosecutions are based on reasonably fresh, and therefore more trustworthy, evidence, and avoid the unfairness of subjecting people to criminal liability virtually indefinitely.

Id. at 762.

Sakr was a public university professor who served on the review committee for the master's thesis of his alleged victim, whom he allegedly attempted to rape on the eve of her oral exam for her degree. Although his teaching position made Sakr a "public servant," the allegations did not involve crimes "tending to subvert the processes of democratic government" that were incorporated into the provision extending the limitations period by reference to a separate statute.

Unlike the Ohio law, section 775.15(12)(b) does not limit the extended time for prosecution based on "misconduct in office" to specific offenses. This distinction led the Second DCA in LaMorte to find Sakr unpersuasive. 984 So. 2d at 551 n.3. However, the court in Sakr also held that, "even if the alleged wrongdoing does not fall within the offenses set forth in R.C. Chapter 2921, … the tolling statute may still be applicable provided that the alleged wrongdoer has misused his or her office either to effectively conceal the misconduct or otherwise to obstruct timely prosecution." 655 N.E. 2d at 762. Thus, as an alternative to a

palpable nexus between an enumerated offense and the "auspices of the office" in which the offense occurs, Ohio requires a connection between the misconduct and the misuse of office. Here, the state did not allege or show either that Crews' offenses occurred at school or in connection with a school activity or that he used his position as a teacher to conceal the crimes or obstruct timely prosecution.

In addition, to the extent that the Ohio law defines "misconduct in office" more specifically than does section 775.15(12)(b), this Court has an alternative definitional source: the crime of "official misconduct" in section 838.022 and its focus on crimes arising from the duties of a public servant. As both Judge Altenbernd and Judge Padovano have observed, any ambiguity that remains must be resolved strictly and in favor of the accused. Crews, 130 So. 3d at 702 (Padovano, J., partially dissenting); LaMorte, 984 So. 2d at 553 (Altenbernd, J., dissenting).

Although it did not involve a teacher, in yet another case from Ohio, State v. Bowsher, 687 N.E. 2d 316 (Ohio Ct. App. 1996), the court relied on Sakr to reverse a conviction of a police officer for theft in office. The officer allegedly stole money collected and placed in a "guns and hoses" fund. Applying the Sakr test of a "palpable nexus between the auspices of the office and the wrongdoing," the court concluded that "[t]he fact that appellant had solicited contributions while in uniform, on duty, and in a city police car has little, if any, relationship to a later

improper withdrawal of funds from a private account." Id. at 320. Applying the "time-honored maxim that criminal statutes should be construed narrowly against the state," the court found that the facts failed to prove a theft "in office." Id. Another Ohio appellate court, applying the Sakr standard, concluded that a police officer's alleged concealment of his employment to obtain subsidized rental assistance from HUD was not an offense "involving misconduct in office as that term is used in R.C. 2901.13(C)." State v. Burchfield, 691 N.E. 2d 1096, 1097, 1102 (Ohio Ct. App. 1997).

In review, although section 775.15(12)(b) does not define "misconduct in office," application of several rules of statutory construction convey its meaning:

- By its plain and ordinary meaning, misconduct "in office" is misconduct that occurs within the confines of the accused's office or employment.
- Had the Legislature intended any misconduct by a public officer or employee to extend the limitations period, it would not have added "in office."
- The offense of "official misconduct" in section 838.022 concerns misconduct in an accused's role as a public servant.
- Ohio courts, interpreting a similar provision, require a "palpable connection between the auspices of the office and the wrongdoing that … constitutes an offense."

From these principles, a rule emerges: Section 775.15(12)(b) authorizes an extension of the statute of limitations for an "offense based upon misconduct in office by a public officer or employee at any time when the defendant is in public office or employment" if the offense has a palpable nexus to the duties of the public officer or employee. A palpable nexus means that the offense involves the misuse of public office or employment. When the accused is a school teacher, coach, or student adviser, the misuse can derive from commission of the crime on school property or in connection with a school activity such as a field trip or school team training session or competition, as in Hebsh and LaMorte. A crime involving a student that does not occur on school property or in connection with a school activity lacks a sufficient nexus to constitute misconduct in office under section 775.15(12)(b).

Therefore, if the certified question is answered in the affirmative, the answer should include a caveat: "The statute of limitations for 'an offense based on misconduct in public office by a public officer or employee' in section 775.12(12)(b), Florida Statutes, applies to a public school teacher only if the misconduct occurs on school property or in connection with a school function or activity." Because Crews' offenses in counts 2-5 and 7-10 occurred off school property and without any connection to a school function or activity, this Court

should quash the First DCA decision affirming these convictions and order that those counts be dismissed.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, Petitioner requests that this Court answer the certified question as specified in the alternative arguments in Points I and II, and that it quash the First District decision and remand with directions to discharge Crews as to counts 2-5 and 7-10.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished via the Florida Courts E-Filing portal to Counsel for Respondent, Jennifer J. Moore, Office of the Attorney General, the Capitol, PL-01, Tallahassee, FL 32399-1050, crimapptlh@myfloridalegal.com, and to Amicus Counsel, William A. Spillias, Florida Education Association, 213 S. Adams St., Tallahassee, FL 32301-1720, will.spillias@floridaea.org, this 7th day of July, 2014. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

/s/ Glen P. Gifford
GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 664261
LEON COUNTY COURTHOUSE
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8500
glen.gifford@flpd2.com

ATTORNEYS FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

WILLIAM R. CREWS,

Petitioner,

v. CASE NO. SC14-319

STATE OF FLORIDA, First DCA No. 1D12-4703

Respondent.
_____/

APPENDIX TO
JURISDICTIONAL BRIEF OF PETITIONER

A. William R. Crews v. State, No. 1D12-4703
(Fla. 1st DCA, November 15, 2013)

B. Order Granting Certification

APPENDIX A

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

WILLIAM R. CREWS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D12-4703

Opinion filed November 15, 2013.

An appeal from the Circuit Court for Bay County.
Elijah Smiley, Judge.

Nancy A. Daniels, Public Defender, and Glen P. Gifford, Assistant Public Defender, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, and Jennifer J. Moore, Assistant Attorney General, Tallahassee, for Appellee.

SENTERFITT, ELIZABETH, ASSOCIATE JUDGE.

William R. Crews appeals the denial of several motions to dismiss prior to the entry of his no contest plea to fourteen felonies. We affirm in part and reverse in part.

Crews formerly worked as a teacher at Deane Bozeman School in Bay County, Florida. According to the amended information, while a teacher, Crews engaged in sexual activity with several students. He was charged with sexual activity with a child (two counts), lewd and lascivious molestation (three counts), lewd and lascivious exhibition (four counts), and showing obscene material to a minor (five counts). He moved to dismiss eight of the fourteen charges filed against him. After these motions were denied, Crews entered a no contest plea reserving the right to appeal the denial of these motions. Pursuant to an agreement, he was adjudicated guilty as to all counts and sentenced to twenty years.

On appeal, Crews argues the trial court erred in denying the motion to dismiss count six of the amended information. Count six of the amended information charged:

> William R. Crews, between June 2004 and June 2006, in the County of Bay and State of Florida, did unlawfully engage in sexual activity with J.E., a child 12 years of age or older but less than 18 years of age, while William R. Crews was in a position of familial or custodial authority over J.E., in that William R. Crews **did perform oral sex on J.E. by placing J.E.'s penis in his mouth**, contrary to Florida Statute 794.011(8)(b). (1 DEG FEL).

(Bold added). Crews moved to dismiss this first degree felony on the ground that he did not have custodial or familial authority over the victim at the time the oral

sex was committed. In support of dismissal, appellant cited Hallberg v. State, 649 So. 2d 1355 (Fla. 1994).

In his deposition, the victim of count six, J.E., described his encounters with Crews. While in the 7th grade, J.E. was asked to go to a car show with Crews. After the show, Crews invited J.E. to a storage unit where he stored a car and also kept a television and DVD player. According to J.E., Crews would play pornography on the DVD player; he had sex "toys" in the unit as well. This pattern was repeated and served as a prelude to Crews' sexual offenses. Eventually, Crews began driving J.E. to and from school, despite the fact that the child's grandparents, who were also his guardians, distrusted Crews. They did not give appellant any authority over J.E. The interaction between Crews and J.E. continued into the child's eighth grade year, when Crews was one of his teachers. Then, on one occasion in the summer between J.E.'s eighth and ninth grades, or early in the ninth grade year, Crews took J.E. to Crews' residence and an incident of oral sex occurred, as described in count six. The State admitted, in its traverse to the motion to dismiss count six, the following from Crews' motion to dismiss:

> (5) At all times material, J.E. lived with his grandparents. His grandparents did not know that he was going to the storage shed; J.E. kept his grandparents from knowing that he went to the storage shed; J.E.'s grandparents never gave Defendant the authority to take him to the storage shed; J.E.'s grandmother did not like Defendant; J.E.'s

> grandmother never gave Defendant authority to do anything with J.E.; and J.E.'s grandparents did not want him to have anything to do with Defendant.
> (7) J.E. testified that the factual allegations of Count VI concerning oral sex occurred in Defendant's house. (See deposition of J.E., page 29). This was the last incident between J.E. and Defendant.
> (8) The factual allegations of Count VI concerning oral sex did not occur on school property; did not occur during a school activity; and did not occur during a school extracurricular activity.

There is no argument by the State that Crews was in familial authority with J.E. As to the question of whether Crews was in custodial authority at the time of the sexual encounter alleged in count six, the defense below argued that no such custodial authority could be said to exist because the encounter occurred away from school grounds and was unconnected with a school activity. As the incident occurred in the summer or early in the ninth grade, Crews was not one of J.E.'s teachers at the time.

In Hallberg v. State, 649 So. 2d 1355 (Fla. 1994), the Florida Supreme Court held that "a teacher, without any teaching responsibility or extracurricular activity supervisory authority over a child during a summer recess, is not in a position of custodial authority" for the purposes of the statute which forbids sexual activity with a child by a person in familial or custodial authority. Thus, "teachers are not, by reason of their chosen profession, custodians of their students at all times,

particularly when school is recessed for the summer." Id. at 1357. The activity between the victim and the defendant in Hallberg:

> did not occur during the school year or on school premises. They did not occur in connection with the activities of a recognized extracurricular event such as band or drama club. Mr. Hallberg went to the home of S.S. in the middle of summer vacation. Although the parents of S.S. were generally aware that this man wanted S.S. to help him with a history project during the summer, these visits were not scheduled with her parents' knowledge or consent. He simply showed up at the front door with a textbook and talked his way inside the house when only S.S. was at home.

649 So. 2d at 1357 (quoting from J. Altenbernd's concurring and dissenting opinion, 621 So. 2d at 705-06). Further, "[i]t is clear S.S.'s parents did not place Hallberg in custodial control and authority over their daughter." Id. at 1357-58.

The trial court, in denying Crews' motion to dismiss count six, held that Hallberg is distinguishable because "the acts between the defendant [and J.E.] occurred during the school year (but off campus) when the defendant had teaching authority over [J.E. and others] **as students in his class**." (Bold added). The highlighted passage is contrary to the facts as admitted by the State in its traverse to the motion to dismiss. As noted above, the sexual activity between Crews and J.E. as alleged in count six occurred away from school, at a time when Crews was not the victim's classroom teacher, and was unconnected to a school activity.

Given the admitted facts regarding the conduct at issue in count six, reversal is required under Hallberg.

Crews also challenges the denial of his motions to dismiss counts two through five and seven through ten. His basis for seeking dismissal of these counts was the claim the statute of limitations, as stated in section 775.15(2), Florida Statutes, had expired and that the State improperly utilized section 775.15(12)(b), to extend the period of permissible prosecution. This statute provides:

> (12) If the period prescribed in subsection (2) . . . has expired, a prosecution may nevertheless be commenced for: . . .
>
> (b) Any offense based upon misconduct in office by a public officer or employee at any time when the defendant is in public office or employment, within 2 years from the time he or she leaves public office or employment, or during any time permitted by any other part of this section, whichever time is greater.

The term "misconduct in office" is not defined in the statute or in any case law interpreting this provision. Crews has argued that the criminal offenses for which he has been convicted do not constitute "misconduct in public office" as intended by this statute. On the authority of LaMorte v. State, 984 So. 2d 548 (Fla. 2d DCA 2008), the trial court disagreed and denied the motions to dismiss. We agree with the trial court and affirm the denial of the motions to dismiss counts two through five and seven through ten.

In LaMorte, the defendant was a teacher and swim coach at a public high school who engaged in sexual activity with two students. He was convicted of sexual battery by a person in custodial authority, attempted sexual battery by a person in custodial authority, and lewd, lascivious or indecent act upon or in the presence of a child. Like appellant in the instant case, the defendant in LaMorte argued that the charges against him were barred by the applicable statute of limitations; the State argued that the time for prosecution was extended by virtue of the "misconduct in public office," section 775.15(3)(b). The trial court agreed as did a majority of the reviewing court. Like the majority in LaMorte, we hold that section 775.15(3)(b) may apply to the type of offenses committed by Crews while he was indisputably a public school teacher.

Accordingly, we affirm all of the convictions except for count six; the conviction for count six is reversed, and the cause is remanded for entry of an order of acquittal as to this count and the vacation of the corresponding sentence.

BENTON, J., CONCURS; PADOVANO, J., CONCURS IN PART AND DISSENTS IN PART WITH WRITTEN OPINION.

PADOVANO, J., concurring in part and dissenting in part.

I agree that Hallberg v. State, 649 So. 2d 1355 (Fla. 1994), requires reversal of the denial of the motion to dismiss count six. As to the affirmance of the denial of the motions to dismiss counts two through five and seven through ten, I respectfully dissent and would certify a conflict with LaMorte v. State, 984 So. 2d 548 (Fla. 2d DCA 2008).

As Judge Altenbernd reasoned in his dissent in LaMorte, section 775.15(12)(b), Florida Statutes does not define the phrase "misconduct in office." We do not know whether the legislature meant to use the phrase in a broad sense to refer to any government employee, or in a narrow sense to include only those employees who hold an "office" as defined in the state constitution or the state laws. The narrow construction makes more sense to me as I do not think there is any valid reason to treat public employees differently from private employees.

At the very least, the statute is ambiguous, and I would resolve the ambiguity in favor of the defendant pursuant to the rule of lenity. See Kasischke v. State, 991 So. 2d 803, 814 (Fla. 2008) ("[a]ny ambiguity or situations in which statutory language is susceptible to differing constructions *must* be resolved in favor of the person charged with an offense.") (quoting State v. Byars, 823 So. 2d 740, 742 (Fla. 2002)).

Accordingly, I would reverse the denial of the motions to dismiss counts two

through five and seven through ten, certify a conflict, and remand for further proceedings.

APPENDIX B

DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850)488-6151

February 04, 2014

CASE NO.: **1D12-4703**
L.T. No.: 12-588-CFMA

William R. Crews	v.	State of Florida
Appellant / Petitioner(s),		Appellee / Respondent(s)

BY ORDER OF THE COURT:

Appellant's motion for certification filed December 2, 2013, is granted, and pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v), the court hereby certifies the following question of great public importance:

> DOES THE STATUTE OF LIMITATIONS FOR "MISCONDUCT IN PUBLIC OFFICE" BY A PUBLIC OFFICER OR EMPLOYEE IN SECTION 775.15(12)(b), FLORIDA STATUTES, APPLY TO A PUBLIC SCHOOL TEACHER?

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Hon.Pamela Jo Bondi, A.G. Hon.Nancy A.Daniels, P.D. Glen P.Gifford, A.P.D.
Jennifer J.Moore, A.A.G.

jm

JON S. WHEELER, CLERK

DISTRICT COURT OF APPEAL
SAT CITO SI RECTE
FIRST DISTRICT
STATE OF FLORIDA