IN THE SUPREME COURT OF FLORIDA

Case No. SC15-233

BRIAN MICHAEL ROBINSON,
Petitioner,

v.

THE STATE OF FLORIDA,
Respondent.

On Petition for Discretionary Review from the First District Court of Appeal, Case No. 1D14-179

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner, Brian Michael Robinson, will be referred to as Petitioner or Robinson. The Respondent, State of Florida, will be referred to as the Respondent or State. The Record on Appeal will be referred to as (R-volume number, page number).

STATEMENT OF THE CASE AND FACTS

A. Background of Proceedings.

On February 29, 2008, law enforcement executed a search warrant at Mr. Robinson's residence at 3112 Skyhawk Drive, Crestview, Florida. (RI, 43; RII, 174-75) Mr. Robinson's computer, several DVDs, CDs, VHS tapes, thumb-drives and other evidence was seized. (RI, 43) The search warrant was related to an investigation of an internet protocol (IP) address allegedly offering to participate in the distribution of child pornography; the IP address was assigned to an account owned by Mr. Robinson's wife although Mr. Robinson was using the account. (RI, 6) On March 7, 2008, Mr. Robinson was voluntarily interviewed by law enforcement and provided a sworn statement. (RI, 43) Mr. Robinson was a member of the U.S. Army stationed at Camp Rudder, Eglin Air Force Base, Florida. (RI, 43) He had always maintained his residential and mailing address at 5865 Curtis Road, Pace, Florida, and this address was, and had been for the nine years he was active duty in the U.S. Army, his

military "Home of Record" address. (RI, 43) Mr. Robinson also lived at the Skyhawk Drive address until he reported to his next duty station at Fort Bragg, North Carolina in May, 2008. (RI, 43) On January 20, 2009, an arrest warrant was issued for Mr. Robinson. (RI, 43) Mr. Robinson was not actually contacted regarding the warrant until June 4, 2012, at which time he immediately surrendered to law enforcement in Fort Walton Beach, Florida. (RI, 43-44)

On July 20, 2012, Mr. Robinson was charged in a 10 count Information as follows: Count 1, promoting sexual performance by a child, pursuant to Section 827.071(3), Fla. Stat.; and Counts 2 through 10, possession of photos, motion pictures, etc., which include sexual conduct by a child, pursuant to Section 827.071(5), Fla. Stat. (RI, 19-20) Count 1 is a second degree felony, and Counts 2 through 10 are third degree felonies. (RI, 19-20)

B. Motion to Dismiss Based on Statute of Limitations.

Mr. Robinson filed a motion to dismiss alleging the statute of limitations had run on all counts of the Information. The motion argued that Section 775.15(2)(b), Fla. Stat., required the prosecution of any felony other than a capital or first degree felony to be commenced within three (3) years after commission of the alleged criminal act. (RI, 34) The motion asserted that despite the arrest warrant being issued on January 20, 2009, Mr. Robinson was never contacted by law enforcement

regarding the active warrant until June 4, 2012. (RI, 35) The motion asserted that at all relevant times Mr. Robinson had been a member of the U.S. Army and therefore available to law enforcement but that no significant effort was made to contact him. The motion asserted that Mr. Robinson was never "unreachable" during the limitations period, and that at all times he could have been contacted through either his military command, his Home of Record (5865 Curtis Road, Pace, FL), or through his parents who also reside at Mr. Robinson's military Home of Record address on Curtis Road. (RI, 35-36)[1]

The State argued that on January 23, 2009, lead case agent Investigator Easterday was contacted by Investigator Watkins regarding the active warrant for Mr. Robinson. (RI, 102, 105-106) Easterday responded that the Defendant should "self-surrender." (RI, 105-106) Two years later, in April 2011, and during a review of Investigator Easterday's cases following his death, Watkins noticed that Mr. Robinson's warrant was still outstanding and thereafter went to Mr. Robinson's old address. (RI, 102) After some "digging," Watkins determined that Mr. Robinson was in the U.S. Army and currently stationed at Schofield Barracks, Hawaii; the State asserted that Mr. Robinson had been stationed outside of Florida "continuously since

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[1] Mr. Robinson also filed a supporting memorandum of law containing a detailed timeline of relevant dates. (RI, 42-101)

May 2008." (RI, 107-113)[2] In April, 2011, Investigator Watkins contacted the U.S. Marshall in Hawaii, at which time it was determined that Mr. Robinson was temporarily deployed to Afghanistan. (RI, 102) It was while Mr. Robinson was visiting his family in Florida in June, 2012 that the U.S. Marshall's office went to his home in Hawaii, made contact with Mr. Robinson's wife and children, and then communicated with Mr. Robinson in Florida that he should contact Investigator Watkins; on that same day Investigator Watkins made arrangements with Mr. Robinson to turn himself in. (RI, 103; RII, 177)

Mr. Robinson's permanent address has always been his parents' address at the Curtis Road location in Pace, Florida; his Florida driver's license has always listed that address as his permanent mailing and residential address. (RII, 176) At the hearing on the motion to dismiss the State and Mr. Robinson stipulated to the factual issues and timeline in the case. (RII, 174) Regarding Count 1, the alleged criminal conduct would have occurred on November 20, 2007. (RII, 178) It was also stipulated between counsel that the three year limitations period for Count 1 started

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[2] Also attached to the State's response was Mr. Robinson's Enlisted Record Brief ("ERB"), which provided assignment information for Mr. Robinson during his period of continuous enlistment in the U.S. during all relevant time periods. (RI, 113) The ERB established that Mr. Robinson was assigned to Eglin Air Force Base, Florida from 9/15/06 to 5/9/08; Fort Bragg from 5/08 to 11/19/10; and Schofield Barracks, Hawaii from 11/19/10 through the current date. (RI, 113)

to run November 21, 2007 and ended November 21, 2010. Regarding Counts 2 through 10, the limitations period started to run March 1, 2008 through March 1, 2011. (RII, 178)

Hearing testimony also established that in an email dated January 23, 2009, from Investigator Watkins to Investigator Easterday it was discussed whether Investigator Watkins should work on arresting Mr. Robinson pursuant to the existing warrant. (RII, 179-80) The email directed Investigator Watkins to have Mr. Robinson self-surrender if called and that if he failed to do so Watkins should inform Easterday of that fact. (RII, 180) It was also stipulated at the hearing that no one from law enforcement contacted or called Mr. Robinson to turn himself in between January 26, 2009 and June, 2012. At no time during the relevant period set forth above did any law enforcement investigator contact Mr. Robinson's parents or check his permanent residence at 5865 Curtis Road, Pace, Florida. (RII, 180)

C. Order Denying Motion to Dismiss, Plea, Sentencing.

The trial court order denying Robinson's motion to dismiss narrowly stated:

> "Section 775.15(5), Florida Statutes (2008), provides that '[t]he period of limitation does not run during any time when the defendant is continuously absent from the state[.]' Because Defendant was continuously absent from the state, the Court concludes that the statute of limitations was tolled and prosecution was timely commenced. *See Pearson v. State*, 867 So.2d 517, 518-19 (Fla. 1st DCA 2004); *King v. State*, 687 So.2d 917, 918-19 (Fla. 5th DCA 1997); *State v. Picklesimer*,

606 So.2d 473, 474-75 (Fla. 4th DCA 1992)." (RI, 133-34)[3]

Mr. Robinson executed a plea and sentencing agreement and plead no contest to all charges in the Information, was adjudicated guilty, and sentenced to 42.45 months in the DOC with five years' probation upon release. (RI, 139) Mr. Robinson expressly preserved his right to appeal the denial of his dispositive motion to dismiss. (RII, 210-212)

D. Proceedings Before the First District.

Following briefing and oral argument, and citing its earlier decision in *Pearson v. State*, 867 So.3d 517, 519 (Fla. 1st DCA 2004), the First District affirmed the trial court's denial of Petitioner Robinson's motion to dismiss. *See Robinson v. State*, 153 So.3d 313 (Fla. 1st DCA 2014). The *Robinson* opinion below provided:

> Brian Michael Robinson challenges the denial of his motion to dismiss, arguing that the statute of limitations prohibited the State from proceeding against him. Because the running of the statute of limitations was tolled under section 775.15(5), Florida Statutes (2008), while Robinson was continuously absent from the state, his prosecution was not barred by the statute of limitations. Accordingly, we affirm.
>
> Under section 775.15(2)(b), Florida Statutes (2008), prosecution for second and third degree felonies must be commenced within three years. This limitations period may be tolled, however, for the time during which the defendant is continuously absent from the state. § 775.15(5), Fla. Stat. (2008);

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[3] On May 17, 2013, Mr. Robinson filed a Petition for Writ of Prohibition with the First District, Case No. 1D13-2345, which was denied by order dated June 21, 2013.

> *Pearson v. State*, 867 So.2d 517, 519 (Fla. 1st DCA 2004). Statutes of limitations on criminal offenses must be liberally construed in favor of the accused. *Sutton v. State*, 784 So.2d 1239, 1241 (Fla. 2d DCA 2001). Once the jurisdiction of the court is challenged by the raising of the statute of limitations, the State has the burden to establish that the offense is not barred by the statute. *Fleming v. State*, 524 So.2d 1146, 1146–47 (Fla. 1st DCA 1988).

Robinson, 867 So.3d at 519.

Robinson further provided:

> Section 775.15(4)(b) provides that process must be executed without unreasonable delay and:
>
> > "In determining what is reasonable, inability to locate the defendant after diligent search or the defendant's absence from the state shall be considered. The failure to execute process on or extradite a defendant in another state who has been charged by information or indictment with a crime in this state shall not constitute an unreasonable delay."
>
> Section 775.15(5) provides, in pertinent part, that "[t]he period of limitation does not run during any time when the defendant is continuously absent from the state ...." Here, the State established that Robinson was continuously absent from the state between May 2008 and May 2012.
>
> Robinson asserts that the State may not avail itself of this tolling provision, however, because it failed to demonstrate that it made a diligent search for Robinson or that his absence from the state hindered prosecution. We do not agree. This court has held that, where the defendant is continuously absent from the state, the express language of section 775.15(5) does not require that the State undertake a diligent search or that the defendant's absence hindered the prosecution for the statute of limitations to be tolled. *Pearson*, 867 So.2d at 519. ***As we noted in Pearson, id., our reading of section 775.15(5) conflicts with the second district's interpretation of that statute in Netherly v. State, 804 So.2d 433, 437 (Fla. 2d DCA 2001), and State v. Perez, 72 So.3d 306, 308 (Fla. 2d DCA 2011).*** Accordingly, since Robinson's continuous absence from

the state resulted in the tolling of the statute of limitations, prosecution in this matter was timely commenced.

Robinson, 153 So.3d 313-314 (emphasis added)

On the basis of the recognized conflict between the First District's opinion in *Pearson*, 867 So.2d at 517, and the Second District's opinions in *Netherly v. State*, 804 So.2d at 437, and *State v. Perez*, 72 So.3d at 308, Petitioner Robinson moved the First District to certify conflict pursuant to Fla. R. App. P. 9.330(a). That motion was denied by order dated January 8, 2015. Petitioner thereafter petitioned this Court for discretionary review.

SUMMARY OF ARGUMENT

I. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE FIRST DISTRICT'S OPINIONS IN *PEARSON V. STATE* AND *ROBINSON V. STATE*, AND THE SECOND DISTRICT'S OPINIONS IN *NETHERLY V. STATE* AND *STATE V. PEREZ*, IN FAVOR OF THE SECOND DISTRICT'S INTERPRETATION OF THE TOLLING PROVISIONS OF SECTION 775.15, FLORIDA STATUTES.

One of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter. Therefore, any ambiguity or situations in which statutory language is susceptible to differing constructions must be resolved in favor of the person charged with an offense. Statutes of limitations on criminal offenses must be liberally construed in favor of the accused. Once a

defendant has raised the statute of limitations defense, the burden is on the prosecution to establish that the offense is not barred by the statute. There is express and direct conflict between the First District's decisions in *Pearson* and *Robinson* with the Second District's opinions in *Netherly* and *Perez*. This conflict should be resolved in favor of the Second District's interpretation requiring law enforcement to undertake some degree of diligent search of a criminal defendant before the State can benefit from statutory tolling.

Relying on the "continuous absence" prong of § 775.15(5), the First District's interpretation of § 775.15(5) that does not require the State to undertake a diligent search, or that it be established that the defendant's absence from the State hindered the prosecution for the statute of limitations to be tolled. Removing the burden on law enforcement to make some effort, albeit minimal, to contact a criminally accused within the limitations period essentially allows law enforcement unbridled discretion to delay prosecutions indefinitely. The Second District's holdings in *Netherly* and *Perez* are more consistent with established principles of statutory interpretation, and the intent of Section 775.15(5), by requiring law enforcement to act diligently in trying to locate an accused and timely pursue prosecution.

In the present case, the State essentially stipulated it made no effort to search for Robinson during the limitations period and therefore should not be entitled to the

tolling provisions of Section 775.15. The State failed to demonstrate why they did not attempt to locate him until after the limitations period had expired. Mr. Robinson was not contacted by law enforcement regarding the active warrant, notwithstanding the fact that he had always been a member of the U.S. Army and was available to law enforcement likely with only minimal effort. Mr. Robinson was never "unreachable" during the limitations period. *Some* burden, even with the First District's narrow interpretation of Section 775.15 in *Pearson*, must be imposed on law enforcement to look for a criminally accused over the span of several years. Thus, Petitioner Robinson urges this Court to adopt the Second District's interpretation of the tolling provisions of Section 775.15 and reverse the trial court's denial of Mr. Robinson's motion to dismiss.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE FIRST DISTRICT'S OPINIONS IN *PEARSON V. STATE* AND *ROBINSON V. STATE,* AND THE SECOND DISTRICT'S OPINIONS IN *NETHERLY V. STATE* AND *STATE V. PEREZ,* IN FAVOR OF THE SECOND DISTRICT'S INTERPRETATION OF THE TOLLING PROVISIONS OF SECTION 775.15, FLORIDA STATUTES.

This Court reviews a trial court's denial of a motion to dismiss de novo. "The interpretation of a statute is a purely legal matter and therefore subject to the de novo standard of review." *Kasischke v. State*, 991 So.2d 803 (Fla.2008); *State v. Glatzmayer,* 789 So.2d 297, 301-02 (Fla.2001). One of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter." *State v. Byars*, 823 So.2d 740 (Fla.2002); *Perkins v. State*, 576 So.2d 1310, 1312 (Fla.1991). Therefore, any ambiguity or situations in which statutory language is susceptible to differing constructions must be resolved in favor of the person charged with an offense. *See Id.; Perkins*, 576 So.2d at 1312. Statutes of limitations on criminal offenses must be liberally construed in favor of the accused. *Sutton v. State,*784 So.2d 1239 (Fla. 2d DCA 2001). Once a defendant has raised the statute of limitations defense, the burden is on the prosecution to establish that the offense is not barred by the statute. *Id.* at 1241.

Pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), and Art.

V, § 3(b)(4), Fla. Const., this Court has jurisdiction to review a decision of a Florida district court of appeal that conflicts with a decision of another district court of appeal. Citing its earlier decision in *Pearson v. State*, 867 So.3d 517, 519 (Fla. 1st DCA 2004), the First District affirmed the trial court's denial of Petitioner Robinson's motion to dismiss that alleged that the statute of limitations barred the State's prosecution. *See Robinson v. State*, 153 So.3d 313 (Fla. 1st DCA 2014). There is express and direct conflict between the First District's decisions in *Pearson* and *Robinson* with the Second District's opinions in *Netherly v. State*, 804 So.2d 433, 437 (Fla. 2d DCA 2001), and *State v. Perez*, 72 So.3d 306, 308 (Fla. 2d DCA 2011). This conflict should be resolved in favor of the Second District's interpretation requiring law enforcement to undertake some degree of diligent search of a criminal defendant before the State can benefit from statutory tolling.

A. State Has the Burden to Prove That a Criminal Prosecution Is Not Time Barred.

When a criminal defendant challenges his prosecution as untimely commenced the State has the burden to prove that the prosecution is not barred by the statute of limitations. Section 775.15, Fla. Stat., provides that a prosecution is commenced when either an indictment or information is filed as long as the capias, summons, or other process issued on such indictment or information is executed without

unreasonable delay. Section 775.15(5), Fla. Stat., provides in pertinent part:

> (5) The period of limitation does not run during any time when the defendant is continuously absent from the state or has no reasonably ascertainable place of abode or work within the state. *This provision shall not extend the period of limitation otherwise applicable by more than 3 years, but shall not be construed to limit the prosecution of a defendant who has been timely charged by indictment or information or other charging document and who has not been arrested due to his or her absence from this state or has not been extradited for prosecution from another state.* (emphasis added)

In the present case, the State argued that the 1997 amendment to Section 775.15 relieved it of its duty to either execute the capias without unreasonable delay or demonstrate that they were unable to execute the capias because Petitioner Robinson was out of the state or had no reasonably ascertainable place of abode or work within the state. (RII, 188-193) However, other than the language added which allows a tolling of the statute of limitations beyond three years under certain circumstances, the original language of Sections 775.15(5) and 775.15(6) remained essentially the same. When Section 775.15 was amended in 1997 the Legislature added language to the section which relaxed the absolute time limits set forth in the statute before 1997. Before the 1997 amendment to the statute, Section 775.15(6) provided that:

> the period of limitation does not run during any time when the defendant is continuously absent from the state or has no reasonable ascertainable place of abode or work within the state, but in no case shall this provision extend the period of limitations otherwise applicable by more than 3 years.

After the amendment of the statute in 1997, the Legislature added the following language to the original text:

> ...this provision shall not extend the period of limitation otherwise applicable by more than 3 years, but shall not be construed to limit the prosecution of a defendant who has been timely charged by indictment or information or other charging documents and who has not been arrested due to his or her absence from this state or has not been extradited for prosecution from another state.

Despite the amendment to Section 775.15 in 1997, the diligent search requirement has not been removed. The State must demonstrate efforts to locate a defendant prior to the running of the statute of limitations and that any delay was not unreasonable. *See Sutton v. State*, 784 So.2d 1239 (Fla. 2nd DCA 2001); *Cunnell v. State*, 920 So.2d 810 (Fla. 2d DCA 2006) (Defendant charged with possession of heroin was not a person who had no fixed place of abode or employment, nor was she a person whose circumstances were such that her place of abode or employment could not be discovered by a diligent search, and therefore the statutes of limitations for prosecution of defendant's drug charges were not tolled).

In *Pearson*, 867 So.2d at 519, the First District narrowly interpreted § 775.15(5), Fla. Stat., and held that the prosecution was timely commenced because the defendant was continuously absent from the state resulting in the tolling of the statute of limitations. *Pearson* adopted *State v. Miller*, 581 So.2d 641, 642 (Fla. 2d DCA 1991), which found that the dispositive issue pursuant to Section 775.15(5) is

whether, in considering the reasonableness of the delay in prosecution, "the defendant's absence from the state hindered the prosecution." *Id.* at 519. The *Pearson* Court reasoned:

> Neither subsection requires that the defendant's absence from the state must have hindered the state from proceeding with the prosecution. Instead, case law from the second district added this requirement first to Section 775.15(5), and later to Section 775.15(6). *See State v. Miller,* 581 So.2d 641, 642 (Fla. 2d DCA 1991)(holding where the defendant's absence from the state is not the fault of defendant and does not hinder prosecution, the statute of limitations is not tolled pursuant to Section 775.15(5), Florida Statutes); *Netherly v. State,* 804 So.2d 433, 436-37 (Fla. 2d DCA 2001) (holding where the state is unable to demonstrate that the defendant's absence from the state delayed prosecution, the statute of limitations is not tolled pursuant to section 775.15(6), Florida Statutes). The second district's holding in *Miller* appears to be proper because the dispositive issue under section 775.15(5) is whether the state's delay in prosecution is reasonable. Thus, in considering the reasonableness of the delay, it is appropriate to look to whether the defendant's absence from the state hindered the prosecution.

Pearson, 867 So.2d at 518.[4]

Pearson further found:

> However, we disagree with the second district's holding in *Netherly* because section 775.15(6) does not require that the delay in prosecution be reasonable in order for the statute of limitations to be tolled. Therefore, we reject the holding in *Netherly* and apply section 775.15(6) as written. Based on the

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[4] For purposes of distinguishing the ultimate holding in *Pearson* from the present case, the defendant in *Pearson* was actually absent from the State of Florida continuously from the date of the crime until approximately five years later when he was found in Chicago; it was also evident in *Pearson* that law enforcement had no information about where the accused was or how he could be located. 807 So.2d at 518.

> express language of section 775.15(6), prosecution in this matter was timely commenced, as the appellant was continuously absent from the state and his absence resulted in the tolling of the statute of limitations. Thus, the appellant's first claim of ineffective assistance of counsel must fail as being without merit.

Pearson, 867 So.2d at 517.

In the present case, the First District also found that pursuant to § 775.15(5) Petitioner Robinson was "continuously absent from the state between May 2008 and May 2012." *Robinson,* 153 So.3d at 314. The First District rejected Petitioner Robinson's assertion that the State could not avail itself of the § 775.15(5) tolling provision because the State failed to demonstrate it made a diligent search for Petitioner Robinson or that his absence from the state hindered prosecution. Relying on the "continuous absence" prong of § 775.15(5), the First District held that the express language of § 775.15(5) did not require the State to undertake a diligent search or that it be established that the defendant's absence from the State hindered the prosecution for the statute of limitations to be tolled. *Robinson*, 153 So.3d at 314. The First District in *Robinson* specifically held that its reading of § 775.15(5), as noted in *Pearson*, 867 So.2d at 519, "conflicts with the second district's interpretation of that statute" in *Netherly,* 804 So.2d at 437, *Perez*, 72 So.3d at 308.

In *Netherly*, 804 So.2d at 433, the Second District held that Section 775.15 requires that the State show that a defendant's absence prevented or delayed

prosecution for the offense. In *Netherly*, the defendant moved to dismiss a fraud count arguing that the statute of limitations had run on the offense. The trial court denied the motion after finding that the statute of limitations was tolled during his absence from the state. The reversing the *Netherly* court found:

> Statutes of limitations on criminal offenses must be liberally construed in favor of the accused. *Sutton v. State,*784 So.2d 1239 (Fla. 2d DCA 2001). Once a defendant has raised the statute of limitations defense, the burden is on the prosecution to establish that the offense is not barred by the statute. *Id.* at 1241. The State established that Mr. Netherly was absent from the state between October 1992 and September 1995. However, merely demonstrating his absence was not enough to toll the statute. In order to avail themselves of the three-year tolling provision of section 775.15, the State must have shown that his absence prevented or delayed his prosecution for this offense. ***This court has repeatedly held that the statute of limitations will not be tolled pursuant to section 775.15(6) in cases where the State is unable to demonstrate that prosecution was delayed due to the defendant's absence from the state. See, e.g., Sutton v. State, 784 So.2d 1239, 1242 (Fla. 2d DCA 2001); Brown v. State, 674 So.2d 738 (Fla. 2d DCA 1995); State v. Miller, 581 So.2d 641 (Fla. 2d DCA 1991).***

804 So.2d at 437 (emphasis added)

The defendant in *Netherly* maintained the limitations period should not have been tolled because the State was aware that he had relocated to Tennessee. *Netherly* held:

> We agree. The record indicates that the Netherlys were, at all times, available to be charged after they moved to Tennessee. There were no charges pending against the Netherlys which would have prohibited them from leaving Florida. It is clear from the record that they did not move to Tennessee to elude authorities. The Netherlys cooperated during several investigations related to Premiere's closing and were in continuous contact with state and federal officials after they moved to Tennessee. Moreover, during this period, Mr.

> Netherly participated in a pretrial diversion program for bad check charges and sent checks to the Pinellas County State Attorney's office which were drawn on a Tennessee bank.
>
> Because Mr. Netherly's absence from the state did not delay his prosecution for this offense, the trial court erred in denying his motion to dismiss this charge. Mr. Netherly's conviction as to count 1 is therefore reversed.

Netherly, 804 So.2d at 437.

In *State v. Perez*, 72 So.3d 306 (Fla. 2d DCA 2011), also cited by the *Robinson* Court as a basis for conflict with *Pearson*, the Second District held the State is required to act diligently in trying to locate a defendant irrespective of their absence from the State of Florida.[5] In *Perez*, the defendant was charged with a crime that occurred in May of 2000; an Information was filed in 2002 and the capias issued within the limitations period. However, the capias was not executed until 8 years after the Information was filed. *Id.* The State argued in *Perez* that the plain language of the statute provides that the defendant's absence from the state in and of itself tolled the limitations period. *Id.* The *Perez* Court disagreed finding the State is required to act diligently in trying to locate the appellant irrespective of her absence

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[5] While the First District's opinion in *Robinson* also references conflict with the Second District in *State v. Perez*, 72 So.3d 306, 308 (Fla. 2d DCA 2011), a component of the *Perez* case addresses a specific limitations provision in Section 812.035(10), Fla. Stat., that Petitioner Robinson believes distinguishes its direct relevance to this conflict consideration. Moreover, the facts in *Perez* do not provide enough detail for purposes of highlighting conflict with *Pearson* and *Robinson*.

from the state of Florida. *Id.* Even though the appellant in *Perez* was admittedly out of the state during the relevant time period, the Court held that since the State had not undertaken any effort to determine the appellant's whereabouts during the applicable limitations period the case should be dismissed. *Id.*

1. <u>The State failed to undertake any effort to locate Robinson or establish that his absence hindered his prosecution</u>.

In determining what is a reasonable effort, an inability to locate a defendant after a diligent search or the defendant's absence from the state shall be considered. § 775.15(5). A single visit to a defendant's residence is not a diligent search within the meaning of section 775.15(5). *Sutton*, 784 So.2d at 1241; *Wright v. State*, 600 So.2d 1248 (Fla. 5th DCA 1992). The State must also check obvious sources of information-such as telephone books, driver's license and vehicle records, and property and utility records-to establish a diligent search. *Lucas v. State*, 718 So.2d 905 (Fla. 3d DCA 1998); *see also Lewis v. State*, 765 So.2d 163 (Fla. 2d DCA 2000).[6]

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[6] In *Cunnell v. State*, 920 So.2d at 810, the Second DCA also held that the State must make diligent efforts to find the defendant during the applicable statute of limitations period, finding that to satisfy this obligation the State must check obvious sources of information and follow up on any leads. Since the State in *Cunnell* was only able to demonstrate one attempt to serve the capias, the court held that there was insufficient evidence to find that the capias had been served without unreasonable delay. *Id.* at 810. Mr. Robinson asserts that *Cunnell* also requires the State to conduct a diligent search for the defendant during the relevant statute of limitations, regardless of whether the defendant is inside or outside the state. *Id.* at 810.

Further, although the reasonableness of the delay in serving a capias may be determined in light of a defendant's efforts to elude prosecution, when the State offers no evidence that it made any effort to locate the defendant, such as checking obvious sources, the search has not been diligent and the delay cannot be held sufficiently reasonable. *McNeil v. State*, 673 So.2d 125 (Fla. 3d DCA 1996); *see Williams v. State*, 913 So.2d 760 (Fla. 4th DCA 2005). Absence from the state can cause the State problems in commencing a prosecution, affording a speedy trial, or affording due process to litigants, and when the absence is the fault of a defendant the relative time periods are tolled. When, however, absence from the state is not the fault of the defendant and does not result in preventing prosecution, or from undertaking diligent efforts to contact an accused, the time periods of statutes of limitation are not tolled. *See State v. Miller*, 581 So.2d 641 (Fla. 2d DCA 1991)

In the present case, the State essentially stipulated it made no effort to search for Robinson during the limitations period and therefore should not be entitled to the tolling provisions of Section 775.15. The State failed to demonstrate why they did not attempt to locate him until after the limitations period had expired. Mr. Robinson was not contacted by law enforcement regarding the active warrant until June 4, 2012, notwithstanding the fact that he had always been a member of the U.S. Army and was

available to law enforcement likely with only minimal effort. Mr. Robinson was never "unreachable" during the limitations period, and that at all times he could have been contacted through military command, his residence, or through his parents who lived at Mr. Robinson's permanent address. *Some* burden, even with the First District's narrow interpretation of Section 775.15 in *Pearson*, must be imposed on law enforcement to look for a criminally accused over the span of several years. Thus, Petitioner Robinson urges this Court to adopt the Second District's interpretation of the tolling provisions of Section 775.15 and reverse the trial court's denial of Mr. Robinson's motion to dismiss.

2. To the extent the Court does not accept the Second District's interpretation of Section 775.15 and impose a diligent search requirement on law enforcement, Petitioner Robinson would argue that the record does not convincingly establish his continuous absence from the State of Florida.

Regarding continuous absence, the Petitioner would assert the facts in the present case do not support the State's assertion that Mr. Robinson was "continuously absent" from the State of Florida during the applicable limitations period. Petitioner Robinson maintained the same permanent Florida address during all relevant time periods, and was continuously a member of the U.S. Army with easily identifiable duty stations that could have been determined simply by contacting his command at

Eglin Air Force Base. Nowhere in *Pearson* or any other case addressing Section 775.15 tolling is "absence" – continuous or otherwise – specifically defined or a clear standard delineated. Again, a fundamental principle of Florida law is that penal statutes must be strictly construed with any ambiguity resolved in favor of the person charged with an offense. *Perkins*, 576 So.2d at 1312. To the extent the Court rejects the Second District's diligence requirement, the Petitioner would argue that he was not continuously absent and that the denial of his motion to dismiss be reversed.

CONCLUSION

Based on the foregoing, the Petitioner respectfully requests that this Court 1) resolve the conflict between the First District and Second District on the interpretation of the tolling provisions of Section 775.15, Fla. Stat., in favor of the Second District's interpretation; and 2) reverse the First District's opinion affirming the trial court's denial of Petitioner Robinson's motion to dismiss and remand to the trial court for discharge of all proceedings against the Petitioner.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by Email to Trisha Meggs Pate, Assistant Attorney General, trisha.pate@myfloridalegal.com and crimapptlh@myfloridalegal.com, and Lauren L. Brudnicki, Assistant Attorney General, Lauren.Brudnicki@myfloridalegal.com, on July 21, 2015.

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Pursuant to Fla. R. App. P. 9.210(a), undersigned counsel hereby certifies that this brief complies with the font requirements the Rule, and is formatted in Times New Roman 14-point font.

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