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 REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner adopts the Preliminary Statement from his Initial Brief on the Merits but would supplement as follows: Petitioner's Initial Brief on the Merits will be referred to as (PIB, page number); Respondent's Answer Brief will be referred to as (RAB, page number).

STATEMENT OF THE CASE AND FACTS

The Petitioner adopts the Statement of the Case and Facts from his Initial Brief on the Merits.

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.

In urging this Court to adopt the First District's interpretation of the tolling provisions of Section 775.15(4)(b) and (5), Fla. Stat., as held in *Pearson v. State*, 867 So.2d 517 (Fla. 1st DCA 2004), and *Robinson v. State*, 153 So.3d 313 (Fla. 1st DCA 2014), the State argues statutory strict construction and plain reading. (RAB, 6-8) And while the conjunctive language in § 775.15(4)(b) ("...diligent search ***or*** the defendant's absence..."), and § 775.15(5) ("...continuously absent from the state ***or***

has no reasonably ascertainable place of abode or work within the state...") (emphasis added), may lend itself to that interpretation, the State's analysis fails to appreciate the legislature's obvious belief that ***some*** degree of effort should be undertaken before law enforcement should be allowed relief through a tolling statue. This is precisely what the Second District considered in *Netherly v. State,* 804 So.2d 433, 436-37 (Fla. 2d DCA 2001), where the Court held that merely demonstrating absence from the state was not enough to toll the statute:

> 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)[1]

Unlike the First District in *Pearson* and *Robinson*, the Second District recognized some middle ground in tolling cases involving the rights of a criminally accused. *See Cunnell v. State*, 920 So.2d 810 (Fla. 2d DCA 2006) (Defendant charged with

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[1] In *Netherly,* as in the present case with Petitioner Robinson, the record clearly established that the Netherlys were at all times available to be charged after they moved to Tennessee; that they did not move to Tennessee to elude authorities; that they cooperated during several investigative efforts; and that they were otherwise not intentionally eluding a police investigation and were seemingly living openly and conspicuously. *Netherly*, 804 So.2d at 437.

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); *Netherly*, 804 So.2d at 433; *State v. Perez*, 72 So.3d 306 (Fla. 2d DCA 2011); *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); *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).

Despite the State's assertions in the present case (RAB, 9-10), the Second District's interpretation of § 775.15 is not inconsistent with statutory plain reading and strict construction. The Second District's recognition that § 775.15 can not be so narrowly construed as to remove *any* obligation of law enforcement to undertake even nominal efforts to search out of state recognizes this Court's decisions and the constitutional requirement 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). Any ambiguity or situation in which statutory language is susceptible to differing constructions must be resolved in favor of the person charged with an offense. 576 So.2d at 1312. This maxim applies to statutes of limitations for criminal offenses which must be liberally construed in favor of the accused. *Sutton v. State,*784 So.2d 1239 (Fla. 2d DCA 2001).

Moreover, when considering the facts in the present case, the Second District's realistic interpretation of § 775.15 in the above-referenced cases makes even more sense. The continuous absence language is reasonably intended to toll the running of the limitations period where law enforcement has no ability to determine a defendant's location. Where, however, a defendant's whereabouts can be determined with even nominal effort by law enforcement, then some degree of diligent search should be required even if out of state. This is especially true in the present case where the State essentially stipulated it made no effort to search for Petitioner Robinson during the limitations period. (RII, 180) The State never once addresses the fact that several years passed before law enforcement even picked up Petitioner Robinson's file and decided they would prosecute. The State also failed to demonstrate why they did not attempt to locate him until after the limitations period had expired, and conceded that Mr. Robinson was not contacted by law enforcement

regarding the active warrant until June 4, 2012, even though he had always been a member of the U.S. Army and was available to law enforcement likely with only minimal effort by contacting his military command.

Petitioner Robinson also maintained the same permanent Florida address during all relevant time periods. It was stipulated that no one contacted or called Mr. Robinson to turn himself in until his wife was contacted by law enforcement in June, 2012. There was no other attempt to directly contact Mr. Robinson. (RII, 180) At no time did any law enforcement investigator go to or contact Mr. Robinson's parents, nor did any of them visit his permanent residence at 5865 Curtis Road, Pace, Florida. (RII, 180) It was not until two years later – in April, 2011 during a review of Investigator Easterday's cases – that Investigator Watkins noticed that Mr. Robinson's warrant was still outstanding and then 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. 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. *Some* burden on law enforcement must be required. The

Petitioner moves this Court to reject the First District's narrow construction of the tolling provisions of §775.15.

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.

Respectfully submitted,

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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 October 15, 2015.

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CERTIFICATE OF FONT SIZE

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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