IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-576

LOWER COURT CASE NO. 3D14-1635

STATE OF FLORIDA,

Petitioner,

-vs-

EARVIN SMITH,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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STATEMENT OF THE CASE AND FACTS

Defense counsel mistakenly thought that the armed burglary offense was not time-barred, and did not object. Defense counsel stated on the record that "the rest of them" (which included the subject armed burglary) were life felonies. (R 163). The charged armed burglary offense was a first-degree felony, albeit punishable by up to life. The applicable statute of limitations for a first-degree felony was four years. §775.15, Fla. Stat. (1989). The statute of limitation ran in 1994.

Following this Court's precedent, the Third District's en banc opinion held that "under these circumstances" the Defendant had not waived the defense, and the statute of limitations issue could be successfully raised for the first time on direct appeal. *Smith v. State*, 211 So. 3d 176, 187 (Fla. 3d DCA 2016). In doing so, however, the Third District said:

> Were we writing on a clean slate, we would hold that a defendant cannot raise, for the first time on appeal, the claim that the crime with which he was actually charged and convicted is barred by the statute of limitations. There are sound policy and practical reasons (set forth in the balance of this opinion) why a defendant should not be permitted to raise the statute of limitations for the first time on appeal under such circumstances.
>
> We are nevertheless bound by the existing decisions of the Florida Supreme Court to hold that the defendant may under these circumstances raise the statute of limitations for the first time on appeal. We affirm the judgment and sentence for armed sexual battery. We reverse the judgment and sentence for armed burglary, with directions to dismiss that charge as time-barred and to discharge the

defendant on that charge.

Smith v. State, 211 So. 3d at 187. The court then certified the following question to this Court as one of great public importance:

> Must a defendant, who claims that the offense as charged in the information is barred by the statute of limitations, raise the issue in the trial court in order to preserve the issue for direct appeal?

Smith v. State, 211 So. 3d at 187. By order, dated May 24, 2017, this Court accepted jurisdiction as to the certified question.

SUMMARY OF ARGUMENT

This Court should answer the certified question in the negative. The statute of limitations is a substantive statutory mandate. §775.15, Florida Statutes "Time limitations; exceptions," plainly states that prosecutions "must be commenced" within the delineated time frames. This Court has historically recognized that the criminal statute of limitation is jurisdictional, in the sense that it controls the ability of the state to prosecute a particular defendant. This Court has also historically recognized that the protection that the statute of limitations affords is absolute, fundamental, and substantive, and that the bar can be asserted for the first time on appeal. The Court's decisions are legally sound. The decisions have not been rendered unworkable in practice, or obsolete, by any significant changes in circumstances.

The suggestion to relegate unpreserved statute of limitations claims to

postconviction proceedings does not advance fairness, justice or judicial economy. There is no right to counsel in postconviction proceedings. A pro se indigent defendant, convicted of a time-barred offense, would have to discover, and then initiate pro se litigation to undo what the government had no statutory authority to do in the first instance. Barring unpreserved statute of limitations claims from consideration on direct appeal would all but absolve the State from its statutory mandate for timely commencing prosecutions, and incentivize untimely prosecutions.

There is no compelling reason for this Court to recede from stare decisis. This Court should decline the invitation to demote the statute of limitations into a mere procedural hurtle, waived on direct appeal by the failure to assert it.

ARGUMENT

> THIS COURT SHOULD ANSWER IN THE NEGATIVE THE CERTIFIED QUESTION: "MUST A DEFENDANT, WHO CLAIMS THAT THE OFFENSE AS CHARGED IN THE INFORMATION IS BARRED BY THE STATUTE OF LIMITATIONS, RAISE THE ISSUE IN THE TRIAL COURT IN ORDER TO PRESERVE THE ISSUE FOR DIRECT APPEAL?"

A. This Court's precedent affording absolute protection from prosecution for a time-barred offense.

This Court's sound and long-standing precedent affords an absolute protection over the substantive rights of our citizens from being tried and convicted of

statutorily time-barred offenses, such that a conviction obtained at trial on an offense determined legislatively to be stale can be challenged for the first time on appeal. *Nelson v. State*, 17 Fla. 195, 196 (1879) ("Statutes of limitation in respect to crimes are always construed liberally in favor of defendants, and it is not deemed necessary for a party relying upon them to plead them in bar"); *Mitchell v. State*, 157 Fla. 121, 25 So. 2d 73 (1946) (reaffirming these same principles); *Mead v. State*, 101 So. 2d 373, 375 (Fla. 1958) ("The appellant was not required to raise the question of the statute of limitations as the statue must be construed liberally in favor of defendants and need not be pleaded in bar). *State v. King*, 282 So. 2d 163 (Fla. 1973) (recognizing that the criminal statute of limitation is jurisdictional in that it controls the ability of the state to prosecute a particular defendant); *State ex rel. Manucy v. Wadsworth*, 293 So. 2d 345 (Fla. 1974):

> Statutes of limitation in criminal prosecutions ('Limitation on Prosecution') are strictly creatures of statute; *State v. Hickman*, 189 So.2d 254 (Fla.App.1966); and as such are considered **as vesting a Substantive right, rather than being a procedural matter.**
>
> '. . . Whenever, however, it so clearly appears that the time of the commission of the offense was so long ago as that the accused is protected from accusation by the statute of limitations, he may be awarded this right on habeas corpus. **There is as much a denial of what we have called the first right of every accused person, by holding him to answer an offense for which he cannot be lawfully prosecuted, as there is for one wholly unsupported by proofs.** Whether the question is properly raised by demurrer, by special plea, or by the general issue

> plea, makes no difference. The right of protection is not a mere procedural one, but is a substantive right.'

293 So. 2d at 347. (emphasis added).

Historically, even the State recognized it could not successfully sustain a conviction on a time-barred offense, without an express waiver by the defendants themselves (and not their defense counsel). In *Tucker v. State*, 417 So. 2d 1006 (Fla. 3d DCA 1982), *decision approved, Tucker v. State*, 459 So. 2d 306 (Fla. 1984), the State prevailed on its claim that the trial court could not instruct the jury on a time-barred lesser-included offense, absent the defendant's own express waiver on the record. The Third District explained:

> **In this sense "jurisdictional" refers to the legality of the actions of the state in prosecuting an individual for an offense determined legislatively to be stale. A court may not convict a defendant of a crime for which the state has no statutory right to prosecute.**
>
> *******
>
> **The right not to be convicted of an offense for which prosecution is barred by limiting statute is substantive and fundamental.** Waiver of that right must meet the same strict standards which courts have applied in determining whether there has been an effective waiver as to other fundamental rights. Waiver of any fundamental right must be express and certain, not implied or equivocal. With respect to waiver of the statute of limitations there should be a waiver in writing made part of the record or at least an express oral waiver of the statute preventing prosecution and conviction made in open court on the record by the defendant personally or by his counsel in his presence. (emphasis added).

Tucker v. State, 417 So. 2d at 1012-13.

This Court approved the Third District in *Tucker v. State*, 459 So. 2d 306 (Fla. 1984), holding that, even when it is obvious on the record that the defense attorney, during a criminal trial, had a tactical reason for waiving the statute of limitations *to benefit* his client, the substantive right is so important and fundamental that only the clients themselves can waive it:

> The statute of limitations defense is an absolute protection against prosecution or conviction. Before allowing a defendant to divest himself of this protection, the court must be satisfied that the defendant himself, personally and not merely through his attorney, appreciates the nature of the right he is renouncing and is aware of the potential consequences of his decision.

Tucker v. State, 459 So. 2d at 309.

B. **Absent a defendant's express waiver of the substantive right not to be prosecuted and convicted of a time-barred crime, the error is fundamental and can be raised for the first time on direct appeal.**

The State, on page 9 of its initial brief on the merits, concedes that if the record contains an inadequate waiver (verses mere silence) under *Tucker* of the substantive right to assert the statute of limitations defense, or defense lawyer mistake, on the face of the record, (our case) that the statute of limitations has not run, the error is fundamental, and can be raised for the first time on appeal. Nonetheless, the State urges this Court to carve out an exception – where the State conceivably could have amended the information to charge a crime that was not time-barred.

The State argues, in instances where the defense counsel may have had a tactical reason for remaining silent in the face of a charged time-barred offense, fairness to the State should prevent a defendant from benefiting by raising the unpreserved statute of limitations claim on direct appeal. The speculative possibility that defense attorneys will tactically remain silent while their clients are prosecuted with a time-barred offense is dwarfed by the reality that in the vast majority (if not all) of non-plea cases, including this one, a defendant was convicted of a time-barred offense because of poor lawyering. Moreover, placing the burden on defendants would incentivize prosecutors to violate their statutory mandate for timely commencing prosecutions.

Likewise, the discussion in the concurrence that the State theoretically could (or would) have decided to charge the armed burglary differently is speculative. The State has nearly unfettered discretion to charge as it sees fit, tailoring the charges to the facts and its ability to prove them. This kind of second-guessing prosecutorial discretion does not offer a compelling reason to depart from stare decisis.

The argument that justice and judicial efficiency are better served by sending challenges to un-objected-to convictions for time-barred offenses to postconviction proceedings is unpersuasive. Adopting this position would significantly prejudice the indigent defendant, and further burden the judiciary. An indigent defendant in Florida is not entitled to counsel in post-conviction proceedings. Indigent

defendants, imprisoned for time-barred crimes, would be left to fend for themselves, not only in having to discover on their own that they have been convicted of a time-barred offense, but then in having to file pro se postconviction proceedings, alleging ineffective assistance of counsel, in the already over-burdened trial courts.[1] The protection that the statute of limitations affords is too important to be unintentionally lost, and then left to chance that it will be ultimately be successfully asserted pro se in postconviction proceedings fraught with uncertainty, and delay.

C. **The arguments in the Third District's concurrence do not meet the standard to overcome the doctrine of stare decisis.**

When considering whether to recede from precedent, this Court guides itself as follows:

> Having discussed our precedent, we next consider whether we should recede from it. We do so recognizing that the doctrine of stare decisis "counsels us to follow our precedents unless there has been 'a significant change in

[1] *See: State v. Kerby,* 141 N.M. 413, 156 P.3d 704 (2007) (adopting the same express waiver approach articulated in this Court's *Tucker* decision as the most judicially efficient method of protecting a defendant's substantive right not to be prosecuted for a time-barred offense):

> Besides the harsh policy of punishing defendants for failing to raise the statute of limitations in time, the forfeiture rule is also an exercise in futility.
>
> ***
>
> Thus, if we were to adopt the forfeiture rule, we would expend judicial (and executive) resources addressing Defendant's ineffective assistance of counsel claim and ultimately delay the inevitable vacating of Defendant's convictions.

State v. Kerby, 156 P.3d at 419.

> circumstances after the adoption of the legal rule, or ... an error in legal analysis.' " *Rotemi Realty, Inc. v. Act Realty Co., Inc.*, 911 So.2d 1181, 1188 (Fla.2005) (quoting *Dorsey v. State*, 868 So.2d 1192, 1199 (Fla.2003)).

Chames v. DeMayo, 972 So. 2d 850, 855 (Fla. 2007).

The concurrence does not (and cannot) identify any error in this Courts' legal analysis. And, despite the concurrence's contentions to the contrary, there has been no significant change in circumstances to warrant a departure from the doctrine of stare decisis. The concurrence opines that the advent of modern rules of discovery and relaxed standards of pleading obviate the need for this Court's continued strict adherence to the protection that the statute of limitations affords. The modern rules of discovery and relaxed standards of pleading were already in place in 1984 when the Third District and this Court issued the *Tucker* decisions.

More significant, these procedural advancements do not alter or diminish the substantive statutory mandate that the state must prosecute within certain statutorily prescribed time limits. §775.15, Florida Statutes "Time limitations; exceptions," plainly states that prosecutions "must be commenced" within the delineated time frames, with limited delineated statutory tolling exceptions.[2]

[2] The concurrence's concern that unless the defendant is required to raise the statute of limitations bar at trial, the State has no opportunity to litigate facts that would support statutory tolling is misplaced. When the State elects to prosecute under a statutory tolling exception, it must allege and prove that statutory exception and the facts necessary to show that the statute was tolled. *Sturdivan v. State*, 419 So. 2d 300, 302 (Fla. 1982).

This Court's interpretation of the statute of limitations as a substantive right, and a legislative limitation on the State's authority to prosecute, has been in place for over 100 years. The legislature has not seen fit to amend the statute of limitations to overrule the precedent, or to create the exception that the State (and Third District) advocate. This Court should decline the invitation, based upon policy reasons best left to the legislature, to do so. *Cf: State v. King,* 282 So. 2d 163, 165 (Fla. 1973) (declining to rewrite the plain and unambiguous statute of limitation to incorporate the concept of continuing discoverable offense; "If this is a 'loophole' that should be closed, we must turn to the legislature to do so").

The concurrence's attempt to draw parallels between venue and the statute of limitations is also unavailing. In *Tucker v. State*, 459 2d 306 (Fla. 1984), this Court considered venue and statute of limitations, and treated each quite differently. This Court receded from its precedent that venue was an essential element of the crime charged, and that the absence of an allegation of venue in an indictment was a fundamental defect that rendered the indictment void. This Court did so after recognizing that "any requirement that venue be alleged in an indictment is a *procedural* rule stemming from common-law applications of due process considerations." *Id* at 308. (Emphasis added). This Court held "that the failure to allege venue in an indictment or information is an error in form, not of substance…" *Id* at 308.

In contrast, in that very same opinion, this Court stated, "The statute of limitations defense is an absolute protection against prosecution or conviction." *Tucker,* 459 So. 2d at 309. Indeed, although the concurrence opined otherwise, the requirement that the State bring a prosecution within a statutorily prescribed time, finds its genesis upon a substantive statutory mandate.

Equally unavailing is the concurrence's invitation for this Court to align itself with *Musacchio v. United States,* 136 S. Ct. 709, --- U.S. ---, 136 S. Ct. 709, 193 L.Ed 2d 639 (2016). In *Musacchio v. United States*, the Court relied upon its own relevant historical treatment (starting 140 years ago, with *State v. Cook*, 17 Wall. 168, 21 L.Ed. 538 (1872) of the criminal statute of limitations bar as a mere procedural defense that becomes part of a case only if the defendant raises it in the district court. *Musacchio v. United States*, 136 S.Ct. at 718. The Court saw no compelling reason to depart from its own stare decisis. Notably, in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 128 S. Ct. 750, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008), the Court drew upon is own longstanding interpretations of the court of claims limitations as a more absolute kind of jurisdictional limitations period, despite the government's waiver, and declined to overturn its earlier precedent, acknowledging the importance of the principles of stare decisis. [3]

[3] The Court also noted that "*stare decisis* in respect to statutory interpretation has "special force" for Congress remains free to alter what we have done." 552 U.S. at 139. "Additionally, Congress has long acquiesced in the interpretation we have given." 552 U.S. at 139.

Undoubtedly, this Court has a longstanding interpretation of the criminal statute of limitations as a legislative constraint on the government's authority to prosecute. This Court has accorded absolute protection from prosecution of offenses legislatively deemed time-barred, such that convictions on time-barred offenses are fundamental error, capable of being raised for the first time on direct appeal. The Court's decisions are legally sound. The decisions have not been rendered unworkable in practice, or obsolete, by any significant changes in circumstances.

This Court's scrupulous honoring of a defendant's substantive right to the protection from prosecution for a time-barred offense is not arcane, or out of step. Other jurisdictions are in accord. *See e.g. State v. Kerby*, 141 N.M. 413, 156 P.3d 704 (2007) (adopting the rationale espoused in *Tucker)*; *Hulsey v. State*, 196 So. 3d 342, 346 (Ala. Crim. App. 2015) ("The statute of limitations in a criminal case is an issue that is not subject to the ordinary rules regarding preservation and waiver"); *Hall v. State*, 497 So. 2d 1145 (Ala. App. 1986) (confirming that in Alabama the statute of limitations is a substantive right, and expressly adopting the *Tucker* rationale to require express waiver). In *State v. Peltier*, 332 P. 3d 457 (Wash. 2014), just three years ago, Supreme Court of Washington, en banc, decided, on the issue of first impression in that state, that while the statute of limitations did not affect the court's subject matter jurisdiction, it did affect the court's authority to sentence a defendant, requiring the same kind of *Tucker* express waiver.

Finally, while this Court need not reach the issue, the constitutional right to be left alone and free from unauthorized governmental intrusion [4] is implicated in the State's action of prosecuting a person for a crime determined legislatively to be stale.

CONCLUSION

This Court should answer the certified question in the negative.

Respectfully submitted,
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[4] Article I, section 23, of the Florida Constitution, states:

> Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

art. I, § 23, Fla. Const. (1980).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered electronically to the Office of the Attorney General, One Southeast 3d Avenue, Suite 900, Miami, Florida 33131, CrimAppMia@myfloridalegal.com, to counsel for the State, Jeffrey Geldens, AAG, Jeffrey.geldens@myfloridalegal.com this 1st day of September, 2017. Pursuant to Rule 2.516, undersigned counsel designates the following e-mail addresses for the service of all documents in this proceeding:appellatedefender@pdmiami.com(primary);sql@pdmiami.com (second -ary).

/s/ *Susan S. Lerner*
SUSAN S. LERNER
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CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

/s/ *Susan S. Lerner*
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