IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-576
L.T. No. 3D14-1635

STATE OF FLORIDA,

Petitioner,

vs.

EARVIN SMITH,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

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THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE AFFIRMATIVE AND APPLY THE PRESERVATION REQUIREMENT; MR. SMITH'S DEFENSE OF DISPENSING WITH PRESERVATION IS BASED UPON INCORRECT CONTENTIONS ABOUT: A) THIS COURT'S PRECEDENT, B) THE FACTS OF THIS CASE, AND C) THE STATE'S REQUEST FOR RELIEF.

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SUMMARY OF THE ARGUMENT

As relevant here, Respondent Earvin Smith was convicted of armed burglary. The crime occurred outside the statute of limitations, but based on the same episode, he was charged with armed sexual battery, which was not barred by the statute of limitations. He was also charged with other offenses for which his counsel obtained dismissal based on the applicable statute of limitations. As to the sex offense, his DNA linked him to the crime; at trial, he contended any sex with the victim was consensual and not at her home. Thus, after the narrowing of the charges, the jury was tasked with assessing whether the State had proven the armed sexual battery (no limitations), armed burglary (the barred offense), or no crime at all. He was convicted as charged; on appeal, his conviction of armed sexual battery was affirmed, but he obtained reversal of the armed burglary conviction.

The Third District erred when concluding that an unpreserved challenge to the armed burglary conviction, based on the statute of limitations, was fundamental error. The record did not support application of the limited doctrine of fundamental error and reversal was error. The State's position is fully laid out in its Initial Brief. In this reply brief, the State notes three defects in Mr. Smith's attack on the merits.

First, Mr. Smith proceeds from a legal premise that is unsupported in the Florida authority he cites. He assumes that the statute of limitations is always fundamental error. But the cases he cites do not create that rule. Instead, those cases

involve preserved error, and, at most, acknowledge that a case that relies solely on a barred offense should be reversed for lack of jurisdiction. But this case does not involve the jurisdictional question, and thus this Court should not reach it and he cannot use that premise to aid his argument. And further, Mr. Smith's case involves the Third District's application of fundamental error despite no facts in the record to support using the doctrine to allow reversal on an unpreserved claim.

Second, Mr. Smith assumes his counsel made a mistake in not moving to dismiss the armed burglary charge. But, there is no evidence requiring that conclusion, and further, a record of such a mistake cannot be created on appeal, since it relates to what occurred in the trial court. Because of this gap in the record, his claim, if any, must be raised on collateral review where the facts can be developed.

Third, Mr. Smith assumes that the State seeks reversal of longstanding Florida authority. The State does not seek such relief, since, as laid out in the State's Initial Brief, the Third District erred in its view of already-existing Florida authority. There is no need to change the law, and instead, answering the certified question in affirmative and quashing the Third District's opinion would clarify the law and ensure judicial economy. The preservation requirement applies to Mr. Smith's claim.

ARGUMENT

A. Mr. Smith's incorrect assumption about the statute of limitations on direct appeal.

1. The cases do not establish a rule requiring reversal.

The Florida cases do not hold that, without regard to the facts developed in the trial court, the statute of limitations warrants reversal of a conviction for fundamental error. Even cases treating the issue as "jurisdictional" would require reversal only when the record showed no jurisdiction at all.

"The bringing of charges within the limitation period is a factual matter which the State must prove just as it must prove all other elements of the offense." *Crews v. State*, 183 So. 3d 329, 331 (Fla. 2015). Thus, although the statute of limitations can preclude conviction of the offense, the question of whether it applies to bar conviction in a specific case is a *factual* matter. This treatment of the statute dates back over a century. In *State v. King* (1970s), the issue was when the statute of limitations began, and this Court considered evidence presented in the trial court. This Court noted that "a most significant **burden of proof** is placed upon the State in order to proceed once the jurisdiction of the Court is questioned through the raising of the Statute of Limitations." *State v. King*, 282 So. 2d, 162 164 (Fla. 1974).

Similarly, the cases addressing the jurisdictional claim also do not establish a fundamental error rule, since they involve preserved error. In *Horton v. Mayo* (1940s), this Court did not establish a rule regarding fundamental error, and instead noted "[t]he trial court reached the conclusion that there was sufficient legal evidence on the subject to submit the case to the jury, in connection with the testimony as to the actual commission of the substantive offense charged, and

overruled defendant's motion for directed verdict," which had been based on the evidence's connection to the limitations period. H*orton v. Mayo*, 15 So. 2d 327, 329 (Fla. 1943). Another 1940s case, *Mitchell*, did not involve fundamental error, because this Court was reviewing preserved error on appeal when addressing whether the trial court erred in denying a motion to quash the indictment. M*itchell v. State*, 25 So. 2d 73, 74 (Fla. 1946).

And, even further back, this Court reversed because "the indictment charges that [the offense] was committed more than four years before prosecution, **and the evidence**, according to the bill of exceptions before us, **shows** that it was committed on or about the time as alleged in the indictment" and thus the offense was barred as a basis for conviction. N*elson v. State*, 17 Fla. 195, 197. (1879) (e.s.)

Even the case Mr. Smith cites, from the 1970s, does not support his claim that invoking the statute of limitations always requires reversal. The opinion states "[w]henever, 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." *State ex rel. Manucy v. Wadsworth In & For St. Johns County*, 293 So. 2d 345, 347 (Fla. 1974). That case involved whether, since the offense was committed before capital (death penalty) crimes were (temporarily) abolished in Florida (after *Furman v. Georgia*), the statute of limitations applicable to non-capital offenses (2 years) would apply.

Id. The issue was preserved, since it came to this Court on a writ of prohibition and a certified question. 293 So. 2d at 346. For two defendants, this Court concluded the longer statute applied, because the alleged date of the offense (i.e. the facts of the case) triggered the statute of limitations, and thus there was no due process problem in depriving the defendant of the protection of the new statute (which would have barred prosecution). 293 So. 2d at 347. For the third defendant, it concluded the crime was during the transition period, and reversed. *See* i*d*. Neither holding addresses whether, where the record reveals a possible strategic choice to waive that protection, an appellate court must presume the choice was legally impossible.

2. Mr. Smith's position regarding fundamental error is inconsistent with Florida law

a. The preservation requirement is the rule, not the exception.

Mr. Smith incorrectly contends the State seeks an exception (or "carve out") to an established rule. Instead, Mr. Smith's position requires a carve-out to the established rule of preservation, as illustrated by the Third District's 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**?

Smith v. State, 211 So. 3d 176, 187 (Fla. 3d DCA 2016). The Third District dispensed with preservation after it misconstrued this Court's precedent. Although the question is of great public importance, that importance arises from a need for

clarification, and not from a need to change the law. Florida law already provides the necessary tools to answer this question in the affirmative.

This court has already said that "[f]undamental error is the sole exception to the preservation requirement." F*arina v. State*, 937 So. 2d 612, 629 (Fla. 2006), and that "[e]rrors that have not been preserved by contemporaneous objection can be considered on direct appeal only if the error is fundamental." *Jackson v. State*, 983 So. 2d 562, 568 (Fla. 2008).

And as to when an error is fundamental, this Court said, in 1960, that "in order to be of such fundamental nature as to justify a reversal in the absence of timely objection the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." B*rown v. State*, 124 So. 2d 481, 484 (Fla. 1960). Ten years later, this Court clarified that "[f]undamental error, which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action" and cautioned that in such cases "[t]he Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly." S*anford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970).

In the following decade, in *Ray v. State*, this Court confirmed this limitation:

> This Court has previously **refused to adopt an absolute rule** that would allow a defendant to object for the first time on appeal. **We refuse to do so in this instance as well**. . . .

R*ay v. State*, 403 So. 2d 956, 960 (Fla. 1981) (emphasis added, citations and quotation marks omitted). Thus, preservation is enforced unless the facts of the case show that enforcement would make the trial process fundamentally unfair.

B. Mr. Smith's incorrect contention that an appellate court can assume his conviction was caused by a mistake in lawyering.

1. *Tucker* permits the gamble he took at trial.

In *Tucker v. State*, this Court recognized that a defendant can waive the statute of limitations to gain a benefit; in *Tucker* it was the possibility of conviction of a lesser-included offense. T*ucker v. State*, 459 So. 2d 306, 309 (Fla. 1984). The District Courts of Appeal have followed this rule and rejected claims that the statute of limitations cannot be waived. *See, e.g.*, M*athis v. State*, 204 So. 3d 104 (Fla. 1st DCA 2016) (stating, in response to Mathis' *direct appeal* claim that counsel was ineffective for failure to move to dismiss charges based on the statute of limitations, that "[i]n this case, it is at least conceivable that Mathis's attorney strategically chose risking convictions on the lesser counts (notwithstanding any viable defense) to increase the chances of an acquittal on the most serious charge."); M*orris v. State*, 909 So. 2d 428, 431 (Fla. 5th DCA 2005)(enforcing the preservation requirement for a statute of limitations defense); *State v. Robbins*, 780 So. 2d 89, 91 (Fla. 2d DCA 2000) (stating "[w]e have found no case holding that the statute-of-limitations defense cannot be waived.")

In *Tucker*, while acknowledging the waiver option available to a defendant, this Court concluded the waiver must be voluntary, because the statute of limitations is an absolute bar to prosecution for an offense. 459 So. 2d at 309. And, as an additional protection, this Court said the waiver must be made personally, not through an attorney. *Id.* As relevant here, once that threshold determination is made, the inquiry on direct appeal should end; if the record reveals on its face that the waiver was voluntary, then the appeals court should exclude, on direct appeal, raising the statute as a bar.

If, however, the record reveals that waiver was not voluntary (*e.g.*, there was no colloquy, or it was insufficient), or that despite a waiver statement it *could not be* voluntary (such as where the *only* charge is barred), then the appeals court can address the question and determine a remedy. Thus, the already-existent framework suffices; the Third District added an additional avenue not present in governing law.

2. Florida law already provides a remedy; the Third District erred in reversing on direct appeal, since in doing so it flipped the presumption *against* finding error on direct appeal from the possible waiver.

a. *Tucker* and ineffective assistance claims focus the inquiry on addressing the presumption of trial strategy.

Tucker requires that the defense's waiver be voluntary, and not through counsel. If the face of the record satisfies *Tucker*'s concerns, then further review requires assessing the attorney-client relationship (to determine if the decision was involuntary due to deficient advice). That relates to ineffective assistance of counsel,

and "with rare exception ineffective assistance of counsel claims are not cognizable on direct appeal." *Gore v. State*, 784 So. 2d 418, 437 (Fla. 2001) (rejecting a claim of ineffective assistance of counsel which was asserted on direct appeal). "A claim of ineffective assistance of counsel may be raised on direct appeal only where the ineffectiveness is apparent on the face of the record." *Gore*, 784 So. 2d at 437-38; *Desire v. State*, 928 So. 2d 1256 (Fla. 3d DCA 2006) (applying the rule).

Like fundamental error, an ineffective assistance claim can address the rare case warranting a direct appeal remedy. "[I]n the rare case, where **both prongs** of *Strickland*—the error and the prejudice—are manifest in the record, an appellate court may address an ineffective assistance claim." *Smith v. State*, 998 So. 2d 516, 523 (Fla. 2008) (emphasis added) (concluding the claims were not manifest on the face of the record). "In other words, an appellate court will consider such a claim only if it is obvious from the record that counsel was ineffective, the prejudice caused by the conduct is indisputable, and a tactical explanation for the conduct is inconceivable." *Fox v. State*, 104 So. 3d 371, 372 (Fla. 1st DCA 2012) (quoting *Dailey v. State*, 46 So.3d 647, 647 (Fla. 1st DCA 2010)).

But a dispute of fact, such as the one in this case, forecloses reversing on direct appeal. Under Florida law, where "[t]rial counsel's decision . .. could have been a strategic one", because the claim raises "a factual question that cannot be determined solely on the basis of the trial record" it is appropriate to reject the claim on direct

appeal. *Johnson v. State*, 942 So. 2d 415, 416 (Fla. 2d DCA 2006); *Caison v. State*, 695 So. 2d 872 (Fla. 3d DCA 1997) (rejecting a claim of ineffective assistance on direct appeal because the factual issues could not be addressed based on the appeal record). The law presumes strategy unless the record unequivocally refutes that presumption. Mr. Smith seeks an exception to this rule, yet there is no basis in the record to support it. This court should answer the question in the affirmative and enforce the preservation requirement.

b. Mr. Smith's challenge does not justify changing Florida law.

Here, the record suggests the decision to move for dismissal on certain charges was based upon reasons that could be strategic. An appellate court cannot presume fundamental error. Mr. Smith contends that enforcing preservation would result in a "defendant convicted of a time-barred offense because of poor lawyering," because it is "speculation" to presume that counsel's choice to move on some but not all charges was strategic. But, a legal presumption is a rule, not speculation, and Florida law recognizes that the statute of limitations can be waived as part of trial strategy. Requiring an on-the-record explanation in the trial court would reveal that strategy and deprive the defendant of its benefit.

Losing the gamble that such a strategy involves is not fundamental error; it only warrants intervention if the gamble was involuntary (the waiver was insufficient) or due to ineffective assistance of counsel (caused by mis-advice that

prejudiced the defendant). Here, where the waiver allowed a separate charge to go the jury – and preserved a more lenient verdict possibility, since under the applicable sentencing scheme burglary sentences included community control as the low end – the preservation requirement can be enforced on direct appeal.[1]

Mr. Smith seeks to flip this rule and require a presumption that there was ineffective assistance of counsel in his case. Mr. Smith argues that depriving all defendants of this strategy (by presuming the waiver came from negligence, not strategy) would prevent having to "second-guess" prosecutorial discretion since the State chose to charge despite the apparent bar. But, like the defense, the State may either have inadvertently included the charge, or alternatively, believed in good faith it belonged in the case as part of the charging strategy.

In addition, allowing the State to make the mistake creates little cost, in contrast to depriving the defense of the benefit of such a "mistake". Enforcing preservation here does not "second-guess" discretion, and instead ensures any mistake in exercising such discretion is timely and properly addressed. The State can amend the information in response to developments in the trial court, and any such amendment (or dismissal) can be tested via a timely appeal. And if the defense spots the error and moves to dismiss, the trial court can address it, which means the

[1] The sentencing analysis is in the State's DCA Answer Brief at pp. 22-24.

defense: a) succeeds in dismissing the charge; or b) triggers an amendment, clarifying the same charge (via addition of elements, or requiring the State to prove a charge with a longer statute of limitations); or c) procures a ruling on the limitations that can be fully addressed on appeal. All three benefit the defendant.

In contrast, accepting Mr. Smith's position and allowing silence and a claim of error on appeal would damage the value of preservation and damage judicial economy, with no commensurate benefit. It would shift the focus on direct appeal from the merits to counsel's strategy and "second guess" the tactics of the defense. And it would eliminate this strategy altogether by prohibiting waiver, a result not supported in any authority he cites. Since there is already a remedy on all sides (the law regarding amendment, the trial court's power to dismiss, and parameters for a proper waiver under *Tucker*), there is no need to change the law to accommodate Mr. Smith's concern. Thus, unless the error is clear (counsel could have no strategy, or such strategy could never do anything but prejudice Mr. Smith), review of the waiver on direct appeal would be inconsistent with Florida law.

Despite this already-existing framework, Mr. Smith argues there must be a carve out, allowing defendants to raise the unpreserved claim on direct appeal in all cases, to ensure the "absolute protection" of the statute of limitations. But that "absolute protection" is a limited subset of cases that is already accounted for by Florida law. In those cases, if, as Mr. Smith asserts, there is no jurisdiction (that is,

the State's only charge is barred), then the remedy is to reverse based upon prejudice from ineffective assistance of counsel. Or, the court on direct appeal would review under *Tucker*. Mr. Smith contends this improperly "relegates" meritorious claims to later proceedings. But that is not the law, since a clear claim can be remedied on direct appeal, while a claim, such as Mr. Smith's, with factual issues, can be addressed in the right forum without speculation. And, because his case involves more than one charge (the trial court had jurisdiction to try him on the life felony), his case provides no compelling reason to demolish the established framework.

"An appellate court initially reviewing a conviction will only grant relief for ineffective assistance of counsel where the ineffectiveness of counsel is apparent from the face of the record before the appellate court *and* a waste of judicial resources would result from remanding the matter to the lower court for further litigation." *Monroe v. State*, 191 So. 3d 395, 403 (Fla. 2016). Likewise, as to preservation, "[t]he failure to properly preserve an otherwise clear error *may* constitute ineffective assistance of counsel cognizable on direct appeal." *Monroe v. State*, 191 So. 3d 395, 403 (Fla. 2016). In *Monroe*, for example, this Court concluded counsel's decision was "patently unreasonable"; thus, it did not require additional fact-finding in the trial court, since it exposed the defendant to a more severe sentence and provided no benefit for such risk. *Id.* Since both avenues are available where the only charge is barred (or the waiver was not voluntary), the

problem Mr. Smith posits from enforcing preservation is non-existent, and there is no need to use this case to carve out an exception to the preservation requirement.

The trial transcript reveals the parties knew the statute of limitations was relevant; dismissals occurred and the trial judge even spoke to the defendant on the record about the defense's tactics. Consequently, the record reveals that there may have been a strategic reason for selectively moving to dismiss. Here, "the interests of justice do not require review of counsel's claimed inadequacy in this case, since Cr.P.R. 3.850 provides a means by which this issue may properly be resolved in a correct procedural setting in the trial court where evidence may be taken." *State v. Barber*, 301 So. 2d 7, 9 (Fla. 1974). The Third District erred; the conviction should be reinstated.

C. Mr. Smith's contentions regarding stare decisis do not apply.

As detailed above, quashing the Third District does not require overruling precedent. The Third District misread this Court's precedent on the statute of limitations, and Mr. Smith's contention that this Court should presume he was the victim of ineffective assistance of counsel is not supported by Florida precedent.

Even the foreign cases he cites are consistent with the State's view here, since none impose an absolute rule of reversal or address a case in this posture. Accepting the State's position would not make Florida's law "out of step" in relation to those other states. In *State v. Kirby*, 156 P.3d 704, 706 (N.M. 2007, e.s.), the New Mexico

Supreme Court stated that "Defendant's attorney *admitted* he did not consult with Defendant about the statute of limitations because he failed the recognize the issue," and thus there was no factual issue to resolve. Further, *State v. Peltier* appears inconsistent with Florida law, since it concludes a defendant cannot waive the statute of limitations for a barred charge, but also appears consistent with the State's position about strategy. *Compare* State *v. Peltier*, 332 P. 3d 457, 460-61 (Wash. 2014) (stating a barred charge is outside jurisdiction and cannot be waived) *with* P*eltier*, 332 P. 3d at 461 (noting that "a defendant may expressly waive any objections to timeliness when the statute has not yet run on the underlying charges and the court still has the authority to sentence on the charges if convicted"). And H*ulsey v. State*, 196 So. 3d 342, 346 (Ala. 2015) addresses a case where *all* the charges were subject to the statute's bar, and notes that in such "ordinary circumstances" the claim can be raised without preservation. There is no discussion of possible waiver in H*ulsey*; the question is treated as one of absolute forfeiture (and rejected). As discussed above, the question of forfeiture is not at issue in this case, since this is a presumptive waiver case and there is jurisdiction for a judgment.

CONCLUSION

This case did not warrant reversal of the burglary conviction for fundamental error. The Third District erred in interpreting this Court's precedent, and this court should reinstate the conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing (PETITIONER'S REPLY BRIEF ON THE MERITS) was emailed to Susan Lerner (SLerner@PDMiami.com and AppellateDefender@PDMiami.com), Counsel for Respondent, this 12h day of October, 2017

/s/ Jeffrey R. Geldens
JEFFREY R. GELDENS

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this Answer Brief was typed using Times New Roman 14 point font and complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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