IN THE FLORIDA SUPREME COURT
CASE NO. 82,412

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APR 5 1994
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CALVIN WILEY,

Defendant/
Petitioner,

vs.

CARRIE LINN YOUNG ROOF,

Plaintiff/
Respondent.

PETITIONER, CALVIN WILEY'S REPLY BRIEF

MARTIN ERROL RICE, ESQUIRE
MARTIN ERROL RICE, P.A.
Post Office Box 205
St. Petersburg, FL 33731
FBN 183594
Counsel for Petitioner

Joryn Jenkins, Esquire
1611 South Arrawana Avenue
Tampa, FL 33629-6301
FBN 366072

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ARGUMENT

"The uniqueness of the problem of child sexual abuse requires a unique solution." With this assertion by amicus curiae, Academy of Florida Trial Lawyers, Florida Association for Women Lawyers, and NOW Legal Defense and Education Fund (p.4), the petitioner cannot disagree. Notwithstanding the veracity of this statement, however, any uniqueness the problem may exhibit cannot require an **unconstitutional** solution.

The respondent does not contest that statutes of limitation are primarily designed to assure fairness to defendants. They are not only calculated for the repose and peace of society, but

> promote justice by preventing surprises through revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944).

The petitioner, in turn, does not debate that this policy of repose is periodically outweighed by judicial considerations arising when the interests of justice require vindication of a plaintiff's rights. Thus, the Supreme Court of the United States has held that a Federal Employers' Liability Act action was not barred, though brought more than the statutory three (3) years after the

cause of action accrued, when the defendant misled the plaintiff into believing that he had more than three (3) years in which to bring the action. Glus v. Brooklyn Eastern Terminal, 359 U.S. 231 (1959). The statutory limitation was suspended by the defendant's conduct. The Supreme Court has held the FELA time limitation on federal actions tolled when the plaintiff filed a state action, which was dismissed for improper venue, within the required time period. Burnett v. New York Central Railroad Co., 380 U.S. 424 (1965). The Supreme Court has held a federal antitrust suit proper, although filed beyond the statutory time period, when a class action was initially brought in a timely manner, but was dismissed for failure to demonstrate that the class was so numerous that joinder of all of its members was impracticable, a class action requirement. American Pipe and Construction Co. v. State of Utah, 414 U.S. 538 (1974). The commencement of the original class suit tolled the running of the limitation period for all asserted class members who would have been parties had the action continued as a class action. Furthermore, the limitation period has been tolled when was prevented the plaintiff from bringing suit (Osbourne v. United States, 164 F.2d 767 (2d Cir 1947)); it has been suspended when the defendant's fraudulent inducement prevented the plaintiff from bringing suit. Holmberg v. Armbrecht, 327 U.S. 392 (1945).

It is for reasons similar to those that led the courts to the preceding decisions that the petitioner would not contest the constitutionality of Section 1 of the 1992 amendment to Florida Statute ((95.11, were that section somehow implicated in this cause. However, while the Academy of Florida Trial Lawyers, Florida Association for Women Lawyers, and NOW Legal Defense and Education Fund (AFTL, FAWL, and NOW) concentrate the bulk of their impassioned amicus curiae argument on both the heinousness of child sexual abuse (with which there can be no dispute) and the obvious justification for expansion of the applicable limitation period, via Section 1, with respect to instances either of delayed discovery, or when the victim has neither reached majority nor left the dependency of the perpetrator within the four-year statutory period, the question here, instead, is the constitutionality of reviving cause of action twenty (or more) years after their expiration, via Section 2. The plaintiff in this cause filed suit thirteen years after attaining her majority, long after leaving her dependency upon the alleged perpetrators. Neither was any delayed discovery alleged below.1 No

1 While the intent behind the legislative revision was evidently to ensure that the law keeps pace with purported developments in hypnosis techniques, repressed memory therapy is not all that it is claimed to be. See, e.g., NEWSWEEK, Was it Real or Memories? p. 54 (March 14, 1994) (in discussing the recent sex abuse complaint of Steven Cook against Cardinal Joseph Bernardin, which relied heavily on memories "recovered" under hypnotism, but which Cook dropped when unable to recall the specifics of the alleged incidents, the author noted that "[i]n recent years, at least 7,000 families have been torn apart by charges of

explanation, reasonable or otherwise, has been suggested for the passage of the nineteen (19) years between the abuse alleged, when the plaintiff was fifteen years of age, and the time of filing the complaint. No explanation, supported by any public policy argument is required by the amendment which provides the window of opportunity. It is for this reason that the section offends notions of due process.

Section 2 purports to resurrect all claims for abuse **already barred** for a period of four years from the effective date of the act, regardless of the reason, if any, for which the claim was not brought in a timely manner. Thus, if Florida's legislature has its way, the statutory protection from suit existing for any cause of action which accrued over four years prior to the enactment of the window of opportunity will be abrogated by legislative fiat (rather than by a defendant's conduct, or by a plaintiff's action, as is more commonly the case) in favor of a trendy policy which enables asserted child abuse victims to revive suits

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sexual abuse, according to the False Memory Syndrome Foundation in Philadelphia.... The charges are always shocking, but not always true. The memory foundation ... contends that hypnosis and other psychotherapeutic techniques are being misused in order to "recover" memories of early-childhood sex abuse. Many psychiatrists ... believe these memories are actually induced innocently or by design - by the therapists themselves," TIME, Lies of the Mind, p. 52 (November 29, 1993) (the author describes repressed memory therapy "as a psychological phenomenon that is harming patients, devastating families, influencing new legislation, taking up courtroom time, stirring fierce controversy among experts and intensifying a backlash against all mental-health practitioners" and discusses the increasing number of recovered memory accusers who have recanted, but not until after the damage has been inflicted).

for wrongs the causes of action for which have long since expired. The amicus curiae (AFTL, FAWL, and NOW) argue at great length the legislative history in support of this provision, explaining that there was "careful study" (which consisted of no more than obtaining the opinion of a local professor, as well as that of a legislative intern) of its constitutionality and that the legislature was satisfied that the window of opportunity was, in fact, constitutional (although the staff analysis did note that the section "may be subject to challenge"). Of course, a determination of its constitutionality is nevertheless for this Court to make.

Professor William VanDercreek's letter, appended incorrectly at Attachment C of the AFTL, FAWL and NOW amicus brief (see Appendix A hereto for a complete copy), and the one and only professional opinion obtained by the legislature before passing the amendment, makes note of the due process problem:

> The constitutional duties and powers of the Florida Legislature to exercise the police powers of the state to promote and protect the general welfare counterbalances any public policy argument on the right of repose.

Professor VanDercreek, however, neglected to discuss the statute's purpose, or how the window was designed to promote the people's health, safety, or welfare. So too did the court below. Yet this Court has mandated that "[t]he guarantee of due process requires that the means selected [to exercise the police power] shall have a reasonable and

substantial relation to the object sought to be obtained and shall not be unreasonable, arbitrary, or capricious." State v. Saiez, 489 So.2d 1125, 1128 (Fla. 1986).

This requirement is not limited to criminal statutes. In Dept. of Ins. v. Dade County Consumer Advocate's Office, 492 So.2d 1032 (Fla. 1986), this Court considered the validity of a statute prohibiting insurance agents from negotiating with clients as to the amount of their commissions, or offering to rebate a portion thereof to the clients, and revealed that "[i]n considering the validity of a legislative enactment, this Court may overturn an act on due process grounds only when it is clear that it is not in any way designed to promote the people's health, safety, or welfare, or that the statue has no reasonable relationship to the statute's avowed purpose." Id. at 1034.

The window of opportunity permits any claim for abuse which has **already been barred** to be brought at any time within four years of the effective date of the act, regardless of the reason, if any, for which the claim was not brought originally in a timely manner, and regardless of the age of the claim. Not unexpectedly, one matter now pending under the new statute is over forty-five years old. (See brief of amicus curiae, Blackwell & Walker, P.A., p. 10.) Although Section 1 of the amendment has a clear purpose and an obvious relationship to the legislative intent of permitting formerly abused children, once grown and out from under the influence and the thumb of the

abuser, to seek redress for that abuse, the window of opportunity is unrelated to any such purpose. It does not appear to deter any abuse which may have occurred decades before, nor to prevent the perpetrator from engaging in further abuse against any other victim. Neither does it serve to either redress the victim (more than purely financially, as in any ordinary breach of contract action) or to ensure that the same abuse is not committed against the next generation by the victim of the first, by providing funds in a timely manner for therapy to heal the injury, as suggested by the amicus. (Surely the victim in the forty-five year old action has already passed the harm on (if s/he would) to his or her children). Even were it so, the balancing test required to determine whether due process is satisfied would compel a finding that any concerns protected by the limitation statute's prescribed repose outweigh so arbitrary and broad a legislative window of opportunity.

In Delk v. Dept. of Professional Regulation, 595 So.2d 966 (Fla. 1st DCA 1992), the court held that the professional practices of a dentist in 1984 and 1985 could not be judged by the standards of a statute enacted in 1986. The dentist's right to practice his profession was a property interest protected by the due process clauses of the state and federal constitutions. In explaining that the conduct proved must legally fall within the statute claimed to have been violated, and that conduct occurring before the effective date of the prohibition could not meet this

requirement, the Delk Court explained that due process encompasses the civil counterpart to the criminal prohibition against ex post facto legislation:

> Due process includes a prohibition against ex post facto laws which deprive a citizen of life, liberty, or property based on conduct occurring before the effective date of the prohibition.

Id. at 967.

In Wiley v. Roof, it may be argued that the original four-year statue of limitation applicable to child sexual abuse suits was only the general provision for a civil action based on an intentional tort, not a specific condition of the statutory cause of action, such as the courts in Corbett v. General Engineering & Machinery Co., 37 So.2d 161 (Fla. 1948) and Walter Denson & Son v. Nelson, 88 So.2d 120 (Fla. 1956) considered. The difficulty with such reasoning however, is that the legislative limitation was nevertheless an element of the statutorily-created cause of action. Once the limitation period expired, the claim was extinguished. The legislative conception, then, of another statutory cause of action, with another limitation period, to apply retroactively to events occurring before the new cause of action was established, is impermissibly akin to enacting an ex post facto law. As in Delk, such a law should be struck down.

An ex post facto law is one which, in its operation, makes criminal and punishes an act which was committed before the passage of the law and which was innocent when

performed, or increases the punishment for an act performed prior to passage of the law, or which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage. Higginbotham v. State, 101 So. 233 (Fla. 1924), and a statute authorizing the prosecution of prior offenses after the pre-existing statute of limitation has run is considered an unconstitutional ex post facto law. U.S. v. Fraidin, 63 F.Supp. 271, 276 (D.C.Md. 1945) (holding prosecution for concealing assets from trustee of bankruptcy estate barred by limitations).

The prohibition of ex post facto laws applies specifically in the criminal context. The prohibitions of ex post facto laws of Article I, Section 9, Clause 3, of the United States Constitution and of Article I, Section 10, of the Florida Constitution apply only to laws prescribing criminal penalties; admittedly, they would not prevent the retroactive application of the limitation window discussed here. See, e.g., Atlantic Cost Line R. Co. v. Turman, 86 So. 199 (Fla. 1920); Surf Club v. Tatem Surf Club, 10 So.2d 554 (Fla. 1942); In re: Inquiry Concerning a Judge, 357 So.2d 172 (Fla. 1978). A law is ex post facto when applied to an offense which occurred prior to the law becoming effective. An ex post facto law is one which, in its operation, makes that criminal which was not so at the time the action was performed, or which increases the punishment, or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his

disadvantage. Higginbotham v. State, 101 So.233, 235 (Fla. 1924).

In Wilensky v. Fields, 267 So.2d 1, 5 (Fla. 1972), a lender brought suit against a guarantor. The Supreme Court held that the statute providing criminal penalties for usurious transactions was not retroactively applicable to the transaction entered into prior to the statute's effective date.

In Higginbotham, on the other hand, the Court considered whether a law changing the venue in which a crime may be prosecuted was ex post facto if applied in an action for a murder committed before the change in the law. The Court found that it was not, considering the question of venue on pertaining to the remedy rather than to the nature of the crime itself. 101 So. at 235. The Higginbotham Court compared a similar case, that of Mathis v. State, 12 So. 681 (Fla. 1893), in which the law fixing the number of peremptory challenges allowed a defendant was changed from twenty to ten while the case was pending. The defendant argued that he should be permitted to use the number of challenges permitted at the time of the offense rather than at the time of trial. The Mathis Court disagreed:

> It is entirely clear that the right to peremptory challenges appertains to the remedy, the procedure under which prosecutions are conducted, and not to the essence of the offense itself. The legislature can at any time change the law in this respect, and such change will apply to prosecutions of offenses committed after the change has been made. Such legislation is not ex post facto.

101 So. at 235.

It is not always clear, however, what is a question pertaining to the remedy and what is a question pertaining to the nature of the crime itself. In Rodriguez v. State, 380 So.2d 1123 (Fla. 2d DCA 1980), the defendant had been convicted of robbery. The appellate court ruled that when the offense had been committed prior to the effective date of the statute allowing the trial court to retain jurisdiction to review the parole release order during the first third of his sentence, application of the statute to Rodriguez was ex post facto in effect.

Although the issue considered in Rodriguez seems patently to involve a remedy rather than the elements of the crime itself, the Supreme Court agreed with the Second District's analysis in State v. Williams, 397 So.2d 663 (Fla. 1981). The Court applied a two-fold test to determine if the law was impermissibly ex post facto: 1) does the law attach legal consequences to crimes committed before the law took effect; and 2) does the law affect those who committed the crimes in a disadvantageous fashion? If the answer to both questions is yes, as the court found it to be there, then the law constitutes an ex post facto law and is void as applied to those individuals.

Plainly, then, the legislative creation of another statutory cause of action, with a different limitation period, to be applied retroactively to events occurring before the new cause of action was established, would be

impermissible ex post facto legislation if implemented in the criminal context. The Delk Court saw this connection and found the civil "ex post facto" legislation unconstitutional when it defined due process as the civil counterpart to the criminal prohibition against ex post facto legislation, and found the provision there could not be applied to conduct occurring before the effective date of the act.

Professor VanDercreek also notice the similarity:

> We are addressing a criminal act which is of a particularly heinous nature.
>
> ***
>
> As you know for criminal charges there is no statute of limitation for child abuse of a child under the age of twelve; thus, this civil provision extending the limitation period, even for time-barred actions, is not a radical departure from acceptable procedural norms.

But Professor VanDercreek, in his examination of the proposed amendment, also concentrated on the intent of the other provisions, rather than on that of the window:

> The delay in bringing the event to the attention of the authorities is caused by the very act of the perpetrator which psychologically causes, not merely a devastating effect on the victim, but a suppressive reaction that will serve to mask the truth of the events for years, and, indeed, sometimes for the entire life of the victim. The victim nevertheless continues to manifest severe psychological and physiological injury notwithstanding the victim's suppression and lack of knowledge of the real cause. In this context, it is implausible to assert that the perpetrator's constitutional rights are being violated by a

> retroactive curing and clarification amendment of the statute of limitations.

Obviously, the professor's last comment is incomprehensible. Even were the language regarding a "retroactive curing and clarification" understandable, it provides no constitutionally acceptable bridge to the effect that the window of opportunity will purportedly have on the sexually abused population, nevermind on the general populace. The means selected [to exercise the police power] shall have a reasonable and substantial relation to the object sought to be obtained and shall not be unreasonable, arbitrary, or capricious.

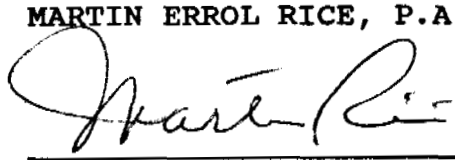
Lastly, the respondent makes much of the fact that the Starnes Court premised its decision upon the Virginia statute which expressly gave the petitioner there a substantive vested right in the extinguishment of the cause of action upon the expiration of the applicable limitation period. Starnes v. Cayouette, 419 S.E. 2d 669 (Va. 1992). But the Starnes Court merely mentioned the explicit prohibition of the legislative action invalidated there, and the fact that the Virginia Code explicitly provides against such violations of due process cannot impede this Court from finding that Florida's Constitution implicitly prevents such action. That is the purpose of the due process clauses of both the Florida and United States Constitutions.

CONCLUSION

Respondent's First Amended and Supplemental Complaint was properly dismissed below and the trial court's order should be affirmed. on the face of the complaint, respondent presented sufficient facts to establish that the claims she attempted to assert were time-barred at the time of her filing of the complaint, as a matter of law. Once extinguished, and the defense of time-bar vested as a matter of right in the defendant, subsequent legislation cannot resuscitate the cause of action without violating the petitioner's constitutional guaranty of due process, which prohibits laws which would deprive him of life, liberty, or property based on conduct which had occurred before the effective date of the prohibition.

Respectfully Submitted,

MARTIN ERROL RICE, P.A.



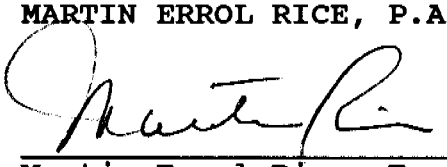
Martin Errol Rice, Esquire
Post Office Box 205
St. Petersburg, FL 33731
(813) 821-4884
FBN 183594

Joryn Jenkins, Esquire
1611 South Arrawana Avenue
Tampa, FL 33629-6301
(813) 251-6987
FBN 366072

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. regular mail to ANTHONY S. BATTAGLIA, ESQUIRE and BRIAN P. BATTAGLIA, ESQUIRE, Post Office Box 41100, St. Petersburg, FL 33742 and BARRY A. COHEN, ESQUIRE and CHRISTOPHER P. JAYSON, ESQUIRE, Post Office Box 173077, Tampa, FL 33672, RICHARD J. DAFONTE, ESQUIRE, 1000 Belcher Road South, Suite 2, Largo, FL 34641; JAMES E. TRIBBLE, ESQUIRE, of Blackwell & Walker, P.A., 2400 SunBank Int'l Center, One Southeast Third Avenue, Miami, FL 33131; and BARBARA GREEN, ESQUIRE, Grove Place, Third Floor, 2964 Aviation Avenue, Coconut Grove, FL 33133, this 1 day of April, 1994.

MARTIN ERROL RICE, P.A.



Martin Errol Rice, Esq.
Post Office Box 205
St. Petersburg, FL 33731
(813) 821-4884
FBN 183594

Joryn Jenkins, Esquire
1611 South Arrawana Avenue
Tampa, FL 33629-6301
(813) 251-6987
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APPENDIX TO
PETITIONER, CALVIN WILEY'S REPLY BRIEF

MARTIN ERROL RICE, ESQUIRE
MARTIN ERROL RICE, P.A.
Post Office Box 205
St. Petersburg, FL 33731
FBN 183594
Counsel for Petitioner

Joryn Jenkins, Esquire
1611 South Arrawana Avenue
Tampa, FL 33629-6301
(813) 251-6987
FBN 366072

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PROFESSOR WILLIAM VANDERCREEK
FLORIDA STATE UNIVERSITY
COLLEGE OF LAW
TALLAHASSEE, FLORIDA 32306

TELEPHONE
(904) 644-3560

TELEFAX
(904) 561-9147

February 14, 1992

The Honorable Elaine Gordon
House of Representatives
State of Florida
The Capitol
Tallahassee, FL 32399

RE: House Bill 703
Amendment 000703-520-0242

Dear Representative Gordon:

This letter is in response to a request for information concerning whether a proposed amendment retroactively extending a statute of limitations would be vitiated because of constitutional objections. The proposed amendment provides:

> Notwithstanding any other provision of law, a plaintiff whose claim is otherwise time-barred four (4) years from the effective date of this act to commence a cause of action for damages.

For a number of reasons the proposed amendment should not be invalidated on constitutional grounds. No vested rights have occurred in regard to any recognized property or personal interest that could be considered to be taken by the proposed amendment. The constitutional duty and powers of the Florida Legislature to exercise the police powers of the state to promote and protect the general welfare counterbalances any public policy argument on the right of repose. It is important to recognize the nature of the cause of action and right that is being given retroactive statute of limitation protection. We are not talking about the limitation to foreclose

a mortgage loan or for establishing adverse possession. We are addressing a criminal act which is of a particularly heinous nature. The delay in bringing the event to the attention of the authorities is caused by the very act of the perpetrator which psychologically causes, not merely a devastating effect on the victim, but a suppressive reaction that will serve to mask the truth of the events for years and, indeed, sometimes for the entire life of the victim. The victim nevertheless continues to manifest severe psychological and physiological injury notwithstanding the victim's suppression and lack of knowledge of the real cause. In this context, it is implausible to assert that the perpetrator's constitutional rights are being violated by a retroactive curing and clarification amendment to the statute of limitations. Indeed it could be argued that even under existing statutes the perpetrator could be estopped to assert the statute of limitations defense. Although such estoppal argument might be a long shot, it does suggest that the perpetrator cannot claim reliance on the existing statute to assert there is a constitutionally protected right that would be impaired by the amendment.

In my opinion, the Legislature of the State of Florida could validly adopt the proposed statute of limitation amendment with the retroactivity clause. As you know for criminal charges there is no statute of limitation for child abuse of a child under the age of twelve; thus, this civil provision extending the limitation period, even for time barred actions, is not a radical departure from acceptable procedural norms. The most recent case is K.E. v. Hoffman, 482 N.W.2d.509 (Minn. App. 1990), which upheld the constitutionality of a retroactive limitation clause. The Florida Supreme Court in Homemakers, Inc. v. Gonzales, 400 So. 2d 965 (Fla. 1981) suggests retroactivity of a statute of limitations is a question of legislative intent. I know of no existing United States Supreme Court case that would mandate a different result on constitutional grounds.

Sincerely,

William VanDercreek
Professor of Law

WV:aem

cc: Representative Keith Arnold
Senator John Grant
General Counsel Tom Tedcastle