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IN THE SUPREME COURT OF FLORIDA

DAVID MASON,

Petitioner,

vs.

ARTURO SALINAS, JR.

Respondent.

CASE NO. 82,968

RESPONDENT'S ANSWER BRIEF

On Review from the District Court of Appeal
Second District, State of Florida
In Case No. 92-04118

J. ARBY VAN SLYKE, P. A.
Post Office Box 13244
216 East Government Street
Pensacola, Florida 32501
(904) 438-0440

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PRELIMINARY STATEMENT

In this brief, the Respondent, **ARTURO SALINAS, JR.**, will be referred to as Respondent. The Petitioner, **DAVID MASON**, will be referred to as Petitioner.

SUMMARY OF ARGUMENT

This Court, relying upon the dissenting opinion in a 1885 U.S. Supreme Court decision, decided only one (1) month ago that the Florida Constitution, unlike that of the United States, provides a child molester a "property" right to be free from a victim's claim once the Statute of Limitations has expired.

This recent decision places, in effect, the child abuser's peace of mind above the victim's attempt to achieve some, and if the Statute of Limitations had expired, would appear to bar Respondent's claim.

However as the statute had not been construed at the time Respondent filed his claim, he should be allowed to amend his Complaint to bring it within the existing Statute of Limitations pursuant to the delayed discovery rule.

ARGUMENT

I. IN FLORIDA, THE LEGISLATURE IS POWERLESS TO REVIVE CLAIMS ONCE BARRED BY A STATUTE OF LIMITATIONS.

The United States Supreme Court has stated:

> [Statute of Limitations] represents a public policy about the privilege to litigate... [T]he history of pleas of limitations shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.
>
> Chase Securities Corp. v. Donaldson, 325 U.S. 304,314 (1945); 65 S.Ct 1137, 1142 (1945). See Osmundsen v. Todd Pacific Shipyard, 755 F.2d 730 (9th Cir. 1985).

"It is within the power of a legislature to enact a new limitation rule so as to revive claims already barred under a prior rule." U. S. v. Hunter, 700 F.Supp. 26,27 (M.D. Fla. 1988).

The general rule is that Statute of Limitations go to matters of remedy only. Davis v. Valley Distributing Co., 522 F.2d 827,830 (9th Cir. 1975)(n 7). To be sure, one may have the Statute of Limitations' protection while it exists but such protection does not involve substantive or fundamental rights and its protection may be removed. Chase Securities Corp. v. Donaldson, 325 U.S. 304,324 (1945); 65 S.Ct. 1137,1142 (1945).

This is not a case where Petitioner's conduct would have been different if the present rule had been known and the change foreseen. He can not say that he molested Respondent in reliance upon some former statute of limitations. Chase Securities at 316,1143. Nor is it likely that Petitioner can say any action was

undertaken by him in the assumption that the old statute would be continued. Id.

> ...[M]ultitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small. Chase Securities at 315,1143 (citing Danforth v. Groton Water Co., 178 Mass. 472,476; 59 N.E. 1033).

Nevertheless, this Court has only recently found some sort of "property" right in our Constitution that does not exist in the U. S. Constitution. Wiley v. Roof, 19 Fla. L. Weekly S344 (Fla. June 24, 1994).

If it were not for the delayed discovery rule, this holding would apparently bar Respondent's claim and thereby reward those molesters who were either clever or lucky enough to so thoroughly traumatize their young prey that the statute of limitations ran before the victims even knew of the claim.

Fortunately, application of the delayed discovery rule in cases such as this will prevent such a perversion of the legal system.

II. APPLICATION OF THE DELAYED DISCOVERY RULE WOULD ALLOW RESPONDENT TO PURSUE HIS CLAIM.

Under Florida's discovery rule, a cause of action does not accrue, and the statute of limitations begin to run until the complainant knew or should have known of the act constituting the invasion of his or her legal rights. Celotex Corp. v. Meehan, 523 So.2d 141,145 (Fla. 1988).

Thus, even absent the expanded statute of limitations, Appellant should be allowed to amend to allege that due to post traumatic stress disorder or other repression mechanisms, his ignorance is blameless and therefore his case is encompassed by the delayed discovery rule as so ably advocated by Judge Jorgenson in Lindabury v. Lindabury, 552 So.2d 1117,1118 (Fla. 3rd DCA 1989) (dissenting opinion). See also Senfeld v. Bank of Nova Scotia Trust Co., 450 So.2d 1157,1162-3 (Fla. 3rd DCA 1984).

Surely, no one could contend that traumatized victims of child molestation are to blame for subconsciously repressing awareness of the horrible acts forced upon them. If the evidence establishes that repression had occurred in the past and the claimant brings the action within four (4) years from the time he or she knew or should have known of the invasion of his or her legal rights, i.e. memories of the abuse rise to consciousness, the Statute of Limitations would be no bar to a claim.

Respondent deserves the chance to prove that he is a blameless victim of child abuse. As he initially based his allegations upon a statute that clearly gave him the right to

bring the action and which has only recently been ruled unconstitutional, he should be allowed to amend the Complaint to include allegations concerning the repression and the time at which he became aware of the traumatizing events for the first time. Sedener v. Jones, 455 So.2d. 643 (Fla. 1st DCA 1984).

CONCLUSION

If this honorable Court declines to reconsider the constitutionality of §95.11(7), Fla. Stat. (1993), the Court should embrace the delayed discovery rule and Respondent should be allowed to amend his Complaint to meet the requirements of that rule of discovery.

J. ARBY VAN SLYKE, P. A.

By: _____

J. ARBY VAN SLYKE
216 E. Government Street
Post Office Box 13244
Pensacola, Florida 32591
(904) 438-0440
Florida Bar No. 374032

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Answer Brief has been furnished to **MICHAEL R. N. MCDONNELL, ESQUIRE, Suite 304 at The Commons, 720 Goodlette Road North, Naples, Florida 33940** this 1st day of August, 1994, by U. S. mail.

J. ARBY VAN SLYKE