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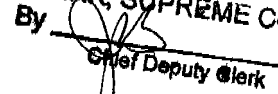

IN THE SUPREME COURT OF FLORIDA

CASE NO. 89, 018
L.T. NO. 94-2627

JUAN LUIS GARCIA JR., and DARLENE GARCIA, minors, by their father and next friend, JUAN LUIS GARCIA SR.,

Petitioners,

v.

CRISTOBAL REYES, et al.,

Respondents.

ORIGINAL ATTACHED

ON REVIEW OF CERTIFIED QUESTION FROM THE COURT OF APPEAL, FOURTH DISTRICT

PETITIONERS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

By order of August 20, 1996 the Fourth District Court of Appeal certified the following question as one of great public importance:

> WHETHER THE CHILDREN HAVE A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST IN FAMILY COMPANIONSHIP UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT THAT WOULD ALLOW A CAUSE OF ACTION UNDER 42 USC SEC. 1983 WHEN THE STATE UNLAWFULLY IMPRISONS THEIR FATHER FOR 30 MONTHS?

(APP- 1). The court of appeal split in holding that there was no such cause of action where the State's interference with the right of familial association was temporary. 677 So.2d 1293 (Fla. 4th DCA 1996). (APP- 2).

Petitioner Darlene Garcia was a six-year-old child and Petitioner Juan Luis Garcia Jr. was a twelve-year-old child at the time that their father, a professional jeweler, was wrongfully arrested, convicted, and incarcerated as a result of an unconstitutional reverse drug-sting operation conducted by Respondent Reyes, an officer of the Fort Lauderdale Police Department. (R. 71, 75). Bail pending appeal being prohibited by law, Garcia Sr. spent 30 months in prison before his release following reversal of his conviction by the court of appeal on due process grounds. Garcia v. State, 582 So. 2d 88 (Fla. 4th DCA 1991), rev. denied, 592 So. 2d 682 (Fla. 1991).

After his release from prison, Juan Luis Garcia Sr. filed suit for damages to redress his personal losses and for those sustained by his children as a result of the wrongful conviction and imprisonment of their father. (R.70). Count III of the First Amended Complaint sought damages from Defendant Reyes under 42 U.S.C. 21983 for his violation of the constitutionally protected liberty interest in family

companionship and association of Garcia Sr. and his children. Count III alleged that Officer Reyes was liable to plaintiffs for his unlawful conduct in the wrongful arrest and conviction of Juan Luis Garcia Sr., i.e., that acting under color of state law, he deprived father and children of their liberty interest, as guaranteed by the Due Process Clause of the Fourteenth Amendment, to be free from unjustified police severance of the family unit. **(R.75-76).**

More particularly, Count III, ¶¶ 26-37, alleged that Garcia Sr. was deprived of the care, custody and companionship of his children during the period of his unconstitutional imprisonment and that his children suffered the reciprocal loss of the companionship and affections of their father. In addition, it alleged that the children suffered a loss of financial support as a result of their father's unlawful incarceration because it terminated his employment and cut off his ability to support them. It further alleged that Darlene became deeply depressed and suicidal for a time.

The Circuit Court dismissed Count III with prejudice. (R.103). The court held that the absence of case law, common law, or statutory law necessitated the finding that the Garcia children did not have a cause of action for loss of parental consortium. **(R.101-02).** The order of dismissal did not specifically address the issue whether the complaint stated a claim for relief under **§1983.** On direct appeal, the court of appeal affirmed. It held that **§1983** did not provide a cause of action where the disruption of the family unit was not permanent, as in the case of a death. Petitioners timely invoked the discretionary jurisdiction of the Supreme Court.

SUMMARY OF THE ARGUMENT

The court of appeal misconceived the law pertaining to the right of family association and made the wrong policy choice in affirming dismissal of Count III for failure to state a claim for relief under §1983. While §1983 is not itself a source of rights, it provides a remedy for the violation of rights guaranteed by the Constitution. The right of familial association between parent and child is a constitutionally protected liberty interest under the Due Process Clause of the Fourteenth Amendment. Thus, its violation gives rise to a cause of action under 42 U.S.C. § 1983.

Although it appears to be a question of first impression in this jurisdiction, four federal circuit courts of appeals have recognized the right of familial association as a constitutionally protected liberty interest. The Ninth Circuit has expressly held that a child can maintain a cause of action under §1983 for death of a parent. No case has confronted the precise question posed here: whether police misconduct that deprives a child of his parent in a serious but nonfatal manner is actionable under 11983 where the deprivation has the potential for life-long harm.

The majority decision below offers no sound reason of law or social policy why the Ninth Circuit ruling should not be applied to a serious and substantial deprivation short of death. Indeed, in this era of increasing solicitude for family values, the majority decision represents the wrong choice at the wrong time. The better rule is that stated in the dissenting opinion of Judge Pariente that the children's losses should be actionable.

The Supreme Court and the lower federal courts have developed a body of case law that articulates a clear vision of the central role of the family in civil society, These cases, spanning seven decades, recognize the right of familial association and deem it fundamental. A right is deemed fundamental and thereby protected as part of substantive due process under the Fourteenth Amendment when, as here, it is so rooted in the traditions and collective consciousness of our people that it lies at the base of our civil and political institutions. Because of the family's special place in civil society, the State's violation of the liberty interest of a parent and children to associate with each other is actionable under §1983.

Here a state actor, in adjudicated violation of law, has inflicted substantial and potentially enduring damage upon the family. The Garcia children are entitled to a remedy under 42 U.S.C. §1983 because Respondent Reyes' misconduct deprived them of their father's nurturance and financial support, Although he was returned to his family after 2 1/2 years, the deprivation may well prove to be a life-long injury to the well-being of the children.

ARGUMENT

THE GARCIA CHILDREN HAVE A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST IN FAMILY COKPANIONSHIP UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT THAT ALLOWS A CAUSE OF ACTION UNDER 42 USC SEC. 1983 WHEN THE STATE UNLAWFULLY IMPRISONS THEIR FATHER FOR 30 MONTHS-

The right to associate together as a family is fundamental. The seminal case is Meyer v. Nebraska, 262 U.S. 390, 399 (1923), defining the "liberty" protected by the Due Process Clause of the Fourteenth Amendment in expansive terms:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, **to marry, establish a home and bring up children,** to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 398-99 [e.s.]. Thereafter, the Supreme Court frequently emphasized the primacy of family life and the parent-child relationship. It has deemed child custody "rights far more precious ... than property rights." Mav v. Anderson, 345 U.S. 528, 533 (1953). "Marriage and procreation are fundamental to the very existence and survival of the race." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

Because of the fundamental importance of the family in civil society, the state may not separate a parent and child even temporarily

without according them procedural due process of law to protect their liberty interest in the integrity of the family unit. Lassister v. Department of Social Services, 452 U.S. 18, 27 (1981); Stanley v. Illinois, 405 U.S. 645, 651 (1972). The teaching of the Supreme Court's family jurisprudence is that the right of family association is protected, both substantively and procedurally, from unwarranted state interference by the Due Process Clause of the Fourteenth Amendment.

It is true that the contours of this right have not yet been held to envelop the precise circumstances of this case, but the federal courts of appeals have come very, very close. Four federal circuits have concluded that the right of parents and children to associate together as a family--to be together as a unit--is violated and actionable by the parent under §1983 when a state actor unlawfully kills a child. Two circuits, one in dictum and one in holding, maintain that the child has the same right to sue for the death of a parent.

The most comprehensive treatment of the liability issue occurs in Bell v. Citv of Milwaukee, 746 F.2d 1205 (7th Cir. 1984). In that case, a father's estate bought an action under 42 U.S.C. § 1983 for the racially motivated fatal shooting of the father's son. The trial court ruled that the Wisconsin Wrongful Death Statute, which limited the amount recoverable by a parent of a decedent, did not apply to the estate's Section 1983 claim, and the City appealed. In order to decide this question, it was necessary for the Seventh Circuit to determine whether the father had a constitutionally protected liberty interest

in the continued society and companionship of his son. The court examined "the parameters of the constitutional protection afforded the parent-child relationship" in Supreme Court decisions and concluded that "Daniel Bell's father possessed a constitutional liberty interest in his relationship with his son." Id, at 1243.

Even more important to disposition of the present case, the Bell court also found rooted in the legislative history of Section 1983 an even stronger reciprocal right of recovery in the children:

> ... the legislative history makes a clearer case for recovery to the child due to loss of support or loss of society and companionship of a parent, recognition of the child's rights vis-a-vis parental loss logically implies the reciprocal recognition of the parent's rights vis-a-vis the loss of a child.

Id. at 1244. The court concluded by holding lost society and companionship to be remediable by damages awarded under Section 1983.[1]

The Third Circuit in Estate of Bailev v. Countv of York, 768 F.2d 503, 509 n.7 (3d Cir. 1985), rev'd on other grounds, Deshaney v. Winnebago County Dent. of Social Services, 489 U.S. 189 (1989), followed suit. It recognized a parent's "liberty interest in the custody of his children and the maintenance and integrity of the family":

> We follow the Seventh Circuit's decision in Bell

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[1] A decade before Bell was decided, Mattis v. Schnarr, 502 F.2d 588, 594 (8th Cir. 1974) had reached the same conclusion: the relationship between parent and child is "fundamental to our civilization":

> The family is the foundation of our society and hence the state. The traditions and common heritage of our people have always stressed the importance of the family bonds.

> ... in holding that based on . . . [Supreme Court] . . . precedents that a parent whose child has died as a result of unlawful state action may maintain an action under § 1983 for the deprivation of liberty.

The Ninth Circuit reached the same result not only as to the parent-child relationship[2] but also as to the child-parent relationship. Smith v. Citv of Fontana, 818 F.2d 1411 (9th Cir. 1987) heldthatthe constitutional interest in familial companionship extends to protect children from unwarranted state interference with their relationships with their father, who died as a result of being unlawfully shot by police.[3]:

> We now hold that this constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents. The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal, and we see no reason to accord less constitutional value to the child-parent relationship than we accord to the parent-child relationship.

Id. at 1417-18. See also Greene v. City of New York, 675 F. Supp. 110 (S.D.N.Y. 1987).

The majority opinion below rejected the forgoing cases on the basis that they involved a permanent deprivation--death--whereas the instant case involved only a temporary deprivation. In this regard, the court of appeal relied upon the decision of a single U.S. District

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[2] "A parent has a constitutionally protected liberty interest in the companionship and society of her child . . . ." Kelson v. City of Springfield, 767 F.2d 651, 655 (9th Cir. 1985).

[3] In Crumpton v. Gates, 947 F.2d 1418 (9th Cir. 1991), the Ninth Circuit extended the rule to authorize suits for losses to the family sustained while plaintiff was a fetus.

Judge in Willard v. Citv of Myrtle Beach, 728 F. Supp. 397 (D.S.C. 1989), quoting (with emphasis added) this passage:

> Significantly, as previously stated, every court which has recognized such a right of action has only done so within the factual context of a permanent, physical separation of parent and child, such as allegations of unlawful killing by individual state actors.

Garcia v. Reves at 1294.

Willard v. Citv of Myrtle Beach provides an outstanding example of the maxim that bad facts make bad law. The civil rights deprivation alleged there was a four-hour detention of a child by police. Not surprisingly, the court held that

> no such liberty interest is implicated by plaintiffs' allegation that their son has suffered permanent emotional and psychological harm by virtue of a brief four hour detention by defendants on June 11, 1986.

Id. at 404. Plaintiffs' counsel should have known better.

By contrast, the claim of the Garcia children "alleges a substantial loss over a long period of time." Garcia v. Reves at 1295 (dissenting opinion). This critical distinction between four hours and 30 months also deepens the impact of the loss:

> Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.

Roberts v. United States Jaycees, 468 U.S. 609, 619-20 (1984).

As Judge Pariente aptly pointed out, at 1295, to call this deprivation temporary does not do justice to the harm that was done: "the effects of the separation during the children's formative years

may very well be permanent." Indeed, the complaint alleged that Darlene in particular became deeply depressed and even suicidal. Such traumatic experiences in childhood can scar the psyche forever. Thus, if permanent injury[4] is required, it may well be present here--as only a trial can prove. And to aggravate the injury, Petitioners suffered the loss of financial support during the entire period of their father's wrongful imprisonment.

The majority below placed heavy reliance on the fact that there is no direct precedent for this particular cause of action. But the law grows by judicial accretion all the time. The real question is whether it should do so here. That normative policy question cannot be answered simply by observing that it is new ground that we plough. The dissenting opinion is more responsive to the challenge:

> The seminal question presented is whether there is a constitutionally-protected liberty interest in family companionship and association under the due process clause of the United States Constitution, which would allow the children to bring a civil rights action under 42 U.S.C. s 1983 for unlawful state interference with that right. There is no Florida case law or eleventh circuit decision on the subject . . . . In my opinion, expansion of the law to allow a claim to be filed on behalf of the children for a substantial constitutional deprivation directly occasioned by the alleged misconduct of the state is consonant with the purpose of s 1983 actions.

This case may not affect a large number of potential plaintiffs, but it is important nonetheless in its principle--that for every

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[4] Even Willard does not flatly hold that there must be a death for a cause of action. It is more nuanced, simply observing the fact that "cases which have recognized such a cause of action have done so" in cases of death. Id. at 400. It rightly deems death "significant." Id. at 404.

serious wrong there be a remedy. The existence of a remedy is of twofold importance: to provide justice to the innocent victims of official misconduct and to vindicate the societal interest in deterring future wrongdoers.

In both respects, it is important to emphasize two things. First is the seriousness of the loss sustained by Petitioners. Parental love, nurturing and guidance, not to mention financial support, is indispensable to the healthy development of a young child. Through parental care, a child is prepared to become a happy, productive adult. These indispensable rights are part of the liberty protected by the Due process Clause of the Fourteenth Amendment. Hence their violation by police misconduct is and should be actionable under 42 U.S.C. 61983.

Second, there is no other remedy for Petitioners under Florida **law.**[5] Unlike the situation in Valdivieso-Ortiz v. Burgos, 807 **F.2d** 6 (1986 1st Cir. **1986),** where the court expressed concern about federal duplication of state tort remedies, there are no alternative state causes of action available to the **Garcias.** In Florida, a child cannot maintain an action for loss of "services, comfort, companionship and society" unless the parent suffers "permanent total **disability."** Fla. Stat. § 768.0415 **(1993).**[6] Florida law gives no right to recover for

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[5] The majority opinion refers to the fact that Garcia Sr. has other remedies. His suit was dismissed and is now on appeal in Case No. 96-2924. Regardless of the outcome of the father's **appeal,** the salient point remains, as Judge Pariente points out, that the children have no other remedies.

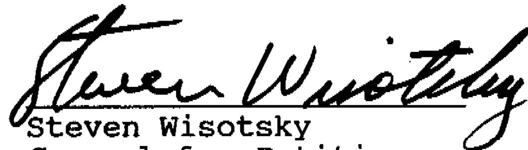
[6] **In** United **States v. Dempsey, 635 So.** 2d 961 (Fla. 1994), the **Supreme** Court **established the reciprocal** right of a parent to recover for loss of a child's filial consortium under the same standard as the statute--permanent total disability.

the destruction of the family unit without such injury. Hence adoption of the rule proposed by Judge Pariente would impose no duplication of state remedies via §1983.

CONCLUSION

Based on the foregoing points and authorities, this Court should accept jurisdiction over this case, answer the certified question affirmatively, and remand for further proceedings.

Respectfully Submitted



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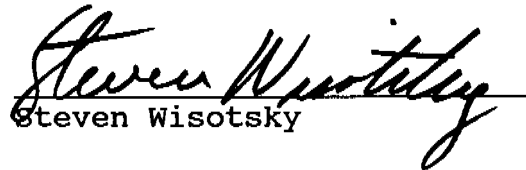
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 13th day of November, 1996 to Robert H. Schwartz, Attorney for Respondents, Adorno & Zeder, 888 S.E. Third Avenue, Suite 500, Fort Lauderdale, Fl. 33335.



Steven Wisotsky

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEAM, FL 33402

JUAN LUIS GARCIA SENIOR, etc., et al. Appellant(s),	CASE NO. 94-02627
vs.	
CRISTOBAL REYES and THE CITY OF FORT LAUDERDALE Appellee(s).	L.T. CASE NO. 94-6231 11 BROWARD

August 20, 1996

BY ORDER OF THE COURT:

ORDERED that appellants' suggestion of question of great public importance filed June 26, 1996, is granted, and the following question is hereby certified:

> WHETHER THE CHILDREN HAVE A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST IN FAMILY COMPANIONSHIP UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT THAT WOULD ALLOW A CLAUSE OF ACTION UNDER 42 USC SEC. 1983 WHEN THE STATE UNLAWFULLY IMPRISONS THEIR FATHER FOR 30 MONTHS?

I hereby certify the foregoing is a
true copy of the original court order.

MARILYN BEUTTENMULLER
CLERK

cc: Steven Wisotsky
Robert H. Schwartz

/CH

Juan Luis GARCIA Senior, on his own behalf, Juan Luis Garcia Jr., and Darlene Garcia. minors, by their father and next friend, Appellants,

v.

Cristobal KEYES, and The City of Fort Lauderdale, Appellees.

No. 94-2627.

District Court of Appeal of Florida, Fourth District.

June 19, 1996.

Order Certifying Question Aug. 20, 1996.

After he was arrested and later convicted of drug charges and held for period of 30 months before his conviction was reversed based on entrapment, 582 So.2d 88, father brought federal civil rights action against city and police officer alleging that detention deprived both him and his children of their constitutionally protected right to familial association. Defendants moved to dismiss for failure to state claim, and the Seventeenth Judicial Circuit Court, Broward County, Mel Grossman, J., granted motion. Father appealed, and the District Court of Appeal, Polen, J., held that claim based on interference with familial rights which was temporary and not permanent was insufficient to state claim under federal civil rights statute.

Affirmed.

Pariente, J., dissented and filed opinion.

Civil Rights ⟹133, 134

Allegations by individual who had been arrested on drug charges and held for 30 months, and whose conviction was overturned on appeal based on entrapment, that city and police officer had violated his and his childrens' due process right to association as family unit were insufficient to state claim in federal civil rights action; no right of action based on interference with right of familial association is recognized where right is only taken away temporarily, rather than permanently. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

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Steven Wisotsky, Miami, for appellants.

Stephanie Curd and Robert H. Schwartz of Gunther & Whitaker, P.A., Fort Lauderdale, for appellees.

POLEN, Judge.

Juan Luis Garcia Sr., on his own behalf and on behalf of his two minor children, appeals from a final order dismissing with prejudice count III of the plaintiffs first amended complaint. We affirm.

Juan Luis Garcia, Sr. was arrested for trafficking in cocaine and conspiracy to traffic in cocaine. He was subsequently convicted of the conspiracy. However, this conviction was overturned pursuant to a decision of this court that Garcia was entrapped.[1] Garcia on his own behalf and on the behalf of his two minor children then filed suit against Officer Cristobal Reyes and the City of Fort Lauderdale, alleging among other counts, that the city violated their due process rights in their association as a family unit. This count essentially alleged that while in prison, Garcia was deprived of the care, custody and companionship of his children and his children were deprived of a reciprocal right. Reyes and the City filed a motion to dismiss for failure to state a cause of action. This motion was granted as to count III only (the count that alleged violation of the due process right of familial association & companionship).

We affirm the trial court's dismissal of this count. The trial court correctly recognized that no Florida court, nor the federal Eleventh Circuit or the United States Supreme Court, has recognized a cause of action under 42 U.S.C. § 1983 [2] based on state interference with the right of familial association. Other federal circuits have been divided on this issue, but nope of the other circuits that have recognized such a cause of action have done so in a situation such as the one at bar

1. *Garcia v. State*, 582 So.2d 88 (Fla. 4th DCA 1991).

2. *42 U.S.C. § 1983* provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage. of any State or Territory or the District of Columbia, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges. or immunities, secured by

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where the right to familial association has been only temporarily rather than permanently taken away. *See Smith v. City of Fontana*, 818 F.2d 1411 (9th Cir.1987) (holding that the constitutional interest in familial companionship extends to protect children from unwarranted state interference with their relationships with their parents when father who was unarmed and offered only instinctive resistance to blows administered by police officers died as a result of being shot by police). *See* also *Willard v. City of Myrtle Beach*, 728 F.Supp. 397 (D.S.C.1989), in which the court stated as follows:

> Alternatively, assuming that a constitutionally protectible parental liberty interest in the continued companionship and association with their children exists within the rubric of substantive due process, it is nevertheless clear that no such liberty interest is implicated by plaintiffs' allegation that their son has suffered permanent emotional and psychological harm by virtue of a brief four hour detention by defendants on June 11, 1986. *Significantly, as previously stated, every court which has recognized such a right of action has only done so within the factual context of a permanent, physical separation of parent and child, such as allegations of unlawful killing by individual state actors.*

(Emphasis added.)

While we recognize at bar that Garcia's thirty month detainment might have been a hardship on his children, and practically speaking his children might have suffered as a result of his incarceration, there is no Florida authority allowing the children to recover for the temporary detainment of their parent. However, we do recognize that there are other causes of actions that can be pursued by Garcia as evidenced by the still viable counts of his complaint where these claims might at least be taken into consideration. We nonetheless affirm the trial court's decision not to recognize a new cause of action based on such a loss.

WARNER, J., concurs.

PARIENTE, J., dissents with opinion.

the Constitution and laws as. shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

PARIENTE, Judge, dissenting.

This is a final appealable order only as to the claims of Juan Luis Garcia, Sr., on behalf of his minor children, and not as to those brought by him individually because several of his related claims are still pending. *See Biasetti v. Palm Beach Blood Bank, Inc.*, 654 So.2d 247 (Fla. 4th DCA 1995). The dismissal of the children's claim for deprivation of familial association is appealable because there are no other pending counts for which they could recover damages.

The complaint alleges that Juan Luis Garcia, Sr. was wrongfully imprisoned for thirty months. At the time of his arrest, his daughter, Darlene Garcia, was six years old and his son, Juan Luis Garcia, Jr., was twelve years old. The complaint alleges that as a result of her father's absence, Darlene sustained severe mental trauma requiring psychiatric therapy. It is further alleged that both Darlene and Juan suffered the loss of their father's care and companionship together with the loss of financial support in the form of child support.

The seminal question presented is whether there is a constitutionally-protected liberty interest in family companionship and association under the due process clause of the United States Constitution, which would allow the children to bring a civil rights action under 42 U.S.C. § 1983 for unlawful state interference with that right. There is no Florida case law or eleventh circuit, decision on the subject, either recognizing or rejecting this cause of action. In my opinion, expansion of the law to allow a claim to be filed on behalf of the children for a substantial constitutional deprivation directly occasioned by the alleged misconduct of the state is consonant with the purpose of § 1983 actions.

In *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir.1987), cert. *denied*, 484 U.S. 935, 108 S.Ct. 311, 98 L.Ed.2d 269 (1987), the ninth circuit explained its reasoning for recognizing an independent civil rights claim of a child:

We now hold that this constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents. The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal, and we see no reason to accord less constitutional value to the child-parent relationship than we accord to the parent-child relationship. *Cf. Roberts v. United States Jaycees,* 468 U.S. 609, 619-20, 104 S.Ct. 3244, 3250, 82 L.Ed.2d 462 (1984) ("Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.").

(Footnote omitted). *Accord Bell v. City of Milwaukee,* 746 F.2d 1205, 1242-48 (7th Cir. 1984); see also *Estate of Bailey v. County of York,* 768 F.2d 503, 509 n. 7 (3d Cir.1985), *overruled on other grounds, DeShaney v. Winnebago County Dep't of Social Servs.,* 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989); *Logan v. Hollier,* 711 F.2d 690, 690-91 (5th Cir.1983), *cert. denied,* 466 U.S. 936, 104 S.Ct. 1909, 80 L.Ed.2d 458 (1984); Greene *v.* City *of* New York, 675 F.Supp. 110 (S.D.N.Y.1987). *But see Berry v. Muskogee,* 900 F.2d 1489 (10th Cir.1990); *Broadnax v. Webb,* 892 F.Supp. 188 (E.D.Mich.1995).

This case is distinguishable from the *de minimis* separation in *Willard v. City of Myrtle Beach,* 728 F.Supp. 397 (D.S.C.1989), which involved a four hour detention and was decided at the summary judgment phase. In *Willard,* based solely on their child's four-hour detention by the police, the parents brought a civil rights action alleging a deprivation of their constitutional right to the continued companionship of their son.

While the nearly three-year separation in this case was not a permanent separation as in cases of death, the effects of the separation during the children's formative years may very well be permanent. Allowing the children's constitutional claim in this case to withstand a motion to dismiss does not trivialize the constitutional right to familial association.

The complaint alleges a substantial loss over a long period of time. Because we are reviewing this case on a motion to dismiss, we must accept the allegations of the complaint as true. I cannot say as a matter of law that no substantial deprivation of the children's constitutional rights occurred as a result of the allegedly wrongful incarceration of their father. Although plaintiff Juan Garcia, Sr. has other cognizable causes of action available to him individually, there is no other relief available to the children. I, therefore, would reverse and find that this complaint states a cause of action.

BY ORDER OF THE COURT:

ORDERED that appellants' suggestion of question of great public importance filed June 26, 1996, is granted, and the following question is hereby certified:

WHETHER THE CHILDREN HAVE A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST IN FAMILY COMPANIONSHIP UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT THAT WOULD ALLOW A CLAUSE OF ACTION UNDER 42 U.S.C. SEC. 1983 WHEN THE STATE UNLAWFULLY IMPRISONS THEIR FATHER FOR 30 MONTHS?

Roy L. MACKEY and Bertha L. Mackey, His Wife, Appellants,

v.

HOUSEHOLD BANK, F.S.B., a Federally Chartered Savings Bank, Appellee.

No. 94-2958.

District Court of Appeal of Florida, Fourth District.

July 10, 1996.

Rehearing and Rehearing En Banc Denied Sept. 3, 1996.

In foreclosure action, the Circuit Court, Fifteenth Judicial Circuit, Palm Beach Coun-