IN THE SUPREME COURT OF FLORIDA

JOHN RICHARD THERRIEN,

Petitioner,

v. CASE NO.: SC03-2219

THE STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S SECOND SUPPLEMENTAL REPLY BRIEF

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INTRODUCTION

This reply brief will address *State Farm Mutual Automobile Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995) in support of Petitioner's argument that substantive amendments to the Florida Sexual Predator Act (FSPA) should not be held retroactive.

ARGUMENT

I. DESIGNATION AS A SEXUAL PREDATOR DEPRIVES PROTECTED LIBERTY INTERESTS.

The thrust of State's argument is that *Laforet, supra*, is not controlling precedent because the FSPA imposes "mild obligations." (Second Supp. Br. 11). In contrast, this court held in *State v. Robinson*, 873 So. 2d 1205, 1213-1214 (Fla. 2004), that the sexual predator designation is more than a stigma and deprives a person of protected liberty interests. Presaging this holding, this court determined that a juvenile offender should not be burdened with the extreme civil disabilities of a sexual predator because the focus of the juvenile system is rehabilitative, rather than punitive. *State v. J.M.*, 824 So. 2d 105, 113-114 (Fla. 2002). Therefore, this court should reject any inference that the FSPA, although a civil regulatory statute which is arguably remedial, is an inconvenience to be lightly brushed aside.

In *Laforet*, this court refused to apply § 627.727(10), Fla. Stat. (Supp. 1992), retroactively where the legislature was reacting to *McLeod v. Continental*

Insurance Company, 591 So. 2d 621 (Fla. 1992) and passed an amendment that, for actions brought under § 624.155, the total amount of the claimant's damages would encompass the excess of the policy limits whether caused by the insurer's bad faith or by the third party tortfeasor. 658 So. 2d at 60-61. This court determined that the expansion of damages recoverable against an insurance company, even though the legislature had labeled this amendment as remedial, could not be applied retrospectively if it ". . . impairs vested rights, creates new obligations, or imposes new penalties." *Id*. at 61, citing cases. This court determined that § 627.727(10) was compelling insurance companies to face two penalties in first party bad faith actions: (1) punitive damages for the willful refusal to pay a claim; and (2) an excess judgment for the wrongful failure to pay a claim without regard to causation. This amendment was not simply a remedial clarification increasing sanctions, but acted to add a new penalty. *Id.* at 61-62.

In much the same way, the addition of new offenses to expand the eligibility for sexual predator designation is not merely a clarification of the legislature's intent to list those offenses qualifying an offender for sexual predator treatment. The legislature has added a new penalty stemming from the commission of certain offenses not listed before October 1, 1998. The sexual predator designation deprives protected liberty interests, imposes civil disabilities, and exposes a predator to further criminal prosecution. *Robinson*, 873 So. 2d at 1213-1214

(describing potential criminal prosecution for violations of the FSPA).

State has cited two decisions from this court upholding retroactive amendments of remedial legislation either where substantive rights were being enforced, such as the right to counsel, or where no rights existed, such as the obligation to discharge liability among tortfeasors. *See City of Orlando v. Desjardins*, 493 So. 2d 1027, 1029 (Fla. 1986) (right of City to preserve attorney-client communications); *Village of El Portal v. City of Miami Shores*, 362 So. 2d 275, 278 (Fla. 1978) (tortfeasor enjoys no right to freedom from contribution). The October 1, 1998 amendment does not enforce substantive rights, but takes them away; nor can the amendment be construed as a procedural adjustment to discharge pre-existing obligations, as Mr. Therrien had no obligations under the FSPA until the amendment. The other decisions relied upon by State are equally unavailing. *Bared & Company v. Landis & Gyr Powers, Inc.*, 650 So. 2d 633 (Fla. 3d DCA 1995), involved expansion of procedural remedies for a pre-existing right which is not present here. *State v. Patterson*, 694 So. 2d 55 (Fla. 5th DCA 1997) was more concerned with the wording of an amendment limiting the patient-psychiatrist privilege so as to exclude the statements of a perpetrator, rather than its retroactivity.

In an analogous situation, several defendants, who are the subject of petitions for post-sentence civil commitment as sexually violent predators pursuant

to §§ 394.910-394.931, Fla. Stat. (Jimmy Ryce Act), have petitioned for discretionary review of their right to invoke the privilege against self-incrimination during their deposition. *Sutton v. State*, Case Nos. SC04-1954 to 1959. Citing *State ex rel. Vining v. Florida Real Estate Commission*, 281 So. 2d 487, 489 (Fla. 1973) and *Kozerowitz v. Florida Real Estate Commission*, 289 So. 2d 391, 392 (Fla. 1974), among other cases, they argue that they should not be compelled to testify against themselves in a civil proceeding which is penal in nature and an adverse finding will be more severe than a degradation of professional standing, reputation or livelihood. (Petitioners' Initial Merits Brief, 9-16). This court has similarly described the penal nature of the predator designation which subjects an individual to "social ostracism, verbal (and sometimes physical) abuse, and the constant surveillance of concerned neighbors." *Robinson, supra*, 873 So. 2d at 1214. This designation results in a harsher penalty than the loss of a professional license.

II. FLORIDA'S PRESUMPTION AGAINST RETROACTIVITY APPLIES IN NON-CONTRACT CASES.

In its effort to create an ocean of difference between *Laforet* and this case, State argues that the due process clause of the Fourteenth Amendment only prohibits retroactive application in the context of contractual relationships, citing *United States Trust Company of New York v. New Jersey*, 431 U.S. 1 (1977). (Second Supp. Br. 12). However, the U.S. Supreme Court has refused to apply

civil statutes retroactively in other contexts such as the award of punitive and compensatory damages resulting from intentional discrimination. *Landsgraf v. USI Film Products*, 511 U.S. 244, 284-285 (1994). The supreme court stated, "[t]he presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." *Id*. at 271. Moreover, this court is free to apply the Florida Constitution to impose higher burdens than that of the federal due process clause. *Traylor v. State*, 596 So. 2d 957, 962-963 (Fla. 1992) (each right in Art. 1, § 9, Fla. Const. is to be construed to achieve the primary goal of individual autonomy). Like the U.S. Supreme Court in *Landsgraf*, this court in *Laforet* has refused to impose retroactively the obligation to pay the total of a claimant's damages on insurance companies because it acted as a new penalty. The fundamental unfairness of imposing a new penalty on Mr. Therrien's conduct completed before the October 1, 1998, amendment is patent. No label that the FSPA is remedial can undo this fundamental unfairness.

CONCLUSION

Laforet is controlling authority that a substantive amendment to the FSPA operates to impose a new penalty upon Mr. Therrien from which he was free when he was sentenced on August 25, 1997. The trial court's designation should be reversed and vacated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Thomas F. Duffy, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, FL 32399-1050, by U. S. Mail, this ___ day of June, 2005.

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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned attorney hereby certifies that this brief was prepared using a 14 Times New Roman font in accordance with Fla. R. App. P. 9.210(a)(2).

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