IN THE SUPREME COURT OF FLORIDA

JOHN RICHARD THERRIEN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

SCO3-2219

RESPONDENT'S SECOND SUPPLEMENTAL BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, John Richard Therrien, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

This brief is submitted pursuant to the Court's Order of April 14, 2005, wherein the Court ordered a second set of supplemental briefs, to be filed simultaneously. The various other briefs in this case will be referenced as follows: "BI" will refer to Petitioner's Initial Brief, "BA" will refer to Respondent's Answer Brief, "BR" will refer to Petitioner's Reply Brief, "SIB" will refer to Petitioner's Supplemental Initial Brief, "SAB" will refer to Respondent's Supplemental Answer Brief, and "SRB" will refer to Petitioner's Supplemental Reply Brief. Each symbol will be followed by the appropriate page number.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

MERITS

IS THE FLORIDA SEXUAL PREDATOR ACT APPLICABLE TO THOSE WHOSE CRIMES WERE NOT QUALIFYING OFFENSES AT THE TIME THEY WERE SENTENCED?

This Court ordered the parties to submit supplemental briefs on the following question:

> [W]hether, pursuant to the language of section 775.21(5)(a)(1) and section 775.21(5)(c), Florida Statutes (2000) Petitioner or any offender who did not meet the statutory criteria for sexual predator designation when he or she was "before the court for sentencing for a current offense committed on or after October 1, 1993," is subject to being subsequently designated a sexual predator.

Order.

The State assumes that, inasmuch as the parties have already briefed whether it is permissible for the statute to be applied retroactively (IB, 8-16, AB 9-24, RB 1-9) and whether the statute is *ex post facto*, (see supplemental briefs) the Court seeking argument simply on the how the statutory language in the Florida Sexual Predators Act is to be construed, and if the legislature actually did intend section 775.21 to apply retrospectively. This brief will discuss the plain language of the statute and extrinsic material that bears on that language.[1]

[1] As the Court asked the parties at oral argument to discuss State Farm Mutual Automobile Insurance Co v. Laforet, 658 So. 2d 55 (Fla. 1995), and in light of Petitioner's providing that case as supplemental authority, the State will, with the Court's indulgence, briefly discuss that case, as well.

1. Section 775.21 Applies Retroactively.

The State submits that the statutory language demonstrates that Petitioner, as with any other person "convicted" (pursuant to section 775.21(1)(c), Florida Statutes (2000)) of what was determined in 2000 as a qualifying offense, must be designated a sexual predator. Section 775.21(5)(a)(1), Florida Statutes (2000) is essentially the same language as is found in section 775.21(5)(a)(2) today, and read in relevant part:

> An offender who meets the sexual predator criteria described in paragraph (4)(a) who is before the court for sentencing for a current offense committed on or after October 1, 1993, is a sexual predator, and the sentencing court must make a written finding at the time of sentencing that the offender is a sexual predator, and the clerk of the court shall transmit a copy of the order containing the written finding to the department within 48 hours after the entry of the order . . . .

This statutory language is clear, straightforward and unambiguous. The Sexual Predators Act will apply to: 1) anyone who is being sentenced, 2) "who meets the sexual predator criteria described in paragraph (4)(a) . . ." [2] and 3) who committed the offense for which he or she is being sentenced on

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[2] I.e., anyone who has been found guilty by a jury or entered a plea of guilty or no contest to certain sexual crimes, including attempted sexual battery when that crime is at least a first-degree felony. §775.21(4), Fla. Stat.

or after October 1, 1993. The Act also applies to those who already have been sentenced. Section 775.21(5)(c), Florida Statutes (2000) provided (and continues to provide today):

> If the Department of Corrections, the department, or any other law enforcement agency obtains information which indicates that an offender meets the sexual predator criteria but the court did not make a written finding that the offender is a sexual predator as required in paragraph (a), the Department of Corrections, the department, or the law enforcement agency shall notify the state attorney who prosecuted the offense for offenders described in subparagraph (a)1., or the state attorney of the county where the offender establishes or maintains a residence upon first entering the state for offenders described in subparagraph (a)3. The state attorney shall bring the matter to the court's attention in order to establish that the offender meets the sexual predator criteria. If the state attorney fails to establish that an offender meets the sexual predator criteria and the court does not make a written finding that an offender is a sexual predator, the offender is not required to register with the department as a sexual predator. The Department of Corrections, the department, or any other law enforcement agency shall not administratively designate an offender as a sexual predator without a written finding from the court that the offender is a sexual predator.

This subsection makes it clear that the statute contemplates situations where, for whatever reason, sexual predator designation was not imposed at sentencing. It lets virtually any agency that is likely to have contact with the defendant – the Department of Corrections, the Department of Law Enforcement or

any police agency in the state – to alert the appropriate office of the state attorney to this fact so that the State may move that an order designating the individual a sexual predator may be entered.[3]

Taken together, these two subsections demonstrate that Petitioner,[4] or any other offender who did not qualify for sexual predator designation at the time of sentencing, may nevertheless subsequently be designated a sexual predator. Subsection (5)(c) is not limited in application whatsoever, and subparagraph (5)(a)(1) makes the Act applicable to anyone who committed a crime on or after October 1, 1993.

This construction is consistent with the Florida Sexual Predators Act's remedial aims, which were to protect the public from those who have been convicted, irrespective of adjudication of guilt,[5] of certain serious sexual offenses. §775.21(3), Fla. Stat. (2000).

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[3] To the extent that this subsection could be construed to prohibit the State Attorney from raising this issue on its own, the State resists such a hypertechnical interpretation. Broadly speaking, the state attorney's offices are "law enforcement agencies," but more to the point, if a state attorney learned of someone who should be subject to the Act, that office could notify a law enforcement agency and start the process.

[4] Having pleaded no contest to attempted sexual battery upon a person under 12 years old by a person under 18 years old, Petitioner qualifies as a sexual predator.

[5] §775.21(2)(c), Fla. Stat. (2000)

To the extent that it is not apparent from the face of the statute that the legislature intended to apply the Act to those who at the time of sentencing were not subject to it, an examination of the Act's 1997, 1998 and 2000 amendments shows such intent. As the Act existed in November of 1996 and August 1997 (the date Petitioner committed his crime and the date he was sentenced), attempted sexual batteries were not qualifying offenses unless they were first-degree felonies. §775.21(4)(a), Fla. Stat. (1996 Supp.) Moreover, the statute at that time established three categories of offenders, based on the date they committed their crimes: October 1, 1993 through September 30, 1995; October 1, 1995 through September 30, 1996; and after October 1, 1996. §775.21(4)(a), Fla. Stat. (1996 Supp.). Only those designated after October 1, 1996, were subject to community notification, but all were subject to registration. Id.

In 1997 the Act was changed to make all sexual predators subject to both registration and notification. §775.21(4)(a), Fla. Stat. (1997), but the three-category system was kept in place. The next year Chapter 98-81, section 3, Laws of Florida, changed the statute to include attempts. See §775.21(4)(c)(1)(b), Fla. Stat. (1998 Supp.).

In 2000, the law changed several times, and one of the amendments eliminated the distinction between dates of offense, with October 1, 1993 being the controlling date for all applications of the Act. Ch. 00-207, §1, Laws of Fla. (2000).

Thus, a clear trend emerges, with the legislature regularly broadening the sweep and reach of the Act, culminating with the legislature scrapping all date restrictions in 2000 and opting instead for a very broad application of the Act, all the way back to its enactment in 1993. The legislature has clearly shown its intent by broadening the definition of a "sexual predator" and by relating this change back to statute's beginnings.

The Staff Analysis of the bills that ultimately became the 2000 revision of section 775.21 bears out this point. It shows that the legislature was aware of and indeed intended to increase the Act's sweep.

> The CS amends s. 775.21, F.S., to eliminate the current three-category or three-tier system embodied in that statute. The CS streamlines the statute so that it is clear that the sexual predator definition, registration procedures, notification procedures, and other provisions of the law **apply to all sexual predators whose offense qualifying them for the sexual predator designation was committed on or after October 1, 1993, the date of enactment of the Sexual Predator Act.**

Senate Staff Analysis, CS, SB 1400 and 1224, at 9. The Staff Analysis also is enlightening as to the rationale behind the

Act's evolution. For example, the "three-tier" system was initially instituted in part because the case law was unsettled as to "whether sexual predator registration and notification constituted punishments." Id. at 5. If they were punishments, the analysis notes, then the Act would be subject to ex post facto challenges, and tiering was intended to protect against such a possibility. Id. When the decision in W.P. v. Poritz, 931 F.Supp. 1199 (D.N.J. 1996) and the opinions in E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997) and Doe v. Pataki, 120 F.3d 1263 (2d Cir 1997) settled some of these issues, the legislature made all three tiers essentially alike in 1997. Id. at 6-7. The report stated:

> For almost all intents and purposes, the tiering system in s. 775.21, F.S., appeared to have no meaning with the 1997 changes to the law. Both notification and registration provisions were given retroactive application, and the body of case law supported such retrospective application. The "sexual predator" definition, which was modified by the inclusion of additional, qualifying offenses was applied to all sexual predators, regardless of offense date. The same situation occurred with changes to the law in 1998, which were mainly to conform Florida's sexual predator and sexual offender registration and notification laws with standards in the federal Jacob Wetterling Act.

Id. at 8.

2.*Laforet* Does Not Control This Case

There may remain, in the Court's viewpoint, a question as to whether the legislature may constitutionally make the Act retroactive. At oral argument the case of State Farm Mutual Automobile Insurance Co. v. Laforet, 658 So. 2d 55 (Fla. 1995) came up, but was not discussed in any detail. Petitioner then provided it to the Court as supplemental authority. In light of these developments, the State will briefly address that case and others to which it relates.

Laforet involved a certified question as to whether section 627.727(10), Florida Statutes, was a remedial statute that operated retrospectively. This Court held that it was not because, by retroactively making insurance companies who in bad faith refused to settle claims responsible for an insured's entire damages, the legislature had created a penalty. 658 So. 2d at 61. Penalties, the Court said, cannot be applied retroactively. The Court also noted that it had invalidated retroactive statutes that took away vested rights and created new obligations. Id.

The mere fact that a new obligation is created, however, does not mean that a remedial statute cannot be retrospectively applied. Remedial statutes should be broadly construed to help effect the remedy, See Becker v. Amos, 141 So. 136 (1932) and

when one seeks to address a serious social problem such as crimes committed by released sex criminals, as the FSPA does, that rule is most compelling. In City of Orlando v. Desjardins, 493 So. 2d 1027, 1028 (Fla. 1986) this Court rejected a lower court decision that refused to apply an exemption from the public record law because it was found to affect substantive rights.

> While the procedural/substantive analysis often sheds light on the propriety of retroactively applying a statute, the dichotomy does not in every case answer the question. Florida's courts have embraced a third alternative. **If a statute is found to be remedial in nature, it can and should be retroactively applied in order to serve its intended purposes.**

(Citations omitted.) Thus, while the presumption may be generally in favor of prospective application only, remedial statutes are to be construed to act retrospectively. This is true even when one party will not be in as good a position as he or she would be if the statute was not applied retrospectively.

For example in Dejardins the individual's right to a public record was held to be inferior to the right of the city to protect its litigation files from public disclosure. In Village of El Portal v. City of Miami Shores, 362 So. 2d 275, 278 (Fla. 1978) the contribution among joint tortfeasors act was held to apply retrospectively, even though the holding required the Village to pay more damages than it otherwise would have had to

pay. In Bared And Company, Inc., v. Landis & Gyr Powers, Inc., 650 So. 2d 633, 634 (Fla. 3d DCA 1995) a contractor was subject to providing an accounting to, or being enjoined or to having its assets attached by a subcontractor under a retroactive application of section 255.071(4), Florida Statutes. In State v. Patterson, 694 So. 2d 55, 57 (Fla. 5th DCA 1997) an amendment to the patient-psychotherapist privilege was applied retroactively even though by so doing a criminal defendant was deprived of potentially useful information regarding a victim.

The broad language in Laforet should not be taken by this Court as a holding that any remedial statute that operates retrospectively cannot thereby create new obligations. When a statute seeks to remedy a social ill as serious and potentially devastating as serious sex crime recidivism, its scope should be as broad as possible so as to provide the maximum protection possible to the vulnerable members of society that it is intended to protect. In such instances, the individual's rights are not paramount. Or, at least, courts should analyze the legislation and balance its benefits and burdens, rather than simply invalidating the law because it operates backward in time to impose relatively mild obligations. The analytical framework set out in Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991) is an example of an appropriate calculus.

It may appear that to the extent Laforet states a rule that remedial statutes cannot retrospectively impose new obligations it and Desjardins are in conflict, in light of the latter case's statement that remedial statutes should be applied retroactively to effect the statutory purpose. Desjardins, 588 So. 2d at 1028. Inasmuch as "this Court does not intentionally overrule itself sub silentio." Puryear v. State, 810 So. 2d 901, 905 (Fla. 2002), both cases are presumed to be valid.

Any tension between these two cases may be resolved, however, by a review of United States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977), where the United States Supreme Court noted that the power to review retroactive civil legislation resides solely in the Contract Clause of the United States Constitution, and not in the Due Process Clause of the Fourteenth Amendment. "[T]he Contract Clause does not prohibit the States from repealing or amending statutes generally, or from enacting legislation with retroactive effects." 431 U.S. at 17. The Court explained:

> The Contract Clause is in the phrase of the Constitution which contains the prohibition against any State's enacting a bill of attainder or ex post facto law. Notwithstanding Mr. Chief Justice Marshall's reference to these two other forbidden categories in *Fletcher v. Peck*, 6 Cranch [87], 138-139, it is clear that they limit the powers of the States only with regard to the imposition of punishment. *Cummings v. Missouri*, 4 Wall. 277, 322-326, 18 L.Ed. 356

> (1867); *Calder v. Bull*, 3 Dall. 386, 390-391, 1 L.Ed. 648 (1798). **The Due Process Clause of the Fourteenth Amendment generally does not prohibit retrospective civil legislation, unless the consequences are particularly "harsh and oppressive."** *Welch v. Henry*, 305 U.S. 134, 147, 59 S.Ct. 121, 125, 83 L.Ed. 87 (1938). *See Usery v. Turner Elkhorn Mining Co*., 428 U.S. 1, 14-20, 96 S.Ct. 2882, 2891-2894, 49 L.Ed.2d 752 (1976).

431 U.S. at 17, n. 13.

Thus, to the extent Laforet stated or applied a rule that statutes cannot operate retrospectively to establish new obligations, that rule would only apply to contractual relationships. The due process clause is not implicated, the legislation in question here not resulting in particularly harsh or oppressive results.

CONCLUSION

Based on these arguments and those set out in the other pleadings and at oral argument, the State respectfully requests that this Honorable Court answer the certified question in the affirmative and approve the decision below.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Charles V. Peppler, Esq., 14 W. Government Street, Room 411, Pensacola, FL 32501 by mail on December 20, 2004.

Respectfully submitted and served,

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[AGO# L03-1-36441]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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