IN THE SUPREME COURT OF FLORIDA

JOHN RICHARD THERRIEN,

Petitioner,

v.

CASE NO.: SC03-2219
LOWER TRIBUNAL NO.: 1DO1-3403

THE STATE OF FLORIDA,

Respondent.
_____/

PETITIONER=S SUPPLEMENTAL INITIAL BRIEF

Charles V. Peppler
Attorney at Law
Florida Bar No: 239739
14 W. Government Street, Room 411
Pensacola, Florida 32502
(850) 595-4970
Attorney for Petitioner, John Richard Therrien

TABLE OF CONTENTS

Page

TABLE OF CITATIONS.....i

INTRODUCTION.....1

SUMMARY OF ARGUMENT.....1

ARGUMENT.....3

I. AS FLORIDA SEXUAL PREDATOR ACT (FSPA) IS NOT A STATUTE OF CRIMINAL PUNISHMENT, IT IS NOT SUBJECT TO *EX POST FACTO* ANALYSIS.....3

II. BECAUSE FSPA IS A SUBSTANTIVE, CIVIL STATUTE, ANY AMENDMENT SHOULD ONLY BE APPLIED PROSPECTIVELY.....6

III. RETROACTIVE AMENDMENT OF FSPA VIOLATED DUE PROCESS…….....10

A. Right to Earn a Living and Engage in a Lawful Occupation is a Vested Right or Liberty Interest.....10

B. Restrictions In Employment are New Obligations.....14

CONCLUSION.....17

CERTIFICATE OF SERVICE.....17

CERTIFICATE OF TYPE SIZE AND STYLE.....19

TABLE OF CITATIONS

Cases **Page**

Anderson v. State, 2004 WL 2599972, ___ So. 2d ___
(Fla. 2d DCA, Nov. 17, 2004) 6

Angell v. State, 712 So. 2d 1132 (Fla. 2d DCA 1998) 5

Arrow Air, Inc. v. Walsh, 645 So. 2d 422 (Fla. 1994) 14, 15

Benyard v. Wainwright, 322 So. 2d 473 (Fla. 1975) 6, 7

Burgos v. State, 765 So. 2d 967 (Fla. 4th DCA 2000) 5

Caple v. Tuttle's Design-Build, Inc., 753 So. 2d 49 (Fla. 2000) 7

Coblentz v. State, 775 So. 2d 359 (Fla. 2d DCA 2000) 4

Connecticut v. Doe, 538 U.S.1, 123 S.Ct. 1160, 155 L. Ed. 2d 98 (2003) 17

Dept. of Transportation v. Knowles, 402 So. 2d 1155 (Fla. 1982) 12

Espindola v. State, 855 So. 2d 1281 (Fla. 3d DCA 2003 13

Fletcher v. State, 699 So. 2d 346, 347 (Fla. 5th DCA 1997),
rev. denied, 707 So. 2d 1124 (Fla. 1998) 4, 5

Forbes Pioneer Boat Line v. Board of Commissioners, 258 U.S. 338,
42 S. Ct. 325, 66 L. Ed. 2d 647 (1922) 12

Fraternal Order of Police v. State, 392 So. 2d 1296 (Fla. 1981) 11, 12

Freeland v. State, 832 So. 2d 923 (Fla. 1st DCA 2002) 9, 10

Goad v. Florida, DOC, 845 So. 2d 880 (Fla. 2003) 3

Hall v. State, 823 So. 2d 757, 763 (Fla. 2002) 3, 7

Haven Fed. Sav. & Loan Ass'n v. Kirian, 579 So. 2d 730 (Fla. 1991) 7

Jackson v. State, 807 So. 2d 684 (Fla. 2d DCA 2002) 9, 15

Kansas v. Hendricks, 521 U.S. 346, 1117 S. Ct. 2072,
138 L. Ed. 2d 501 (1997) 4

Kensler v. State, 2004 WL 2579737, ___ So. 2d ___
(Fla. 1st DCA, Nov. 15, 2004) 5

L. Ross, Inc. v. R.W. Roberts Construction Co. Inc., 466 So. 2d 1096
(Fla. 5th DCA 1985) 9, 15

Metropolitan Dade County v. Chase Federal Housing Corp., 737 So. 2d 494
(Fla. 1999) 10, 13

Milks v. State, 840 So. 2d 1167 (Fla. 2d DCA 2003) 9, 13

Nicholson v. State, 846 So. 2d 1217 (Fla. 5th DCA 2003) 5

Polakoff v. Dept. of Insurance and Treasurer, 551 So. 2d 1223
(Fla. 1st DCA 1989) 11

Pondella Hall For Hire, Inc. v. Lamar, 866 So. 2d 719
(Fla. 5th DCA 2004) 9, 15

R.A.M. of South Florida, Inc. v. W.C.I Communities, Inc., 869 So. 2d 1210
(Fla. 2d DCA 2004) 10

Rupp v. Bryant, 417 So. 2d 658 (Fla. 1982) 12

Smith v. Doe, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) 4, 6

St. Johns Village I Ltd. v. Dept. of State, Div. of Corporations,
497 So. 2d 990 (Fla. 5th DCA 1986) 9

State v. Giorgetti, 868 So. 2d 512, 519-520 (Fla. 2004) 10

State v. J.P., 2004 WL 2609242, ___ So. 2d ___
(Fla., Nov. 8, 2004) 8

State v. Robinson, 873 So. 2d 1205 (Fla. 2004) 10, 13

State, DOC v. Goad, 754 So. 2d 95 (Fla. 1st DCA 2000) 4

Therrien v. State, 859 So. 2d at 587 (Fla. 1st DCA 2003) ..... Passim

Trushin v. State, 425 So. 2d 1126 (Fla. 1982) 16

Westerheide v. State, 831 So. 2d 93, 99 (Fla. 2002) 3

Statutes

§ 95.031(1), Fla. Stat. 14

§ 95.11(3)(p), Fla. Stat. 14

§ 95.11(7), Fla. Stat. 14

§§ 394.910-.930, Fla. Stat. (2000) 3

§ 775.21(4)(c), Fla. Stat. (1998) 7

§ 775.21(5)(c), Fla. Stat. (1998) 7, 14

§ 775.21(6)(a)(1), Fla. Stat. (2001) 8

§ 775.21(6)(e), Fla. Stat. 8

§ 775.21(6)(f)(1), Fla. Stat. 8

§§ 775.21(6)(j) and (10)(a), Fla. Stat. (2000) 8, 10

§ 775.21(7)(a) and (d), Fla. Stat. 8

§ 775.21(10)(b), Fla. Stat. 8

§ 934.0435(9), Fla. Stat. (2000) 11

§ 943.0436(1), Fla. Stat. (2002) 8

OTHER AUTHORITIES

Fla. R. Civ. P. 1.540 4

Merriam-Webster Collegiate Dictionary 620 (9th ed. 1986) 7

INTRODUCTION

Petitioner, John Richard Therrien, is seeking this court's affirmative answer to the question certified by the First District Court of Appeal as one of great public importance. Supplemental briefs were ordered by this court on November 30, 2004, for the purpose of addressing the "*ex post facto* issue." This initial supplemental brief will not only brief the issue of the applicability of the *ex post facto* clause, but also the issue of the retrospective application of an amendment to FSPA which broadens criteria for labeling Mr. Therrien a sexual predator.

SUMMARY OF ARGUMENT

The Florida Sexual Predator Act (FSPA), despite distinct legislative findings that sexual offenders pose a high level of threat of danger to public safety, has not been construed by the courts as a statute of criminal punishment. Accordingly, the *ex post facto* clauses of the federal and Florida constitutions would not prevent the retroactive application of an amendment to FSPA because it is civil in nature. However, FSPA as a civil, regulatory statute, is substantive law and the product of legislative policy. It is not a statute concerned with the method and means of protecting rights or implementing a statutory scheme. Rather, it is a statute which sets forth the duties and obligations of those designated as sexual predators which includes registration, submitting photographs, and fingerprints, as well as genetic material, and being restricted from employment

opportunities for those offenders who have committed predicate offenses involving minors. Mr. Therrien's employment opportunities will be impaired if the amendment is retroactively applied to him because of one qualifying offense involving a minor.

The right to earn a living is a liberty interest protected by the due process clause. It is fundamentally unfair to apply an amendment which severely impairs employment opportunities for Mr. Therrien in derogation of the constitutionally protected right to earn a living or pursue a career. These employment restrictions are new obligations which were not in effect at the time that Mr. Therrien entered his plea of no contest on August 20, 1997. At the time of his plea, all facts had occurred which would justify his being subjected to the onerous conditions of FSPA. Like those facts which dictate when a cause of action accrues, his susceptibility to being designated a sexual predator matured when he entered his plea, not later. Otherwise, the State would have an unlimited amount of time to bring a motion or action for designation. The legislature has not enacted any law giving a claimant with a similar cause of action the right to initiate a civil proceeding at any time of the claimant's choosing.

Moreover, Mr. Therrien, at the time of his plea, was already subject to the Florida Sexual Offender Act which imposed upon him the requirements of registration and public notification. The added obligations of employment restrictions and community

notification is a new obligation or burden which should not be applied retrospectively to Mr. Therrien in violation of due process.

ARGUMENT

I. AS FLORIDA SEXUAL PREDATOR ACT (FSPA) IS NOT A STATUTE OF CRIMINAL PUNISHMENT, IT IS NOT SUBJECT TO *EX POST FACTO* ANALYSIS

This court has only applied the constitution prohibitions on *ex post facto* laws to criminal legislation and proceedings. *See, Goad v. Florida, DOC*, 845 So. 2d 880, 882 (Fla. 2003); *Westerheide v. State*, 831 So. 2d 93, 99 (Fla. 2002). The primary purpose of a criminal code is punishment. It is substantive because it is the result of legislative policy. *Hall v. State*, 823 So. 2d 757, 763 (Fla. 2002). In reviewing whether the Jimmy Ryce Act (§§ 394.910-.930, Fla. Stat. (2000)) violated the *ex post facto* prohibition contained both in the Florida and federal constitutions, this court in *Westerheide* held that a statute, which requires the involuntary commitment of a person who has been convicted of a qualifying offense and who has been determined to have a mental abnormality or personality disorder causing that person to be likely to engage in violent sexual acts, was civil in nature and not a statute of criminal punishment. 831 So. 2d at 103. Furthermore, this court held that the Ryce Act does not violate Florida's constitutional protection against *ex post facto* laws because, in part, the U. S. Supreme Court in construing the Kansas version of the Ryce Act in *Kansas v. Hendricks*, 521 U.S. 346, 1117 S. Ct. 2072,

138 L. Ed. 2d 501 (1997), also found the Kansas statute of involuntary commitment of violent sexual offenders to be civil in nature. As Florida's *ex post facto* clause is identically worded to that of the federal constitution, the Ryce Act will not undergo a more vigorous analysis than that given by the U.S. Supreme Court. *Id.* at 103-104. The U.S. Supreme Court in reviewing Alaska's Sexual Offender Registration Act held, in line with *Kansas v. Hendricks, supra*, that it was a civil statute designed to protect the public from harm by creating a civil remedy of registration and public notification. *See, Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 1147-1148, 155 L. Ed. 2d 164 (2003).

As stated in Mr. Therrien's initial brief, those Florida courts have which reviewed the FSPA, have uniformly held that FSPA is not a statute of criminal punishment but either is a civil, regulatory statute or is subject to civil remedies. *See, State, DOC v. Goad*, 754 So. 2d 95, 98 (Fla. 1st DCA 2000) (*citing, Fletcher v. State, infra*, that FSPA is a regulatory statute)); *Coblentz v. State*, 775 So. 2d 359, 360 (Fla. 2d DCA 2000) (sexual predator designation can be attacked by Fla. R. Civ. P. 1.540 motion or action for declaratory relief), *rev. denied*, 789 So. 2d 344 (Fla. 2001); *Burgos v. State*, 765 So. 2d 967 (Fla. 4th DCA 2000) (FSPA is regulatory); *Angell v. State*, 712 So. 2d 1132 (Fla. 2d DCA 1998) (FSPA is neither sentence nor punishment so a designee can pursue reversal of an adverse finding through declaratory relief); *Fletcher v. State*, 699 So. 2d 346, 347 (Fla. 5th DCA 1997), *rev. denied*, 707 So. 2d 1124 (Fla. 1998) (regulatory statute).

There is now, some courts have suggested, a controversy as to the appropriate method to redress an erroneous finding of or designation as sexual predator. *See, Kensler v. State*, 2004 WL 2579737, *1, ___ So. 2d ___ (Fla. 1st DCA, Nov. 15, 2004) (not released for publication, division among the districts as to whether sexual predator designation can be attacked in a criminal forum). As one court put it, ". . . the courts have painted ourselves into the 'no sentence, no punishment' corner . . ." and find themselves in a quandary as to the correct door to open at the courthouse to obtain relief. *See, Nicholson v. State*, 846 So. 2d 1217, 1219 (Fla. 5th DCA 2003) (quoted, *supra*, and adhering to the view that because FSPA is neither a sentence nor punishment, civil remedies will be eschewed for application of the Florida Criminal Rules of Procedure). The latest decision of the Second District, as noted by J. Ervin, concurring in *Kensler, supra*, is that the sexual predator designation is subject to review only in a civil forum through the Florida Rules of Civil Procedure. *See, Anderson v. State*, 2004 WL 2599972, *1, ___ So. 2d ___ (Fla. 2d DCA, Nov. 17, 2004) (not released for publication). As Judge Benton, dissenting, noted, the U.S. Supreme Court in *Smith v. Doe*, *supra*, and all Florida courts addressing FSPA have either called it a civil or regulatory statute. 859 So. 2d at 592, n.7.

No matter the appropriate procedural vehicle to obtain relief from a wrongful finding of sexual predator status, this court is urged to apply the law as it existed when

Mr. Therrien entered his pleas of no contest in August 1997. If the Jimmy Ryce Act is civil in nature, which involves involuntary commitment, then, *a fortiori*, the FSPA is civil in nature which involves community notification, registration, and employment restrictions. Mr. Therrien should not be designated a sexual predator whether one deems the label a status or a civil finding.

II. BECAUSE FSPA IS A SUBSTANTIVE, CIVIL STATUTE, ANY AMENDMENT SHOULD ONLY BE APPLIED PROSPECTIVELY.

"Substantive law prescribes the duties and rights under our system of government." *See, Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975). As observed by this court, the responsibility to make substantive law is that of the legislature as constrained by the Florida and federal constitutions. In contrast, procedural law provides the "means and method" to implement legislative policy. *Id.* at 475; *Hall v. State*, *supra*, 823 So. 2d at 763 (quoting from *Benyard*). As an example, construing a substantive statute permitting a mortgagee to foreclose without posting a bond and to obtain a prejudgment order requiring mortgagor to pay interest, this court observed that the statute was substantive law because it defines and regulates rights and may include rules that fix those rights *vis-a-vis* persons and property. In contrast, procedural law is the "judicial machinery" to enforce rights. *See, Caple v. Tuttle's Design-Build, Inc.*, 753 So. 2d 49, 53-54 (Fla.

2000) (quoting from *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla . 1991)).

Applying this precedent to the FSPA, this court can readily come to the conclusion that the rights of Mr. Therrien are being regulated. No part of the FSPA describes the judicial processes needed to implement the law other than the hearing which could take place at sentencing or later should further information come into the hands of law enforcement to establish the qualifying offenses. See, §§ 775.21 (4)(c) and 775.21 (5)(c), Fla. Stat. (1998).[1] A brief recap of FSPA's limitations on rights and elaboration of duties is warranted. The sexual predator must register with the Department of Corrections providing his social security number, residence and place of employment. § 775.21(6)(a) 1., Fla. Stat. (2001). When a sexual predator is not in custody, he must provide a photograph and fingerprints to the local sheriff who then transmits this information to the DOC. § 775.21(6)(e). He then must also register at the driver's license office of the DHSMV and identify himself as a sexual predator. § 775.21(6)(f) 1. He is subject to community notification within one mile radius of his residence. §§ 775.21(7)(a) and (d). Finally, the predator (whose qualifying offense involves a minor) may not work or

[1] There is an argument to be made that a substantive amendment to FSPA adding qualifying offenses is not the type of "information" the legislature contemplated for invoking the designation at a time later than sentencing. Information is commonly defined as knowledge or intelligence obtained from investigation or study. See, Merriam-Webster Collegiate Dictionary 620 (9th ed. 1986). An amendment is not the result of investigation or study by law enforcement, but is the result of legislative policy making.

volunteer at schools, daycare centers, parks, or where children regularly congregate. § 775.21(10)(b).

All of these statutory requirements either impair vested rights, such as the right to travel[2] and the right to earn a living, or impose duties such as registering with state and local authorities and notifying authorities of employment and residence addresses. One can be subjected to criminal penalties for failing to follow these duties. *See, e.g.,* §§ 775.21(6)(j) and (10)(a), Fla. Stat. (2000). Not only do this court's precedents dictate that FSPA is substantive, but the Florida legislature has deemed it to be substantive as evidence of its legislative intent. See, § 943.0436(1), Fla. Stat. (2002).

An amendment to a statute is substantive in nature if the amendment expands a right or increases an obligation. *Pondella Hall For Hire, Inc. v. Lamar*, 866 So. 2d 719, 723 (Fla. 5th DCA 2004) (legislative amendment giving the winning party, who contests a government forfeiture proceeding, an action for damages is substantive, and entitled to prospective application only); *see also, L. Ross, Inc. v. R.W. Roberts Construction Co. Inc.*, 466 So. 2d 1096 (Fla. 5th DCA 1985) (limitation on amount of attorney's fees to be recovered is not retroactive); *St. Johns Village I Ltd. v. Dept. of State, Div. of*

[2] This court has recently discussed the violation of the Florida constitutional rights of intra-state travel and freedom of movement in striking down a juvenile curfew ordinance. *See, State v. J.P.*, 2004 WL 2609242, *8, ___ So. 2d ___ (Fla ., Nov. 8, 2004) (not released for publication).

Corporations, 497 So. 2d 990 (Fla. 5th DCA 1986) (imposition of $500 fine by amendment was not retroactive).

FSPA's amendment, effective October 1, 1998, which broadens the qualifying offenses for sexual predator designation, has the effect of imposing obligations on Mr. Therrien which he did not shoulder prior to that date. It should only be given prospective application. Although one opinion from the First District Court of Appeal has described the registration and reporting requirements of the Florida Sexual Offender Act (same requirements under FSPA, *see Jackson v. State, infra*) as procedural in nature, *Freeland v. State*, 832 So. 2d 923 (Fla. 1st DCA 2002), Mr. Therrien urges this court to adopt the reasoning of Judge Benton below who observed that in both *Milks v. State, infra*, and *Freeland, supra*, those defendants were on notice at the time they pleaded that their pleas could result in their being designated a sexual predator. 859 So. 2d at 591. In contrast, Mr. Therrien had no inkling that he would be subjected to FSPA. Although *Freeland* cites to two cases holding that registration and reporting under the FSPA are procedural in nature, there is no explanation by the *Freeland* panel as to why that is the case.

More importantly, *Freeland* is of questionable authority in light of this court's opinion in *State v. Robinson*, 873 So. 2d 1205, 1214 (Fla. 2004), that the sexual predator designation causes a deprivation of a liberty interest. Even if one were to construe FSPA as remedial, which State has argued in its answer brief, if it creates new obligations by

amendment, then it is to be only applied prospectively. *See*, *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So. 2d 494, 500, n.9 (Fla. 1999); *R.A.M. of South Florida, Inc. v. W.C.I Communities, Inc.*, 869 So. 2d 1210, 1217 (Fla. 2d DCA 2004) (*citing, Chase Federal Housing Corp., supra*). Reporting and registration are obligations carrying with them criminal penalties if one knowingly fails to abide by these strictures. *See, State v. Giorgetti*, 868 So. 2d 512, 519-520 (Fla. 2004) (knowingly failing to register as a sexual offender under § 934.0435(9), Fla. Stat. (2000) is a crime); see also, §§ 775.21(6)(j) and (10)(a), Fla. Stat. (2000) (failure to register as a sexual predator or giving false information about intent to reside elsewhere is a felony).

Accordingly, the FSPA, whether one characterizes the statute as remedial, regulatory or substantive, has, by amendment, effective October 1, 1998, impaired Mr. Therrien's vested liberty interests or imposed new obligations on him. It should only be applied prospectively. As will be argued below, if FSPA is construed to have a legislative intent to apply the October 1, 1998, amendments retroactively, due process still requires prospective application only.

III. RETROACTIVE AMENDMENT OF FSPA VIOLATES DUE PROCESS.

A. Right to Earn a Living and Engage in a Lawful Occupation is a Vested Right or Liberty Interest.

Judge Benton, in his scholarly dissenting opinion, cited to those decisions which held that the right to pursue a career or earn a living is a liberty interest protected by the due process clause. 859 So. 2d at 590 (*citing cases*). This court in *Fraternal Order of Police v. State*, 392 So. 2d 1296, 1301-1302 (Fla. 1981), reiterates that the right to pursue employment or business opportunities is a constitutional right subject to the limitation of the police power of the state to achieve a valid objective by rational means. *See also, Polakoff v. Dept. of Insurance and Treasurer*, 551 So. 2d 1223, 1225 (Fla. 1st DCA 1989) (right to engage in a lawful occupation is worthy of constitutional protection, *citing, Fraternal Order of Police, supra*). Other rights similar to the right to earn a living or engage in a lawful occupation are considered to be vested rights which cannot be impaired by retroactive legislation. *See, Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338, 339, 42 S.Ct. 325, 66 L. Ed. 2d 647 (1922) (reversing a Florida Supreme Court decision and holding that legislature cannot enact a law which takes away the right of a private party to recover money which was due before the amendment was enacted); *Rupp v. Bryant*, 417 So. 2d 658, 666 (Fla. 1982) (tort immunity statute could not be amended to take away the vested rights of persons to sue others who were not immune from tort liability on the date when their cause of action accrued); *Dept. of Transportation v. Knowles*, 402 So. 2d 1155 (Fla. 1982) (amendment

to tort immunity statute insulating two state employees from liability for negligent acts could not defeat a judgment obtained against an employee before the date of enactment).

In much the same way, when Mr. Therrien entered his plea in August 1997 to the amended charges brought against him, he could work either for compensation or as a volunteer in any business, school, daycare center, park, or other place where children regularly congregated without fear of committing a felony of the third degree. Furthermore, when he entered his plea, he was not subject to community notification, within a one mile radius of his place of residence, that he was a sexual predator. Consequently, his liberty interest in his good name as well as the right to earn a living of his choice will be severely impaired if the 1998 amendment is made retroactive to him. As argued in Mr. Therrien's initial brief and argued by the individual offenders in *Espindola*[3] and *Milks*[4], the stigma and loss of a liberty interest caused by the sexual predator designation has been well briefed and has become a legal holding issued by this court in *State v. Robinson, supra*. In applying the two-step process in determining the retrospective application of a substantive law, even if one concedes the intent of the legislature to make the October 1, 1998, amendment applicable to offenses committed on or after October 1, 1996, this court must still consider whether it is constitutionally

[3] *Espindola v. State*, 855 So. 2d 1281 (Fla. 3d DCA 2003), review pending, *State v. Espindola*, SC03-2103.

[4] *Milks v. State*, 848 So. 2d 1167 (Fla. 2d DCA 2003) review pending, *Milks v. State*, SC03-1321.

permissible to do so. *See, Chase Fed. Housing Corp., supra*, 737 So. 2d at 499; *see also, Therrien v. State*, 859 So. 2d at 587 (Fla. 1st DCA 2003) (*citing to Chase Fed. Housing Corp., supra*).

Because the set of facts imposing criminal consequences had crystallized at the time of Mr. Therrien entering his plea and no facts have occurred subsequently which would bring Mr. Therrien within the clutches of the FSPA, the amendment enlarging

qualifying offenses should not be given retrospective application. Although the FSPA allows law enforcement agency to bring a sexual predator designation proceeding against an individual subsequent to the sentencing hearing (§ 775.21(5)(c)), this provision must be construed, as a matter of logic, to capture those offenders whose qualifying offenses from Florida or a foreign jurisdiction were uncovered subsequently and which were not readily apparent at the time of the original sentencing hearing. Any other interpretation of this catch-all provision would give law enforcement agencies an unlimited statute of limitations to bring a sexual predator proceeding that no civil claimant enjoys in the state of Florida. See, §§ 95.031(1) and 95.11(3)(p), Fla. Stat. (all other actions not specified have four years); § 95.11(7), Fla. Stat. (certain intentional child abuse claims may be brought within seven years of reaching majority or four years under other circumstances).

B. Restrictions In Employment are New Obligations.

This court has traditionally taken a strict view of any retrospective legislation, which is touted as remedial, when it imposes new legal burdens or obligations. It is presumed to apply only prospectively. *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 424 (Fla. 1994). At the time of Mr. Therrien's plea in August 1997, he was already subjected to the Florida Sexual Offender Act requiring registration and public notification through the internet. The public notification and registration requirements under this Act are exactly the same as under the FSPA. *See, Jackson v. State*, 807 So. 2d 684 (Fla. 2d

DCA 2002). The 1998 amendment imposed new obligations on Mr. Therrien which was not apparent nor contemplated from the facts to which he pleaded which provided the legal basis upon which to enter his plea. Florida courts, as announced by *Arrow Air, supra*, will not apply a substantive amendment if it increases an obligation. *See also, Pondella Hall for Hire, Inc. v. Lamar, supra*, 866 So. 2d at 723; *L. Ross, Inc. v. R.W. Roberts Construction Co., Inc., supra*, 466 So. 2d at 1098 (it is fundamentally unfair for the legislature to increase the burdens of an obligation premised on a set of facts that have already occurred).

The set of facts upon which Mr. Therrien entered his pleas of no contest had occurred prior to August 1997, in November of 1996. Those facts were described in the information and in the plea colloquy. On one count, Mr. Therrien pleaded no contest to the attempted digital penetration of the minor's vagina. On the second count, he pleaded to lewd and lascivious fondling of the same minor. There are no other operative facts which came into play subsequent to August 1997, such as would be the case if Mr. Therrien were being designated a violent sexual predator subject to civil commitment. In that situation, there would be the additional findings of fact of a present personality or mental disorder making Mr. Therrien likely to engage in violent sexual acts. No such findings are required by the FSPA. Either the facts show a qualifying offense or they

don't. The facts in August 1997showed that Mr. Therrien did not qualify for sexual predator treatment.

This is precisely why this court must decline to apply laws retroactively when they act to deny an individual due process. Mr. Therrien is unable to show a trial judge that he has no present personality disorder or proclivity which would compel him to prey on women or children. Without such a hearing, the retrospective application of new obligation infringing on a substantial, liberty interests of good name, reputation, employment, and business pursuits violates due process both procedurally and the due process afforded every person in Florida to be burdened only by prospective application of a substantive amendment.

Perhaps, the question certified by the First District below should be parsed as follows: (a) Does the FSPA violate procedural due process? and (b) Does the retroactive application of a substantive amendment to the FSPA violate due process? This court has the power to consider any issue once it has acquired jurisdiction to review a case, if the issue is necessary or fundamental to the decision to be made by the court. *Trushin v. State*, 425 So. 2d 1126, 1130 (Fla. 1982) (citing cases). Accordingly, the substantive amendments of the FSPA broadening the reach of qualifying offenses impose a new obligation on facts which occurred long before their effective date. In Mr. Therrien's case, the relevant amendment came into being on October 1, 1998, over fourteen months

after his plea and two years after the commission of his offenses. More than two years later (four years after his offenses) on October 7, 2000, State filed an amended motion to seek sexual predator status while Mr. Therrien was still on probation and had completed more than half of his five year probation without incident. This is a fundamentally unfair retroactive application of a substantive amendment.

CONCLUSION

Even if this court were to hold that the FSPA comes within the umbrella of *Connecticut v. Doe*[5], and that procedural due process does not require a hearing to determine dangerousness, the FSPA cannot be constitutionally applied to Mr. Therrien because either vested rights are taken away from him or new obligations are imposed on him in violation of his Florida due process rights to be free from the retroactive application of a substantive amendment.

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 8th day of December, 2004.

Charles V. Peppler
Attorney at Law
14 W. Government Street, Room 411

[5] 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003).

Pensacola, Florida 32502
(850) 595-4970

_____

Florida Bar No: 239739
Attorney for Petitioner,
John Richard Therrien

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).

Charles V. Peppler
Attorney at Law
14 W. Government Street, Room 411
Pensacola, Florida 32502
(850) 595-4970

_____
Florida Bar No: 239739
Attorney for Petitioner,
John Richard Therrien